



**Northern Territory Government**

Department of Justice

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# VENDOR DISCLOSURE LEGISLATION

## DISCUSSION PAPER

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Legal Services - Policy  
68 The Esplanade, DARWIN NT 0800  
GPO Box 1722, DARWIN NT 0801  
Telephone: (08) 8935 7665 Facsimile: (08) 8935 7662  
[www.justice.nt.gov.au](http://www.justice.nt.gov.au)

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## 1. VENDOR DISCLOSURE – KEY POINTS

- Vendor disclosure seeks to identify best practice conveyancing, in respect of contracts, speedy and efficient conveyancing (minimizing gazumping)<sup>1</sup> disclosures, allocation of costs and remedies, and then impose those practices on all conveyancing transactions.
- Whilst some conveyancing transactions are carried out in accordance with such high quality conveyancing practices, many conveyancing transactions would not comply with these principles. Documentation may be sloppy, disclosure may be haphazard and most of the conveyancing costs (aside from real estate agents' commission) are met by purchasers.
- There are transactions where it is clear that a purchaser has ended up owning property with undisclosed faults in circumstances where the price may have been excessive having regard to those faults.
- There is duplication of costs associated with purchasing in circumstances where a prospective purchaser obtains a number of searches or reports on various properties before a purchase eventuates.
- The critical issue is whether the costs of imposing a vendor disclosure regime in the Northern Territory justify the benefits to the community as a whole.

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<sup>1</sup> Many buyers are hurt by this practice, which occurs when a price is agreed to verbally but later the agent says someone else wants to buy the property at a higher price. Sometimes the prospective purchaser is given the opportunity to match, or better, the increased offer, other times there is no chance because the contracts have been signed (perhaps whilst the prospective purchaser was undertaking searches or obtaining necessary reports prior to signing a contract). The prospective purchaser has been "gazumped".

## 2. INTRODUCTION

The Northern Territory Department of Justice has prepared this discussion paper to obtain the views of the community on possible vendor disclosure legislation. In developing the paper the Department has consulted with the Property and Commercial Law Taskforce.<sup>2</sup>

The broad issues are:

### 1. Vendor Disclosure statement

Whether a vendor disclosure statement should be made mandatory in the Northern Territory, and if so:

- should it apply only to residential property sales; or
- all property sales.

### 2. Availability of Contract of Sale

Whether a vendor of residential property<sup>3</sup> should be required to have prepared and make available for inspection by potential purchasers a draft contract of sale at the time of offering the property for sale.

### 3. Cooling Off

Whether there should be a mandatory cooling off period in favour of buyers of residential property. If so, should there be exceptions (for example, auctions, properties above a prescribed value).

### 4. Prescribed Contract of Sale

Whether there should be a prescribed contract of sale for residential property in the Northern Territory.

In relation to each issue, if the response is “yes”, then how this may be achieved.

## 3. OVERVIEW

The *Consumer Affairs and Fair Trading Act* contains general provisions regulating unfair trading practices. In particular section 45 provides that a person shall not in trade or commerce make false or misleading representations concerning the land (e.g. misrepresentations as to the seller's interest in the land, the price of the land, the location of the land, the characteristics of the land and the use to which the land can be put). A breach of section 45 leaves the offender

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<sup>2</sup> A consultative group comprising local Legal Practitioners, Conveyancers, representatives from Departments of Planning and Infrastructure and Business, Economic and Regional Development, the Australian Valuation Office, the Property Council of Australia, Earl James and Associates (Surveyors), the Registrar-General's Office, REINT and Territory Housing.

<sup>3</sup> Subject to “issue 1”, throughout this paper it is assumed that, like other jurisdictions, vendor disclosure legislation would apply only to sales of residential property.

open to prosecution and to various types of civil action (e.g. injunction, damages etc). Similar provisions are contained in the Commonwealth's *Trade Practices Act 1974*.

These general legislative provisions can only be enforced by relatively complex litigation. The monetary value and/or the need for speedy resolution can make court action relatively impractical as a means of resolving most conveyancing problems. There may be a need for more specific legislation to cover some specific issues in the sale of land (especially residential property and including vacant land), similar to the situation in other jurisdictions.<sup>4</sup>

Some of the issues which have been identified in the Northern Territory (and elsewhere in Australia) include:

- (a) purchasers of residential property enter into binding contracts without having the benefit of adequate knowledge of, or information about, the property that is being purchased;
- (b) on the other hand, the signing or exchange of a contract of sale for the purchase of residential property is sometimes delayed whilst prudent potential buyers conduct all of the searches and obtain other information necessary in order to feel confident about entering into a binding contract. This allows opportunity for “gazumping” to occur;<sup>5</sup>
- (c) some sellers of residential property are unwilling to disclose (even to their own real estate agents, solicitors and conveyancers) all available information concerning the property;
- (d) some residential land (including land that will be subject to the *Unit Titles Act*) is offered for sale prior to the completion of the planning and sub divisional processes;
- (e) potential buyers and sellers in the Northern Territory sometimes sign an “offer to purchase” not realising this is not a binding contract. Again, this allows opportunity for “gazumping” to occur whilst formal contracts are prepared; and
- (f) cautious buyers often expend considerable amounts of time and money obtaining information about one or more properties (including obtaining reports, undertaking searches etc) without making a purchase – either due to problems identified with the property during these investigations or due to less cautious buyers signing binding contracts without making such investigations.

