17 November 2016

Property Law Review
c/- Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: propertylawreview@justice.qld.gov.au

Dear QUT Research Centre

Submission - Interim Report: Seller Disclosure in Queensland

Thank you for the opportunity to provide comments on the recommendations in the "Interim Report: Seller Disclosure in Queensland" (Commercial and Property Law Research Centre, QUT) released in July 2016. Queensland Law Society appreciates being consulted on this important reform process.

This response has been compiled with the assistance of the Property and Development Law Committee who have substantial expertise and practice in this area.

The Society also refers to its previous submission of 7 April 2014, responding to “Property Law Review Issues Paper 1 – Seller Disclosure in Queensland.”

Our policy committees and working groups are the engine rooms for the Society’s policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise.

In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. The Society assists the public by advising government on improvements to laws affecting Queenslanders.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Wendy Devine on (07) 3842 5896 or w.devine@qls.com.au.

Yours faithfully

Bill Potts
President
Queensland Law Society Submission responding to recommendations in “Interim Report: Seller Disclosure in Queensland”  
(Commercial and Property Law Research Centre, QUT)

Background

1. Recommendation 1 – a statutory seller disclosure regime should be introduced in Queensland

As outlined in the Society’s submission to the Property Law Review (Department of Justice and Attorney-General) on 7 April 2014, the Society supports the reconsideration of the elements of disclosure to vendors and the formation of residential sales contracts.

The Society supports the consolidation of vendor disclosure obligations in one part of the statute book. This will benefit the community by making their obligations more accessible and readily identifiable.

The Society considers that the statements made in a seller disclosure statement should be treated as statutory warranties, as discussed further below.

The key issue with developing a seller disclosure regime is determining the nature and extent of the information which is required to be disclosed.

The Society also notes the discussion at pages 21-23 and page 32 of the Interim Report in relation to the absence of consumer behaviour research in the context of property sales disclosure. Whilst the options proposed in the Interim Report appear logical and sensible to legal practitioners (subject to our comments below), the Society considers that the options under consideration would benefit from further research and appropriate “market testing” to assess how helpful the proposals (with respect to content and format) will be to a potential buyer during the sale process.

The Society sets out its comments in this regard under the relevant recommendations of the Interim Report.

QLS Recommendation

Subject to the Society’s comments below in relation to the specific elements of a disclosure regime, the Society supports the introduction of a statutory seller disclosure regime in Queensland.

QLS Recommendation

The Society supports further market testing with consumers of the proposed statutory seller disclosure regime in Queensland.
2. Recommendation 2 – the guiding principles set out in Recommendation 2 will be used as a benchmark for the seller disclosure regime

The Society commends the inclusion of the guiding principles set out in recommendation 2 and supports the guiding principles proposed in the Interim Report.

**QLS Recommendation**
The Society supports the guiding principles proposed in Recommendation 2.

*What land should be covered by the statutory disclosure regime?*

3. Recommendation 3 – The seller disclosure regime should apply to all freehold land, subject to exclusions (Option 1)

The Society supports the recommendation of adopting Option 1 - that the seller disclosure regime should apply to all freehold land, subject to exclusions.

We have discussed proposed exclusions below.

**Exclusion – sale price over $5 million**

The Society considers that it should apply to the sale of both residential and commercial land except where the purchase price of the sale is over $5 million.

Similar to the methodology adopted for the $2 million threshold for the foreign resident capital gains tax withholding regime, it is suggested that the $5 million would be a GST exclusive figure unless the margin scheme were being applied, in which case the figure would be GST inclusive.

This value threshold is an appropriate balance between the need for consumer protection in the conveyancing context and the likelihood that a purchaser of property with a sale price in excess of $5 million is likely to be sufficiently sophisticated and cognisant of the risks and significance associated with the transaction.

Purchasers need to be informed of the potential issues affecting the title of the property offered for sale. In the Society's view, the proposed disclosure regime should not be overly burdensome for property under the $5 million threshold.

In our members' experience, purchasers of commercial property under $5 million are not always corporate entities. The colloquial "mum and dad" investor regularly invests in commercial property under this threshold.

For this reason, the Society recommends that the disclosure regime apply to both residential and commercial property under this threshold.
Other exclusions

The Society also supports the exclusions discussed in Recommendation 23 of the Interim Report (as discussed further below), so that the disclosure regime will not apply to:

- Related party transactions
- Court ordered sales
- Where the prospective buyer is the State or a statutory body; and
- Where the prospective buyer is a publicly listed company.

