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**THE CONTENT AND TIMING OF VENDOR DISCLOSURE IN
THE SALE OF RESIDENTIAL REAL ESTATE:
WHY BOTH MUST BE CONSIDERED**

LYNDEN GRIGGS*

The recent introduction in Tasmania of the Property Agents and Land Transactions Act 2005 has highlighted what has become an increasing trend within Australia to legislative mandate for vendor disclosure in the sale of residential real estate. The purpose of this paper is to outline the differences between the jurisdictions as to what must be disclosed as well as the timing of disclosure. The submission will be that whilst much of the focus has been on the content of disclosure, the timing of disclosure must also be at the forefront of consideration. To support this, the author will draw on ideas from economics and psychology to support the thesis that if disclosure is not made at the outset of the search process, then the qualitative impact and value of that information will be lessened.

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I INTRODUCTION

The recent introduction in Tasmania of the *Property Agents and Land Transactions Act 2005* has continued a recent trend away from caveat emptor in the sale of residential real estate and towards a principle of caveat vendor. Similar steps were taken in the ACT in 2004 with the introduction of the *Civil Law (Sale of Residential Property) Act 2003*. Victoria, New South Wales, and South Australia also have some form of vendor disclosure whilst Queensland, Western Australia and Northern Territory largely rely on what is contained in the standard form contract applicable to those jurisdictions.

Keeping in mind jurisdictional differences, the purpose of this paper is to outline what is disclosed,¹ and, with this background to concentrate on the time when disclosure is made to potential purchasers. There is little in the Australian literature² on the importance of early as against late disclosure in the context of the sale of residential real estate – yet, intuitively and the evidence from psychology would suggest the timing of disclosure could be just as critical as what is disclosed. The argument will be that if information relevant to the buying decision is presented late in the process of investigation, the qualitative impact of that information is likely to be lessened by potential purchasers. The legislative goal must therefore be to provide information at an appropriate time to ensure that the allocation of resources by the buyer in the decision-making process and subsequent purchase will be put to the optimum use. By doing this, a law and economics perspective will tell us that the individual will be maximising the utility, and the information asymmetry, so often seen as the basis of redress of common law rules, will be corrected in a more clinical and disciplined fashion. The argument will be made, using evidence from the discipline of psychology that the asymmetry that exists between the vendor and purchaser will

¹ A summary of the position in the Australian States can be located in Tasmanian Law Reform Institute, *Vendor Disclosure, Final Report No 5*, September 2005, Part 3: <www.law.utas.edu.au/reform> at 15 February 2007.

² An exception to this in the American context is Stepahnie Stern, 'Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing' (2005) *Utah Law Review* 57. The paper by Stern understandably focuses on the position in the States of the Unites States of America. The intent is to bring a similar analysis to the Australian regimes.

arguably continue if information is disclosed late. The importance of such an analysis is that residential property values 'reflect a complex interaction of spatial, temporal, economic, sociological and hydrologic variables'.³

I OVERVIEW OF DISCLOSURE REGIMES IN AUSTRALIA

A The Common Law

The starting premise of the common law is as follows: *Caveat emptor, qui ignorare non debuit quod jus alienum emit*—let a purchaser, who ought not be ignorant of the amount and nature of interest which he is about to buy, exercise proper caution. Despite the clear weakening of this principle,⁴ it is reasonable to say that it remains the premise on which vendor disclosure is built. In other words, vendor disclosure may well impact and reduce the significance of caveat emptor, but disclosure by the vendor does not serve as the cornerstone and starting point of conveyancing practice. The traditional authorities of *Cook v Waugh*⁵ and *Lowndes v Lane*⁶ still apply today – it is the purchaser's obligation to inspect the land and discover such defects as one could reasonably hope to find. The purchaser cannot later complain if they fail to make an inspection, or make an inadequate inspection.⁷

Not surprisingly, the common law itself recognised the inherent inequity in such an absolute rule and through its own jurisprudential development drew a distinction between defects in title and defects in quality (of title). A defect of title described in *Liverpool Holdings Ltd v Gordon Lynton Car Sales Pty Ltd*⁸ as involving the question 'whether the purchaser is obtaining essentially what it bargained for....[or was it] obtaining something so materially altered in character as to be in substance a different thing from that contracted for'.