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<sup>4</sup> *Conveyancing Act 1919* (NSW), *Land and Business (Sale and Conveyancing) Act 1994* (SA), *Civil Law (Sale of Residential Property) Act 2003* (ACT), *Sale of Land Act 1962* (VIC), *Property Agents and Land Transactions Act 2005* (TAS).

<sup>5</sup> Above n 1.

The legislative solutions that have developed elsewhere in Australia for these issues include:

- (a) the requirement that the vendor disclose prescribed information (“vendor disclosure statement”) at the time of listing the residential property for sale;
- (b) the requirement that a contract of sale be prepared and available for inspection by prospective purchasers at the time of listing the property for sale; and
- (c) the giving of purchasers a cooling off period following the signing of formal contracts of sale of residential property.

These solutions exist in the form of statutory obligations in place in South Australia, Victoria, New South Wales, the Australian Capital Territory and Tasmania.<sup>6</sup>

In the Northern Territory, section 121A of the *Agents Licensing Act* mandates the use of a standard form contract by Real Estate Agents and Conveyancing Agents.<sup>7</sup> The standard form contract contains, amongst other things, a cooling off period.<sup>8</sup>

#### 4. VENDOR DISCLOSURE LEGISLATION

Under vendor disclosure legislation, the vendor of residential property is required to have readily available to all prospective purchasers of the property all generally relevant information concerning the property that is being sold.

Vendor disclosure legislation usually has the aims of:

- (a) improving the efficiency of the conveyancing system; and
- (b) improving the fairness of the conveyancing system.

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<sup>6</sup> Above n 3.

<sup>7</sup> «121A. Contracts for sale of land to be in approved form

A real estate agent or a conveyancing agent must not arrange for the preparation and execution of a contract of sale of land, unless the contract is in a form –

(a) approved by the Registrar for the purposes of this Act; or

(b) approved by the Law Society Northern Territory for use by persons who are not legal practitioners.»

<sup>8</sup> The contract approved by the Registrar of Land, Business and Conveyancing Agents under section 121A is currently being reviewed by a working group comprising representatives of the Registrar, the Law Society Northern Territory, the Real Estate Institute of the Northern Territory and the Australian Institute of Conveyancing.

Vendor disclosure legislation can be characterized as being:

- (a) consumer protection legislation in so far as it seeks to ensure that the relevant information is made available to the prospective purchaser prior to becoming contractually bound to buy the land, or later so as to give the consumer the right to avoid the contract;
- (b) efficiency legislation in so far as it seeks to minimise the amount of searching required and number of reports obtained for the sale of land. It does this by ensuring that the seller gets together a full set of information which he or she is then obliged to provide to the buyer; and
- (c) efficiency legislation in so far as it is intended to minimise the opportunity for gazumping. It does this by reducing the time between when an offer is made and a binding contract is entered into.

## 5. VENDOR DISCLOSURE STATEMENT

Vendor disclosure statements are in use in other States and the ACT.<sup>9</sup> These statements generally include factual information available from public sources - such as zoning, flood plans, sewer connections and rates and other charges.

### 5.1 The current situation in the Northern Territory

The disclosure obligations imposed on vendors<sup>10</sup> of residential property in the Northern Territory are minimal. Purchasers are subject to the common law principal of *caveat emptor* (buyer beware). Under common law, vendors are not required to disclose defects in a property.<sup>11</sup>

While disclosure obligations are minimal in the Northern Territory, one common practice of buyers is to make their purchase of a property conditional on a range of checks being made and subject to those checks providing satisfactory results.

For example, many prudent purchasers require that pest/termite and building inspections be conducted before they will either enter into a contract, or make satisfactory results of such inspections a condition of a contract. If the checks do not produce a satisfactory result, then the purchaser may elect not to proceed with the contract to purchase the property or may re-negotiate the contract based on the new information obtained.

This situation requires purchasers to take responsibility for specifying conditions in either the “offer to purchase” (which is not binding) or in the contract of sale (if there is one at that stage), and obtaining the appropriate reports or information themselves.

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<sup>9</sup> Above n 3.

<sup>10</sup> Including their Real Estate Agent (if any).

<sup>11</sup> However, buyers who have been deliberately misled may be able to obtain redress through the Courts

## 5.2 The Situation in Other Jurisdictions

New South Wales, South Australia, Tasmania, Victoria and the Australian Capital Territory have some form of mandatory vendor disclosure.