The information proposed in the seller statement will not be relevant to proposed lots. This aspect will require further consideration.

QLS Recommendation

The Society supports the recommendation of adopting Option 1 - that the seller disclosure regime should apply to all freehold land, subject to the following exclusions:

(a) the regime should not apply to the sale of both residential and commercial land where the purchase price of the sale is greater than $5 million (excluding GST unless the margin scheme were being applied);

(b) the regime should not apply to related party transactions, court ordered sales or where the prospective buyer is the State, a statutory body or a publicly listed company.

4. Recommendation 4 – Auctions and all options (including put and call options) to purchase land should be subject to the statutory seller disclosure regime

The Society supports this recommendation.

QLS Recommendation

The Society supports Recommendation 4 of the Interim Report.

5. Recommendation 5 – The current disclosure obligations under the BCCM Act, Land Sales Act 1984 (Qld) and the Building Units and Group Titles Act 1980 (Qld) should remain in substantially the same form

The Society generally supports this recommendation.
However, the Society suggests that this review is an opportunity to address an issue with section 214(3)(b) of the BCCM Act.

This section imposes an obligation on a seller to give the buyer an updated disclosure statement (further statement) if before the contract settles, the seller becomes aware that information contained in the disclosure statement is no longer accurate.

However, if the inaccuracy relates to a plan mentioned in the disclosure statement, the further statement must be certified as accurate by a cadastral surveyor.

Where the plan relates to a building, a cadastral surveyor cannot undertake this task until the building is complete. Often developers of apartments become aware of changes in the course of detailed design of the development or at an early stage of construction. It is of benefit to both developers and buyers that a further statement can be given early in the process, rather than being required to wait until the building has been constructed and can be surveyed.

QLS Recommendation

The Society supports this recommendation and further recommends that section 214(3)(b) of the BCCM Act be addressed as part of this review.

**Form of disclosure**

**6. Recommendations 6 and 7**

Recommendation 6 - the form of the seller disclosure in Queensland should be a seller statement as described in Option 4 – ‘seller statement which only lists exceptions to the warranties along with a copy of the title’. Copies of some documents may need to accompany the statement, where appropriate.

Recommendation 7 - The form of the seller statement should be prescribed and must be a simple, tabulated document in either the form proposed in Attachment D or which:

- Enables the seller to understand the warranties that he or she is providing and the need to disclose information where the relevant warranty cannot be given; and
- Is easily understood by the buyer.

The Society broadly supports the approach taken in Option 4 (Attachment D) as outlined in the Interim Report.

In addition to the information presently outlined in Attachment D, the Society considers that the form of seller disclosure in Queensland should also:

(a) Require the seller to provide:

(i) Copy of registered survey plan of the lot
(ii) Details of any planning authority's development conditions which "run with the land" on the sale of the land

(iii) Details of any infrastructure charges (if applicable)

(iv) Details of current local government rates and charges

(v) Details of land tax liability (if any)

(b) In addition, for the sale of a lot in a community titles scheme:

(i) Details of the sinking fund forecast and the balance of the sinking fund

(ii) Levies and budgets for the current year

(iii) Copies of current insurance certificates

(iv) Any special levies which are yet to be paid by the seller

The Society acknowledges that not all of the information proposed above is available to a seller by way of an immediate online search. The time taken to obtain some search results could mean a delay in finalising the seller statement, which will impact on the time taken to put a property on the market.

The primary rationale for a seller disclosure regime is to ensure that prospective buyers have information that is helpful to the decision to make an offer. However, this needs to be balanced with the current expectations of property owners about how property is sold in Queensland.

The Society would welcome the opportunity to discuss the proposed content of the seller disclosure statement, and its impact on the marketing process, with the QUT Commercial and Property Law Research Centre and other affected stakeholders.

The Society supports the position that the seller should sign the seller statement, as it is important that sellers understand that they are warranting certain information and that this has legal implications.

The Society understands that in Victoria, local governments provide standard information in response to conveyancing searches. However, in Queensland, the amount of information and quality of information available from different local governments varies significantly.

The Society believes that there would be a significant benefit to the conveyancing process, and therefore the efficiency of the property market in Queensland, if local governments were financially supported to provide consistent, standard information to buyers in relation to rates, basic planning information and approvals. It will also be of considerable benefit to buyers, as presently it is time consuming and expensive to source this information post-contract, which is exposing buyers to risk during the contractual phase. At present, different local governments have different levels of searches available.