³ Stephen Yeo, 'Effects of disclosure of flood-liability on residential property values' (2003) 18 *Australian Journal of Emergency Management* 35, 39.

⁴ See Lynden Griggs, 'The Duty of Disclosure by Vendors in a Conveyance: If Caveat Vendor, are we allowing the Camel's Nose of Unrestrained Irrationality Admission to the Tent' (1998) 7 *Australian Property Law Journal Lexis* 4.

⁵ (1860) 2 Giff 201; 66 ER 85.

⁶ (1798) 2 Cox, Eq Cas 363; 30 ER 167.

⁷ *Oldfield v Round* (1800) 5 Ves 508, 31 ER 707 (sale of a meadow, which had a public road running through it).

⁸ [1979] Qd R 103, 106.

Despite the concern of the judiciary that the distinction between defects going to title and those only going to quality is of ‘doubtful moralistic foundation’,⁹ it is a principle that the courts have traditionally reinforced. Thus in *Tsekos v Finance Corp*¹⁰ the vendor was not required to disclose at the date of signing the contract that the local authority intended to resume the land. Other case law examples of defects in quality which need not be disclosed include the vendor having knowledge the house was infested with termites,¹¹ or that the land is being sold subject to an undisclosed mining lease.¹² Furthermore, in *Carpenter v McGrath*¹³ the possibility that the fixtures on the land would become subject to a local government demolition order was not a sufficient basis to hold that there was a defect in title – with this decision subsequently being overcome by legislative initiative.¹⁴ The only softening of the previously mentioned principles occurring where courts have held that vendors were not entitled to fraudulently conceal defects in quality¹⁵ or actively conceal any such defect.¹⁶ Such an action would amount to a positive misrepresentation that there is no defect. In this instance, a purchaser would be entitled to remedy.

From this initial premise, the common law then drew a further distinction between latent defects in title and patent defects in title. Latent defects - that is those defects not discoverable upon exercising reasonable care when inspecting the property, had to be disclosed, whereas patent defects (defects visible to the eye or arising by necessary implication from something visible to the eye) need not be disclosed.¹⁷ Examples of

⁹ *Dormer v Solo Investments* [1974] 1 NSWLR 428, 432.

¹⁰ [1982] 2 NSWLR 347.

¹¹ *Eighth SRJ Pty Ltd v Merity* (1997) 7 BPR 15,189; ANZ ConvR 522.

¹² *Borda v Burgess* (2003) 11 BPR 21, 203.

¹³ [1996] 40 NSWLR 39.

¹⁴ *Conveyancing (Sale of Land) Regulations* 2000 (NSW) sch 3.

¹⁵ *Franich v Swannell* (1993) 10 WAR 459; [1994] ANZ ConvR 152.

¹⁶ *Anderson v Daniels* (1983-84) ANZ ConvR 265 (house had inadequate foundations, due to the house being built on reactive clay soil – instead of fixing the foundations, the vendor plastered over the cracks and then put the house on the market); *Gronau v Schlamp Investments Ltd* (1974) 52 DLR (3d) 631 (concealment of cracks by use of matching bricks).

¹⁷ *Yandle and Sons v Sutton* [1922] 2 Ch 199; (1922) 127 LT 783; See also *Carlsh v Salt* [1906] 1 Ch 335.

latent defects include a right of way neither known to the vendor or purchaser,¹⁸ a vendor unable to convey free of encumbrances,¹⁹ and where the misdescription, though not resulting from fraud, amounted to an error of such substance that the purchaser would not have entered the contract if he or she had known of the matter.²⁰ By contrast to latent defects, patent defects would be the visual existence of a public right of way,²¹ or a road through a meadow.²²

1 Statutory Intervention

The common law developments have now been supplemented by jurisdictional specific regimes.²³ In this section, an overview of the statutory regimes will be provided.²⁴

¹⁸ *Ashburner v Sewell* [1891] 3 Ch 405.