### New South Wales

Section 66R of the *Conveyancing Act 1919* requires that certain documents be attached to a contract for the sale of any residential property before it is advertised or sold.

The documents that must be attached to the contract for sale include:

- (a) a council zoning certificate;
- (b) a full title search;
- (c) a sewer diagram if a sewer is available; and
- (d) easements or restrictive covenants.

While the contract for sale does not require a property condition report, one can be included. Building inspection and pest reports are also not required.

Section 52A and Regulation 6 of the *Conveyancing Act 1919* also require sellers to provide buyers with a warranty in respect of several matters, including:

- (a) that the land does not contain any part of a sewer that belongs to a recognised sewerage authority;
- (b) that all buildings on the property are of a standard that would not justify the upgrading or demolition of those buildings;
- (c) any conservation instrument or order or notice under the *Heritage Act 1977*; and
- (d) any proposal of the New South Wales Land and Housing Corporation to acquire the whole or any part of the land.

The NSW legislation imposes a maximum fine of \$1,100 on sellers who do not prepare the required documents for inspection before marketing. This in effect reverses the principle of caveat emptor (buyer beware) and places responsibility on sellers. Where a seller fails to provide the documents or breaches the warranty, buyers may also rescind the contract.

### South Australia

Section 7 of the *Land and Business (Sale and Conveyancing) Act 1994* stipulates what information must be supplied to buyers before settlement. The Land and Business (Sale and Conveyancing) Regulations 1995 prescribe (by way of completion of a form) the information that sellers of real estate must provide.

The vendor is required to give the purchaser a completed form at least 10 days before the date of settlement.

If a real estate agent is involved in the sale then the agent is responsible for verifying the information provided by the seller. In practice, the seller's real estate agent, or their representative, obtains the required information from the authorities. The seller then signs the statement before providing it to the buyer.

If a seller signs a statement knowing it to be false, they may be liable to a fine not exceeding \$2,500. The buyer may also apply to the Court to void the contract and may claim damages against the seller and/or agent.

### Victoria

Section 32 of the *Sale of Land Act 1962* requires that the seller provide the buyer with a disclosure statement before the buyer signs a contract for the sale of land. The disclosed information forms part of the contract.

The disclosure statement is usually prepared by the vendor's solicitor along with the contract of sale. As the Act's definition of a seller includes a person acting as an agent for the seller, real estate agents may also become involved in preparing disclosure statements.

The information to be disclosed relates to:

- (a) zoning of land;
- (b) building improvements;
- (c) easements;
- (d) covenants; and
- (e) sewerage and electricity.

A copy of the certificate of title and a copy of the strata plan (if relevant) are to be attached.

The disclosure statement does not include any information about the legality of extensions or subjective descriptions of the condition of the property.

Where a seller fails to disclose the required information or discloses false information the buyer may rescind the contract for the sale of land before accepting title. Where the seller knowingly or recklessly fails to supply the required information or supplies false information, the seller is liable to a fine of up to \$5,000.

### Australian Capital Territory

The *Civil Law (Sale of Residential Property) Act 2003* is one of the most recently enacted "vendor disclosure" legislation. This legislation may provide a suitable model for any "vendor disclosure" legislation in the Northern Territory.

Part 2 of the Act deals with sale of residential property.

A proposed contract of sale must be available at the time of listing the property for sale. Other vendor disclosure documents must also be available. These include:

- (a) copy of the title;
- (b) copy of any encumbrance on the title (e.g. covenant or easement);
- (c) copy of unit plan (if relevant);
- (d) building inspection report; and
- (e) pest treatment certificate or pest inspection report.

Section 11 sets out certain terms which must be included in a contract of sale.

Section 12 provides for a five day cooling off period. There is no cooling off for an auction, or if a buyer waives the cooling off after receiving independent legal advice. If a buyer rescinds the contract during the cooling off period, 0.25% of the purchase price is forfeited to the vendor.

A vendor may be reimbursed by the purchaser the costs of obtaining the building inspection report and the pest inspection report.

If disclosure documents contain information that is false or misleading in a material way, a purchaser may be entitled to compensation for any loss or expense incurred from the person who prepared the information.

A person who knowingly provides false or misleading information in relation to vendor disclosure may be subject to a maximum penalty of \$11,000.

### Tasmania

In late 2005, the Tasmanian Parliament enacted the *Property Agents and Land Transactions Act 2005*. Part 10 of this Act provides for vendor disclosure. The main features of the legislation are as follows:

- obligation of vendors and agents offering land for sale to make disclosure documents available (s. 186). These documents include:
  - (a) the proposed contract;
  - (b) a statutory warning (as to be prescribed in regulations);
  - (c) a copy of the title (as registered);
  - (d) statements (if relevant) about strata title land (including contact details for the secretary or the manager of the body corporate, copy of by-laws, copy of insurance policies, outline of liabilities, sinking funds);

(e) any other prescribed documents.