It would not be necessary to prescribe a form, but the legislated disclosure regime could specify standard information that must be provided by a local government in response to a particular type of conveyancing search.

In relation to paragraphs (a)(iii) and (iv) above, the Society is aware of instances where a buyer was not made aware of a development condition requiring an access easement to be
registered over the subject property in favour of a neighbour. The District Court subsequently ordered that the easement be registered, burdening the buyer’s property.

At present, this type of outstanding development condition may not be brought to a buyer’s attention before settling on the purchase, because not all local governments are able to provide this type of information within the usual 30 day settlement timeframe.

However, this type of information should be within the personal knowledge of the seller. It is an issue which has a material adverse effect on the buyer and the quality of the interest the buyer is acquiring.

For this reason, the Society considers that the disclosure regime should address these types of development conditions which “run with the land” on the sale of the land.

If local governments are not able to provide this information within a specific timeframe, then the legislation should clarify that these types of development conditions do not run with the land so as to bind an innocent purchaser. The Society recommends that a reasonable period would be within 14 days from the date of lodging the search request with the local government.

QLS Recommendation

The Society recommends that the additional information outlined above be required as part of a seller disclosure regime and that that information be made more accessible in terms of both time and cost to parties and the parties’ lawyers.

QLS Recommendation

The Society recommends that consideration be given to financially supporting local governments to provide consistent, standard information to buyers in relation to rates, basic planning information and approvals in response to conveyancing searches.

The Society believes that there would be a significant benefit to the conveyancing process, and therefore the efficiency of the property market in Queensland, if legislation prescribed the information to be provided by all local governments in this context.

7. Recommendation 8 – Information relevant to community title lots should be provided in the form of a body corporate certificate.

The Society supports Recommendation 8, noting that it is proposed that “This certificate will accompany the seller statement when provided and will replace the disclosure statement required under section 206 of the BCCM Act and the body corporate certificate which is available under section 205 upon request.”
QLS Recommendation
The Society supports Recommendation 8.

**Timing of Disclosure**

8. Recommendations 9 and 10

Recommendation 9: The seller statement and, where applicable, the body corporate certificate must be available to prospective buyers of residential property from the time the property is offered for sale (Option 2).

Recommendation 10: The seller must provide a copy of the seller statement, and where applicable, the body corporate certificate to the buyer prior to contract being entered into. The seller is not required to provide disclosure twice.

Recommendation 11: In the case of a dispute, the onus of proving that the seller complied with the statutory disclosure obligation should rest with the seller (Option 3).

The Society supports both Recommendations 9 and 10.

The Society considers that any failure to comply with the obligations outlined in Recommendation 9 should only be an offence by the selling agent and should not affect the validity of any contract that is formed.

In relation to Recommendation 11, the Society recommends that the statement allow for the buyer to sign an acknowledgment of receipt.

QLS Recommendation
The Society supports **Recommendations 9, 10 and 11** subject to:

(a) adopting the position that any failure to comply with the obligations outlined in recommendation 9 should only be an offence by the selling agent and should not affect the validity of any contract that is formed; and

(b) the seller statement allowing for the buyer to sign an acknowledgment of receipt.

**Content of disclosure**

9. Recommendation 12 – The information which is currently required to be disclosed in Queensland should be retained under a statutory disclosure regime.

The Society considers that the introduction of a seller disclosure regime is an opportunity to develop a single disclosure statement and a single coordinated piece of legislation dealing
with the seller disclosure process. This approach has been at the forefront of the Society advocating for a seller disclosure regime for many years. The regime should incorporate more than the current requirements, as discussed in this submission.

**QLS Recommendation**

The Society considers that the introduction of a seller disclosure regime is an opportunity to develop a single disclosure statement and a single coordinated piece of legislation dealing with the seller disclosure process. The Society has highlighted a number of suggested "new content" for the seller disclosure regime in this submission.

10. **Recommendation 13** — A mandatory seller commissioned pest and building inspection report should not be introduced as a statutory disclosure obligation in Queensland.

As noted in the Interim Report, the Society does not support the inclusion of pest and building inspection reports in the disclosure regime.

**QLS Recommendation**

The Society supports this recommendation.

11. **Recommendation 14** — Flooding information should not be introduced as a statutory disclosure obligation.