¹⁹ *Re Stone and Saville's Contract* [1963] 1 All ER 353; [1963] 1 WLR 163.

²⁰ *Torr v Harpur* (1940) 40 SR (NSW) 585 (presence of stormwater drain underneath house forming subject matter of the sale – house not built upon proper foundations and walls likely to crack at sometime in the future). See also *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160. A misrepresentation as to the status of part of what is being sold will also be a latent defect, *Simons v Zartom Investments Pty Ltd* [1975] 2 NSWLR 30 (status of lock-up garage); See Diane Skapinker, 'A different perspective on Defects in Title and Quality' (1994) 2 *Australian Property Law Journal* 27.

²¹ *Ashburner v Sewell* [1891] 3 Ch 405, 408.

²² *Oldfield v Round* (1800) 5 Ves 508; 31 ER 707.

²³ *Conveyancing Act* 1919 (NSW) s 52A; New South Wales *Conveyancing and Sale of Land Regulation* 2005; *Sale of Land Act* (Vic) 1932; *Civil Law (Sale of Residential Property) Act* (ACT) 2003; *Property Agents and Land Transactions Act* (TAS) 2005; Tasmania Standard Form Contract; *Land and Business (Sale and Conveyancing) Act* (SA) 1994, South Australia *Land and Business (Sale and Conveyancing) Regulations* 1995; In Queensland, Western Australia and the Northern Territory, there is no general legislative disclosure regime, reliance is placed on disclosure through the standard form contract; See Clive Rossiter, *Principles of Land Contracts and Options in Australia* (2003) 166-173. It should also be noted that the *Trade Practices Act* 1974 (Cth) (ss 52 and 53A) and equivalent Fair Trading legislation of the States will provide a remedy for misleading and deceptive conduct in the sale of land, or interests in land. Some examples brought under this legislation include *Central Equity Ltd v Central Corp Pty Ltd* (1995) ATPR 41-443 (location of land); *Tenji v Henneberry & Associates Pty Ltd* (2000) 98 FCR 324, 172 ALR 697 (misrepresentation as to value of land); *Greenteam (WA) Pty Ltd v Brulee Pty Ltd* (1995) ATPR 41-435 (accuracy of white-ant certificate); *Australian Competition and Consumer Commission v Gary Peer and Associates Pty Ltd* [2005] FCA 404 (misrepresentation as to selling price of the land).

²⁴ Sections of the summary have been extracted and updated from Tasmanian Law Reform Institute, *Vendor Disclosure*, Final Report No 5 (2005), pt 3: <www.law.utas.edu.au/reform> at 15 February 2007.

2 New South Wales

The disclosure regime in New South Wales is contained in s 52A of the *Conveyancing Act 1919*, and the *Conveyancing Sale of Land Regulation 2005*. Pursuant to s 52A(2), a vendor shall before the contract is signed by the purchaser attach to the contract such documents as may be prescribed, with such terms, conditions and warranties included in the contract as may be prescribed. This is supported by s 66R of the *Conveyancing Act 1919*, which requires that a vendor who has indicated that a property is for sale must make available for inspection the 'required documents'. The required documents include the contract of sale, the documents required by s 52A to be attached to the contract, and, in the case of an option, a copy of the option document.

The documents that must be annexed to the contract of sale before the purchaser signs it include:²⁵

- a certificate disclosing the planning status of the land, issued pursuant to s 149 of the *Environmental Planning and Assessment Act 1979*;
- a copy of the folio of the register comprising the title;
- a copy of any registered plan;
- a sewerage diagram;
- copies of all deeds, dealings and other instruments lodged or registered in the Land Titles Office relating to: easements, profits a prendre, restrictions on the use of the land and positive covenants that affect the land; and
- additional documents that must be disclosed for Crown land and strata lots.

Failure to annex the prescribed documents does not render the contract void. Rather, the purchaser can rescind within 14 days of entry into the contract, unless the contract has been completed.²⁶

²⁵ *Conveyancing Act 1919* (NSW) s 52A(2)(a).