- A cooling off period of two business days from the day when the purchaser is bound (s.200); and a prohibition on agent receiving commission if the right to cool-off is exercised. (s. 202).
- A broad ranging liability of agents for the disclosure of known information that might affect a purchaser's decisions (s. 196). This is meant to make agents reveal their knowledge of matters such as the house being the place of some murders that occurred.

The Act also facilitates electronic transactions (s. 186), contains provisions about advertising (s.187), requires documents to be available prior to auction (s. 188), and provides for six months limitation on validity of disclosure documents (s. 193);

Contracts are voidable if the disclosure statements are not provided (s. 189).

A purchaser may rescind the contract if a loss arising from breach of a contract is 5% or more of the value of the land. Alternatively, the purchaser in such a case may claim damages.

### 5.3 What are the advantages of Vendor Disclosure Statements?

A key benefit arising from vendor disclosure statements is that prospective purchasers are able to make informed decisions about a property. The resulting improved transparency early in the transaction should increase buyer confidence.

A further benefit should be fewer disputes between vendors, purchasers and real estate agents, with fewer complaints from purchasers claiming to have been misled or that important or relevant information has been withheld. That in turn should lead to savings in time and resources for the industry, and for government agencies involved in dispute resolution or industry regulation.

Vendor disclosure statements also provide a form of liability protection to vendors and agents by providing a written record of what information has been provided to a purchaser.

### 5.4 What are the disadvantages of Vendor Disclosure Statements?

A major issue in the Northern Territory lies with the fact that some properties may contain illegal extensions or some other defect. These properties may also have changed ownership several times since the work was first carried out and (with no vendor disclosure legislation in place) and the current owner may be unaware there could be a problem. If vendor disclosure is introduced in the Territory, current owners of these properties may be unhappy when they come to sell and the problems are brought to light.

Mandatory vendor disclosure statements may impose additional costs on sellers, which may be passed on to buyers. Those costs may include the seller's time in preparing the statement or the cost of obtaining professional assistance.

## 5.5 What Could a Northern Territory Vendor Disclosure Statement Include?

A vendor disclosure statement has the objective of providing information about a property to a prospective purchaser that has been compiled by (or on behalf of) the vendor. Disclosure must only be to the extent that there can be certainty about the information provided (some matters cannot be certain because, for example, of undocumented history).

What information should be provided?

Desirably, a prospective purchaser should have, at the time of making a decision to purchase, all information necessary to make that decision. This is information that under current conveyancing practices would generally be obtained by the time of settlement of a transaction - with the basic proposed change being to move the time of disclosure forward to the time of signing the contract and to move responsibility for obtaining some of the information from the purchaser to the vendor.

The information that a purchaser would generally want includes:

- (a) land titles information relating to the land;
- (b) other government information relating to the land (eg planning information);
- (c) basic building information (eg illegal or unapproved building works); and
- (d) some information that might not be obtainable from any of those sources (eg termites/pest infestation, or some historical event such as being the scene of a murder).

Importantly, a vendor should only be obliged to disclose what they know or what they can, acting reasonably, find out. In that context, a vendor should be required to disclose certain information that can be obtained by formal inspection of the property (eg termites/pests, building status), or from Government (including local government) sources. A purchaser should continue to exercise caution and decide whether or not to obtain additional information a “prudent buyer” would consider necessary or appropriate.<sup>12</sup>

As it is common practice for residential land (including land that will be subject to the *Unit Title Act*) to be sold ‘off the plan’ prior to completion of planning and sub-divisional works, it would also seem appropriate that it be mandatory that any contract for pre-sale be accompanied by a vendor disclosure statement that addresses at least a minimum set of standard criteria.

The level of mandatory disclosure needs to be determined on the basis of:

- (a) What information can be realistically provided?
- (b) Who, if anyone, is able to accept responsibility for providing the information?

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<sup>12</sup> for example, an Engineer’s report.

- (c) What level of responsibility should the purchaser be expected to accept for searching additional information about a property?

In determining the contents of a Vendor Disclosure Statement, it is essential that these practical issues of implementation be examined. It is of no value including a specific item of information if no person or agency can easily provide it or, if they can, they cannot provide any warranty as to its accuracy.

In order to provide useful information to prospective purchasers, a Northern Territory vendor disclosure statement should contain all relevant information that will assist the buyer to make informed decisions. This information should include information regarding the land, the dwelling and other buildings (if any) and the surrounding environment.