As noted above, the Society disagrees with this recommendation. The Society considers that flooding information should be provided where such a service is available from the relevant local government authority.

The Society acknowledges that not all local governments in Queensland have the capacity to provide such a search facility. This position is consistent with the Society's submission of 7 April 2014.

**QLS Recommendation**

The Society does not support this recommendation. The Society considers that flooding information should be provided where such a service is available from the relevant local government authority.

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1 See the Society's submission of 7 April 2014 at page 8.
12. **Recommendation 15 – Building approval information should not be required as a statutory disclosure obligation.**

The Society considers that if this information was available from all local governments in Queensland, then building approval information should be included in the disclosure regime. However, as not all local governments can provide this information, the Society supports this recommendation.

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13. **Recommendation 16 -**

A seller should be required to disclose the following additional information:

- Vegetation Protection Order details;
- Services infrastructure (electricity, water and sewerage) connected to the land;
- Resource authority and access, conduct and compensation agreements affecting the land; and
- Details of State Heritage Register and Local Heritage Register entries.

The Society supports this recommendation.

In relation to the “Services Infrastructure” information, the Society recommends amending the format of the form appearing in Attachment D so that the reference to services information (the statement: “Electricity, water and sewerage are connected to the land”) does not appear under the heading of “Buildings on the land”.

If the land is vacant, this information is relevant to the buyer. However, including this under the heading “Buildings” for the sale of vacant land may cause confusion.

The Society considers that this item should be listed in a separate category.

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14. **Recommendation 17 – The Body Corporate Certificate should include the information identified at page 37 of the Interim Report**

The Society supports this recommendation but wishes to clarify the intent of the Society’s submission of 7 April 2014. The Society’s members receive feedback from bodies corporate about buyers not understanding the nature of the body corporate or that they are automatically...
members and liable to pay levies. The Society proposes a simple explanatory statement as part of the prescribed form.

It is envisaged that this is therefore not burdensome in any way to sellers but will give some context to the information in the statement.

The Society recommends that the drafting of the explanatory material regarding the nature of a body corporate needs to be carefully prepared so that it is simple and easily understood. The Society acknowledges that too much detail could lead to confusion for buyers.

The Society proposes wording similar to:

"The property is part of a community titles scheme. If you purchase the property, you will become a member of the body corporate and you will be required to pay levies and comply with the bylaws."

### QLS Recommendation

The Society supports this recommendation subject to the explanatory material being carefully drafted.

### 15. Recommendation 18 – seller disclosure in Queensland should only occur within the framework of the statutory regime proposed under the PLA (and the BCCM Act, where applicable). Any future revisions or additions should occur within this framework.

The Interim Paper discusses this recommendation in the context of Gold Coast City Council Local Law No. 17.

The Society supports this recommendation. The Society is concerned that permitting local governments to make amendments to the disclosure regime will have the result of a piecemeal and arbitrary regime.

### QLS Recommendation

The Society supports this recommendation.
Accuracy and currency of information and continuing disclosure

16. Recommendations 19, 20 and 21

Recommendation 19 - The buyer may rely on information in the disclosure statement as if the seller had warranted its accuracy.

Recommendation 20 – The statutory disclosure regime in Queensland should not require continuing disclosure.

Recommendation 21 – A seller who becomes aware of an inaccuracy in the seller statement (or body corporate certificate) is able to rectify the inaccuracy by appropriate disclosure in the contract.

The Society supports these recommendations to the extent that the warranties given are statutory warranties. However, the seller cannot warrant the accuracy of information provided by a third party, for example, a local government.

The legislation should ensure that sellers are not held liable where the inaccuracy arises as a result of information provided by a third party.

The Society also supports the position that the warranties and search results provided in the seller statement should be current.

The Society considers that the statutory warranties should be current at the date of the contract and any annexures to the seller statement should be updated if the seller (or the seller’s agent) is aware that the information is out of date.

For example, if a seller is aware that the rates for the property have changed since the seller statement was prepared, the seller should be obliged to update this information.

QLS Recommendation

The Society supports Recommendations 19 and 21.

The seller should be obliged to update the seller statement and any relevant annexures if the seller (or the seller’s agent) is aware that the information is out of date.

Remedies

17. Recommendations 22 and 23

Recommendation 22 - Failure by the seller or agent to make the seller statement available from the time the residential property is offered for sale is an offence.
Recommendation 23 – A defence or excuse to the offence may arise:
- In related party transactions
- In Court ordered sales
- Where the prospective buyer is the State or a statutory body; and
- Where the prospective buyer is a publicly listed company

The Society supports Recommendation 22.