²⁶ *Conveyancing (Sale of Land) Regulation 2005*, cl. 19(1)(a), 20(1)(a).

Secondly, the vendor is deemed to make a prescribed warranty to the effect that:

- except as disclosed in the contract, the land is not subject to an ‘adverse affectation’;²⁷
- the land does not contain a sewer vested in a public sewerage authority;
- the planning certificate annexed to the contract specifies the true planning status of the land;
- there is no matter in relation to any building or structure on the land that would justify the making of any upgrading or demolition order, or if there is such a matter, a building certificate has been issued; and
- there is no amount payable relating to a positive covenant.

If this warranty is breached the purchaser may rescind the contract at any time before completion,²⁸ if the purchaser was unaware of the matter which ought to have been disclosed when the contract was made and the purchaser would not have entered into the contract if they had been aware of the matter.²⁹ The purchaser loses their right to rescission if they elect to affirm the contract.³⁰

As can be seen from this, whilst the disclosure regime is relatively detailed as to what must be disclosed, the reality from practice, and this despite the presence of s 63 of the *Property, Stock and Business Agents Act 2002* (which requires agents to have the prescribed documents available for inspection by prospective purchasers), much of this information will not be accessed until the potential purchaser has made a considerable investment prior to purchase. A practical example of the operation of conveyancing practice in New South Wales can be seen in the High Court decision of *Butcher v Lachlan Elder Realty Pty Ltd*.³¹ In this case, the purchasers were first shown the property on 6 February 1997. Subsequent visits were arranged with the

²⁷ This is defined in sch 3 of the *Conveyancing (Sale of Land) Regulation 2005*, and includes a wide range of matters as diverse as heritage issues, energy aspects, compulsory acquisition and mining rights.

²⁸ *Conveyancing (Sale of Land) Regulation 2005*, cl. 20.

²⁹ *Ibid* cl. 19.

³⁰ *Zucker v Straightlace Pty Ltd* (1987) 11 NSWLR 87.

³¹ (2004) ATPR 42-033; [2004] HCA 60.

purchasers, where they were accompanied by architectural designers and builders. In this time, the potential purchasers also had legal and financial advice. It was not until 17 February 2005 that the purchaser's solicitors received the prescribed documents – the auction the next day.³² The point of this example is simply to illustrate that disclosure does not occur at the time of first interest in the property, but only after a considerable effort has been placed into the search process.

3 Victoria

Vendor disclosure is required in Victoria by s 32 of the *Sale of Land Act 1962*. Under the Victorian legislative regime the vendor must disclose the following in a signed statement, before contract completion by the purchaser:³³

- for any land upon which a residence is erected, any information concerning building permits within the last seven years given with respect to any building on the land;
- the particulars of any mortgage not to be discharged before the purchaser becomes entitled to possession or to rents and profits;
- particulars of any charge imposed under any Act;
- a description of any easement, covenant or similar restriction affecting the land;
- details of any planning instruments and the zoning of the land;
- a warning to the purchaser concerning permitted user; namely, where a planning instrument prohibits the construction of a dwelling on land outside the metropolitan area;
- details of any rates and taxes charged on the land;
- particulars of any notices, order declarations, reports or recommendations of a public authority or government department or an approved proposal

³² Whilst the problems in this case would not have been overcome by earlier discussion, the facts are simply used to highlight how information that would have been disclosed was provided very late in the investigation phase to the ultimate purchasers.

³³ *Sale of Land Act 1962* (Vic) s 32(2).

affecting the land of which the vendor might reasonably be expected to have knowledge;

- basic information about the following services: gas, electricity, water, sewerage and telephone;
- if there is no road access to the property, a statement to this effect;
- particulars of any current land use restriction notice that affects the land due to contamination;
- a copy of the certificate of title or other evidence of title to the land;
- if the vendor is not the registered proprietor or owner, evidence of their right or power to sell; and
- if the land is subject to a subdivision, certain information must be disclosed concerning the subdivision.