#### Information on the Land

The following is a list of matters of which the buyer may wish to know when making a decision. Some of this information is available from a search of the title. Other information may not be readily so available.<sup>13</sup>

In respect of the land, buyers may wish to know the following information:

- (a) Are there any restrictions over the use of the land (e.g. an easement) or a legislative restriction that may not have been registered?
- (b) What is the zoning (i.e. what are the restrictions on the lawful use to which the land may be put)?
- (c) Are the boundaries correctly identified?<sup>14</sup>
- (d) Are there any known encroachment problems?
- (e) Is the land subject to any (known) notice, order, report or recommendation of Government or a public authority to acquire the land?<sup>15</sup>
- (f) Are there any known contaminants on the property?
- (g) Is the property land that may be subject to floods or storm surge?
- (h) Is the swimming pool fence compliant?

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<sup>13</sup> In considering what information is to be available as part of a disclosure statement it needs to be remembered that the context of a disclosure statement may be that of an agent seeking to sign up a purchaser – sometimes at a time or place when a purchaser may not have ready access to the land register. For those kinds of situations the agent (or vendor) would be responsible for providing an accurate search of the land register.

<sup>14</sup> The main practical issue is whether an identification survey report is necessary.

<sup>15</sup> This information should be available on the Records of Administrative Interest and information. However, the information might also be something that only the vendor knows.

- (i) Unit titles matters, such as details of sinking fund, insurance, annual contribution, current legal disputes, special fees and proposed levies and works.
- (j) Are there any outstanding charges over the property?

Information on the dwelling and other buildings

- (a) Are there any known structural defects in the premises?
- (b) What services do the premises possess?
- (c) Details of bore, septic tank, water supply etc (if applicable) and disclosure of any known problems.
- (d) What appliances are sold with the premises and do they work?
- (e) Connections or availability of electricity, gas, water, sewerage, telephone services (as far as the vendor knows).
- (f) Pest and termite inspection reports.
- (g) A building status report setting out what structures have been approved and what structures have not been approved.<sup>16</sup>

(If a building status report is to be obtained by a vendor before the property is placed on the market, and the report identifies an illegal extension or some other problem, this is likely to motivate the vendor to correct the problem before placing the property on the market.

Another potential benefit of this strategy is that only one inspection needs to be carried out, whereas at present, separate inspection reports may be obtained by several possible purchasers, thereby unnecessarily adding to transaction costs.)

Information on surrounding environment and other issues

In respect of the surrounding environment, purchasers may want to know the following kinds of information:

- (a) Are there any known future public works or other works planned in the area that may affect the property?
- (b) Are there any known problems with noise or other disturbance in the area? If so, what type?

The specific matters to be included in any vendor disclosure statement would be prescribed by Regulations, and would be subject to further consultation with key stakeholders. However, comments are invited on what matters should and should not be included in any vendor disclosure statement in the Northern

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<sup>16</sup> It is up to a “prudent purchaser” to decide whether they need to obtain an engineer’s (or building certifier’s) report.

Territory (remembering a balance needs to be maintained between what information is available to the vendor and what is too difficult to obtain or is outside their knowledge).

Questions:

1. Should there be mandatory vendor disclosure in the Northern Territory?
2. If there was to be mandatory vendor disclosure, should the information to be disclosed include all those matters set out above? Is there any other information that should be disclosed?
3. Based on the scheme described in this discussion paper, is there a need for exemption for vendors who are selling in capacities such a mortgagee (forced creditor's sales) or an executor or administrator of a deceased estate?
4. Are there any other circumstances where a vendor should be exempt (either fully or partly) from having to provide a disclosure statement?
5. Who should be responsible for preparing a vendor disclosure statement and take liability for errors?
6. What remedies should be made available to buyers who find that a vendor disclosure statement is inaccurate or contains false information? What penalties should apply to a vendor who has knowingly or recklessly included inaccurate or false information?
7. Should a penalty should apply to vendors who fail to complete a disclosure statement?
8. What practical limitations or problems are there in implementing vendor disclosure of the nature described?

## **6. CONTRACT OF SALE AT TIME OF MAKING PROPERTY AVAILABLE**

A prospective purchaser will often engage a real estate agent to market the property, however a number of sales are arranged without any involvement from a real estate agent.

Upon receipt of an offer:

- A real estate agent may have a buyer and seller sign an "offer to purchase". The offer to purchase does not constitute a legally binding document for the purchase and sale of land.
- Alternatively, (and with or without a real estate agent involvement) a buyer and seller may simply reach in-principle agreement.

In either scenario, the matter is then (in the vast majority of cases) handed over to solicitors or conveyancing agents for the preparation and exchange of contracts of sale.

Some enquiries are made by the prospective purchaser in this period (i.e. before exchange) and others are made after exchange. It is this delay between agreement to buy and the entering into of a binding contract that leads to the potentiality of gazumping. This system is also potentially inefficient in so far as each potential buyer makes multiple searches.

It has also been suggested that the completion of preparation and exchange of contracts is often subjected to "engineered delays" pending resolution of various matters that could have been disclosed or resolved at the beginning.