The Society suggests that rather than providing for a defence or excuse to the offence, the legislation could provide that the disclosure regime does not apply in the circumstances identified in Recommendation 23.

As noted above, the Society would also recommend adding the exclusion of the sale of both residential and commercial land where the purchase price of the sale is over $5 million (being a GST exclusive figure unless the margin scheme were being applied, in which case the figure would be GST inclusive).

**QLS Recommendation**

The Society supports Recommendation 22.

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**QLS Recommendation**

The Society suggests that rather than providing for a defence or excuse to the offence, the legislation could provide that the disclosure regime does not apply in the circumstances identified in Recommendation 23 and the further circumstances outlined above.

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18. **Recommendations 24 – 26 – Rights of rescission**

The Society notes that Recommendation 24 provides that rescission should only be available for 21 days after the contract has been entered into or up to the time of settlement, whichever is the earlier.

The Society considers that if there has been a failure to provide the required seller statement, the rights of rescission should extend for 30 days after the contract has been entered into or up to the time of settlement, whichever is the earlier. This timeframe reflects the usual 30 day settlement period in Queensland.

If the seller statement is not provided, the buyer must elect to carry out its own searches. The buyer may not be in a position to make this election within 1-2 days of the contract date, as the buyer will need to obtain legal advice about how to respond to the lack of the seller statement. Some search results take at least 14 days to arrive and often longer.
QLS Recommendation
In relation to Recommendation 24, the Society recommends that if there has been a failure to provide the required seller statement, the rights of rescission should extend for 30 days after the contract has been entered into or up to the time of settlement, whichever is the earlier.

QLS Recommendation

19. Recommendations 27 to 29 – Breach of statutory warranties
The Society supports these recommendations.
The legislation must also deal with the consequences of failing to comply with the obligation to provide required searches with the seller statement or if the searches provided are incomplete.

QLS Recommendation
The Society supports Recommendations 27 to 29.

20. Recommendation 30 – Deeming provision for rescission of contract for failure to disclose certain information (including coastal protection and tidal works notices, contaminated land, tree applications and transport infrastructure proposals)
The Society supports this recommendation.

QLS Recommendation
The Society supports Recommendation 30.

21. Recommendation 31 – Contracting out of statutory seller disclosure regime be expressly prohibited and any provision to this effect in a contract for the sale of land is void and of no effect.
The Society supports this recommendation subject to the seller disclosure regime excluding the sale of property for a sale price of greater than $5 million (excluding GST unless the
margin scheme were being applied), as this reflects a financial threshold for large, significant complex transactions where there has likely been extended negotiation between the parties or, as outlined above, a sophisticated purchaser.

**QLS Recommendation**
The Society supports Recommendation 31 subject to excluding from the seller disclosure regime the sale of property for a sale price of greater than $5 million (excluding GST unless the margin scheme were being applied).

### 22. Recommendation 32 – exclusion categories
The Society supports this recommendation subject to our comments above in relation to Recommendation 3 and Recommendation 23.

**QLS Recommendation**
The Society supports this recommendation subject to our comments above in relation to Recommendation 3 and Recommendation 23.

**Accessing information**

### 23. Recommendation 33 – Further investigation of the potential to develop a “one-stop shop” for state and local government disclosure information should be undertaken.

The Society strongly supports this recommendation. As noted throughout this submission, one of the key challenges in the conveyancing context is the lack of consistency of information available from the various local governments across Queensland.

**QLS Recommendation**
The Society strongly supports Recommendation 33, to undertake further investigation of the potential to develop a “one-stop shop” for state and local government disclosure information.
24. **Recommendation 34** – That a statutory disclosure regime comprising a number of statutory warranties, disclosure of a seller statement and body corporate certificate (where applicable) be enacted in Queensland

Subject to the comments and recommendations outlined in this submission, the Society supports the introduction of a statutory disclosure regime in Queensland.

By way of general comment, the Society recommends that:

- The legislation clearly state that any seller statement may be delivered by electronic means; and
- If a seller disclosure regime is introduced, it should not give rise to a right to terminate for minor breaches of the disclosure regime.

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<td>Subject to the comments and recommendations outlined in this submission, the Society supports <strong>Recommendation 34</strong>.</td>
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