Currently, real estate agents seek to have the parties sign a contract of sale as soon as possible. However, haste can result in parties being bound by inadequate contracts.

### **6.1 The situation in other jurisdictions**

In New South Wales and the Australian Capital Territory, a vendor must have available a contract of sale at the time of listing the property for sale, but this is not the case in any other jurisdictions (noting however that in many other jurisdictions the contract of sale is generally ready for signing in the hands of the real estate agent).

### **6.2 What are the advantages of having a contract of sale available**

The requirement to have a contract of sale ready at the time the property is listed or made available for sale:

- (a) gives purchasers the maximum amount of information at the earliest possible time; and
- (b) importantly, facilitates the early exchange of contracts (thus minimising the opportunity for gazumping to take place).

The cost of conveyancing would not be increased, as a contract must be prepared at some point in the conveyancing process.

### 6.3 What are the disadvantages

There may be additional costs for those vendors who are merely “testing the market”. However, others (such as Real Estate Agents and potential purchasers) currently incur costs (either directly or in terms of time wasted) in such circumstances. Such potential vendors may be discouraged from “wasting everyone’s time” if some part of the cost is met by them.

Question:

9. Should there be a requirement that a draft contract of sale be available at the time of listing the property for sale?
10. Should there be a prescribed contract of sale for the sale of (residential) property?

## 7. SCOPE OF POSSIBLE REGULATION – LIMITED TO RESIDENTIAL LAND?

This paper has been prepared on an assumption that the legislation is only required for residential land – this is the model in place elsewhere around Australia.

Whilst most of the advantages of the legislation could equally be applicable to commercial property, there is very little evidence to suggest that prospective purchasers of such property experience the same problems as purchasers of residential property.

Imposing the regulation on commercial property transactions may provide little benefit to the parties, and increase costs unnecessarily (particularly when the varied nature of commercial property is considered).

Question:

11. Should any vendor disclosure legislation apply just for residential land/premises?

## 8. COOLING OFF

A critical element of vendor disclosure legislation in other jurisdictions is a mandatory cooling off period in favour of the purchaser, after the signing of the contract. Cooling-off periods generally do not apply to sales by auction or where the buyer has obtained independent legal advice.

The contract approved for use by Northern Territory Real Estate Agents and Conveyancing Agents under section 121A of the *Agents Licensing Act* provides for a cooling off period of three days.

Another issue is to whether the cooling off period should not apply to properties above a certain value – possibly on the basis that such legislation is only designed to protect those purchasers who may not be in a position to protect themselves (having noted this issue however, there does not appear to be any obvious distinction between the information needs of prospective purchasers of residential property, no matter what the value).

### 8.1 The Situation In Other Jurisdictions

Five other jurisdictions have legislated cooling off periods:

- (a) New South Wales (five days);
- (b) Victoria (three days);
- (c) Queensland (five days);
- (d) South Australia (two days);
- (e) Australian Capital Territory (five days); and
- (f) Tasmania (two days).

### 8.2 What are the advantages?

Cooling off is an important element of vendor disclosure, and allows the parties to sign contracts at the earliest opportunity (with the associated benefits to each party) whilst still allowing purchasers time to verify disclosed information (if necessary), to undertake further searches and to obtain legal advice.

### 8.3 What are the disadvantages?

A major disadvantage of cooling off periods lies with the uncertainty that may result during the cooling off period, when the property is basically off the market.

In the Australian Capital Territory, the vendor is compensated an amount equal to 0.25% of the purchase price if the purchaser rescinds using the cooling off provisions. This also has the effect of dissuading people from entering into contracts without having any serious intention to follow through on the purchase.

In other jurisdictions there appear to be practical problems which arise from cooling off periods that commence with the time when contracts are signed. In many cases, it appears to be a matter of practice that the real estate agent keeps the signed contract and undertakes to provide it to the purchaser's lawyer or conveyancer. Sometimes the contract is not handed over to the lawyer or conveyancer until the cooling off period has ended or is about to end.<sup>17</sup>

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<sup>17</sup> This practice does not represent good practice. The cooling off period is to allow the purchaser to think about the basic deal and take action on their own behalf to rescind the contract. Real estate agents (whose main duty is to the vendor) should not take on the responsibility for providing the contract to the purchaser's lawyer or conveyancer in a timely manner.

Questions:

12. Should there be a cooling off period in the Northern Territory?
13. If yes, what should be the period of time:
  - \* 2 days
  - \* 3 days
  - \* 4 days
  - \* 5 days
  - \* other?
14. If there is a cooling off period, should there be an ability to waive the right after receiving legal advice?
15. If yes, should such “legal advice” be able to be provided by both legal practitioners and licensed conveyancing agents?
16. Should the prospective purchaser incur a financial penalty in favour of the vendor if the cooling-off option is exercised?
17. If yes, should be the amount be .25% of the purchase price (as per ACT) or some other amount?

## 9. LEGISLATIVE IMPACT

Any proposal to enact vendor disclose legislation will, in due course, need to be justified in terms of the benefits to the community being greater than the costs. This analysis will also need to identify alternatives to achieving the same objective.

The suggestion has been made that an alternative to vendor disclosure obligations is to reform the Torrens land title register so that all relevant interests are disclosed as part of a search of the title. In contrast, the point has also been made the Record of Administrative Interests cannot be relied in unless there is a government warranty of the accuracy of the information. Accordingly, Government may incur additional expenses in order to be able to provide the kind of information that may be required in order to meet the demands of vendors and their agents.

However, the *Land Title Act*, being the Act that establishes the land title register already provides for:

- Register of administrative interests and information

Section 38 provides that the Registrar-General may maintain a record of administrative interests and information.<sup>18</sup> This section is sufficient to permit the Registrar-General (on behalf of Government) to collect and publish most information relevant to the sale of land. However, Government does not know all of the relevant information.

Additionally some information (e.g. regarding outstanding council rates or outstanding unit titles dues), may change on a daily basis. Currently the Registrar-General and the Northern Territory do not give any warranty about the accuracy of this information.

- Caution notices

Section 34 permits Governments to register caution notice against the titles for land. This section is designed to permit Government to publish knowledge that

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<sup>18</sup> 38. **Record of administrative interests**

- (1) *The Registrar-General may keep information that the Registrar-General considers necessary or desirable in relation to land.*
- (2) *Subject to another Act and the Regulations, the Registrar-General may allow a person access to information referred to in subsection (1) in accordance with an agreement entered into between the Registrar-General and the person and on the person paying the prescribed fee, if any.*
- (3) *The Registrar-General may provide information referred to in subsection (1) by means of a certificate, statement, visual display unit, computer print-out, microfiche reader or any other means that the Registrar-General considers appropriate.*
- (4) *The Registrar-General may provide access to information under this section in a way to limit the liability of –*
  - (a) *the Registrar-General or the Territory;*
  - (b) *the Commonwealth;*
  - (c) *a statutory authority of the Territory or the Commonwealth, a local government body or a prescribed organisation; or*
  - (d) *an employee of the Territory or the Commonwealth or of a statutory authority, local government body or prescribed organisation referred to in paragraph (c),*  
*for any omission from, or misstatement or inaccuracy in, the information.*
- (5) *Information referred to in subsection (1) is not part of the land register.*

may be of a government nature about land.<sup>19</sup> The section was specifically designed to permit Government, when disposing of land that is subject to some land use problem (e.g. in a flood zone or in a former bombing range) to be sold in such a way that both the immediate purchaser and future purchasers are aware of the nature of the land.

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<sup>19</sup> **34. Caution notices**

- (1) *The Minister or, if a minister of the Commonwealth has administrative responsibility for the first grant or transfer of land from the Crown, that minister may lodge with the Registrar-General a memorandum if he or she is of the opinion that characteristics of or relating to the land may adversely affect its use or occupation.*
- (2) *The memorandum may be lodged –*
  - (a) *on the first grant or transfer of land (whether freehold or leasehold) from the Crown; or*
  - (b) *at any time afterwards with the consent in writing of the registered proprietor of any interest in the land that is affected by the memorandum.*
- (3) *The memorandum is to –*
  - (a) *identify the land;*
  - (b) *set out the characteristics of or relating to the land that may adversely affect its use or occupation; and*
  - (c) *if the memorandum is lodged other than on the first grant or transfer of the land – contain the consent of the registered proprietor of any interest in the land that is affected by the memorandum.*
- (4) *Characteristics of or relating to land that may be set out in the memorandum include –*
  - (a) *a propensity towards flooding;*
  - (b) *the presence of unexploded bombs or other ordnance; and*
  - (c) *the presence of rubbish disposal or landfill sites, whether compacted or not.*
- (5) *The Registrar-General must –*
  - (a) *register the memorandum; and*
  - (b) *enter a caution notice in the land register against the land to which the memorandum relates.*
- (6) *A caution notice does not of itself preclude any dealing with the land.*

- Notices of statutory restrictions

Section 35 of the *Land Title Act* provides for the registration of statutory restrictions.<sup>20</sup> These are restrictions, in the nature of property rights, that are provided for in legislation.

They may ‘secure’ land use restrictions or monies that are owed. Other provisions in the *Land Title Act* and the *Law of Property Act* divide these statutory restrictions into two classes – overriding statutory restrictions and ordinary statutory restrictions. In the latter case such restrictions have priority against other registered interests that is determined in accordance with the date of

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<sup>20</sup> 35. Notices of statutory restrictions

(1) *If a law of the Territory imposes a restriction on the use or occupation, or any dealing, with land, the Minister having responsibility for the administration of the law –*

(a) *may; or*

(b) *if the land is prescribed property and was granted to an association by section 46(1A) of the Lands Acquisition Act – must,*

*lodge with the Registrar-General a memorandum.*

(2) *The memorandum is to –*

(a) *identify the land;*

(b) *specify the statutory authority under which the restriction was imposed and the date on which it was imposed; and*

(c) *request that a memorial be entered in the land register in relation to the land.*

(3) *A restriction under this section includes the right of the Crown to revoke the reservation on land held by a council on lease under section 337 of the Local Government Act 1985 as saved by Part 14 of the Local Government Act 1993.*

(4) *If land is prescribed property and was acquired wholly or partly from or using funds obtained under a grant from the Commonwealth, the appropriate minister of the Commonwealth may lodge the memorandum instead of the Minister.*

(5) *The Registrar-General must –*

(a) *register the memorandum; and*

(b) *enter a statutory restrictions notice in the land register against the land to which the memorandum relates.*

(6) *A statutory restrictions notice does not of itself preclude any dealings with land but has effect according to the tenor of the statutory restriction to which it refers.*

(7) *In this section, “prescribed property” has the meaning it has in the Associations Act.*

registration. Others, for example, concerning debts in relation to council rates, take priority regardless of when registered.

It is not apparent that any further legislation is required in order for the *Land Title Act* to facilitate as much information as possible to be referenced to a land title search. It also needs to be remembered that a core aim of Torrens legislation is simplicity of title and ease of dealing with land. Cluttering all titles with advisory information would detract from the concept of simplicity of title. It is also unlikely that Government is in a position to give warranties about all of this kind of information, especially when it relates to historical data.

## **10. A SUITABLE MODEL FOR VENDOR DISCLOSURE LEGISLATION IN THE NORTHERN TERRITORY?**

The two most recent pieces of legislation dealing with vendor disclosure are the *Civil Law (Sale of Residential Property) Act 2003* (“the ACT Act”) and Part 10 of the *Property Agents and Land Transactions Act 2005* (TAS) (“the Tasmanian Act”)<sup>21</sup>.

The Tasmanian Act:

- Only applies to residential property (but not if the property is for rental)
- Requires the following documents or information to be made available to prospective purchasers:
  - Copy of proposed contract
  - Copy of the title;
  - Unit title information, including by-laws, plans, insurance, sinking funds, liabilities etc.
- Other information will be prescribed in the Regulations (not yet in place);
- An Agent must also disclose anything known (or which ought to have been known) about the property;
- Sets out certain (general) conditions that must be included in the contract (and provides that they are implied into any non-complying contract);
- Contract is voidable by the purchaser if the disclosure documents are not given.
- Provides for a cooling off period of 2 working days (which can be waived upon the buyer obtaining independent advice). There is no cooling off for a sale by auction.

The ACT Act:

- Applies only to residential property (less than 3ha in size);
- Sets out certain (general) conditions that must be included in the contract (and provides that they are implied into any non-complying contract);
- Provides for a cooling off period of 5 working days (which can be extended by agreement, or shortened or waived upon the buyer obtaining legal advice). There is no cooling off for a sale by auction or tender, or if the buyer is a corporation;

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<sup>21</sup> Not yet commenced (as at 27 February 2006).

- Requires a copy of the contract to be available for inspection by prospective purchasers;
- Requires the following documents to be available to prospective purchasers:
  - Copy of title;
  - Copy of any encumbrances on the title;
  - A pest inspection report;
  - For units – a copy of the minutes of the meetings of the body corporate for the past 2 years and a copy of the unit plan;
  - The lease conveyancing inquiry documents. These include information regarding heritage listing, known contamination, development applications and other matters under the *Land (Planning and Environment) Act 1991 (ACT)*;
  - The building conveyancing inquiry documents. These include documents held by the planning and land authority, including:
    - Certificate of occupancy for the residence;
    - Survey plan;
    - Approved plans for the residence;
    - Drainage work plan;
    - A summary sheet of the contents of the building file.
  - A building inspection report. The report must be completed in accordance with Australian Standard 4349.1-1995, and include a copy of the approved plans, building permit, and certificate of occupancy for any structures.
- Provides that the seller may be reimbursed by the buyer for the cost of the reports obtained;
- Provides that the buyer can be compensated by a person who makes any false or misleading report in connection with the sale.

Question:

18. Do either the Australian Capital Territory legislation or the Tasmanian legislation provide a suitable model for Vendor Disclosure legislation in the Northern Territory?

## 11. SUBMISSIONS

Submissions can be sent to:

Robert Chamberlain  
Senior Policy Officer  
Department of Justice  
GPO Box 1722  
DARWIN NT 0801

Email: [robert.chamberlain@nt.gov.au](mailto:robert.chamberlain@nt.gov.au)  
The closing date for submissions is 28 April 2006.