Where a vendor supplies false information or fails to supply all the information required, the purchaser may rescind a contract entered into based on that information at any point before completion or becoming entitled to possession of rents and profits.³⁴ However, the purchaser may not rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if the relevant disclosure had been made.³⁵ The burden of proof lies with the vendor.³⁶ As with New South Wales, the practice appears to be that this information will normally only be made available to potential purchasers who have formally expressed an interest in acquiring the property – or those who specifically request the information. It is not routinely made available to all potential buyers. Specialist property practitioners aside, intuitively this is unlikely to happen.

4 Australian Capital Territory

In the ACT the newly introduced *Civil Law (Sale of Residential Property) Act 2003* came into effect on 1 July 2004. This legislation seeks to balance the rights of the

³⁴ Ibid s 32(5).

³⁵ Ibid s 32(7).

³⁶ *Urban No1 Co-Operative Society v Kilavus* [1993] VR 201,205-10.

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seller and buyer. The legislation introduces comprehensive reforms to counter gazumping, a five-day cooling-off period and compulsory vendor disclosure. The vendor disclosure is by way of the vendor making the following documents *available to all prospective purchasers throughout the time that an offer can be made*:³⁷

- a copy of the Crown Lease;
- a copy of the current edition of the certificate of title;
- a copy of any encumbrance that is shown on the certificate of title (for example, a restrictive covenant or an easement);
- a statement about any encumbrance that does not appear on the title;
- a copy of the lease conveyancing inquiry documents for the property;
- for a unit, a copy of the units plan, and the current edition of the certificate of title for the common property;
- the building conveyancing inquiry documents;
- the energy efficiency rating statement;
- a building inspection report from an inspection carried out not earlier than 3 months before the day the property was first advertised for sale or listed by an agent; and
- a pest inspection report.

It is an offence if a seller does not make the required documents available for inspection by a prospective buyer.³⁸

The following conditions must also be included in all contracts for the sale of residential property:³⁹

- the property is sold free of encumbrances;
- the buyer is entitled to vacant possession;

³⁷ *Civil Law (Sale of Residential Property) Act (ACT) 2003 s 9.*

³⁸ *Ibid* s 10.

³⁹ *Ibid* s 11.

- that there are no unapproved structures, except as disclosed in the contract;
- that the buyer may not make any requisitions on the title to the property;
- that there are no unsatisfied judgements, orders or writs affecting the property; and
- that the required documents form part of the contract.

On completion of a contract for the sale of residential property, the seller is entitled to reimbursement from the buyer for the cost of obtaining a building inspection report and a pest inspection report.⁴⁰ If the buyer becomes aware of an error in the description of the property before completion of the contract the buyer may:⁴¹

- (i) if the error is material, rescind the contract, or complete the contract and claim damages; and
- (ii) if the error is not material – complete the contract and claim damages.

5 Tasmania

The disclosure regime in Tasmania has been radically altered by the introduction of the *Property Agents and Land Transactions Act 2005*. Division 2 of Part 10 of this legislation provides that when offering land for sale, a vendor or any agent must ensure that the relevant disclosure documents are available to a purchaser. If this is not complied with, a penalty not exceeding 50 penalty units may be imposed.⁴² To support this, s 187 requires that any advertisement by an agent must contain a statement advising a purchaser of the means by which documents can be obtained.⁴³ Prior to settlement, the purchaser can void the contract if the documents are not disclosed.⁴⁴ Post settlement, the purchaser can recover pursuant to the contract for any loss occasioned by inaccurate or non-disclosure.⁴⁵ A purchaser is not entitled to

⁴⁰ Ibid s 18.

⁴¹ Ibid s 11(h).

⁴² *Property Agents and Land Transactions Act* (Tas) 2005 s 186.

⁴³ The penalty is an amount not exceeding 500 penalty units.

⁴⁴ Above n 42, s 189.

⁴⁵ This is achieved by the legislation stating that the contract of sale is subject to a term that the information within the disclosure documents is correct; Ibid s 197.

rescind if the vendor has acted honestly and ought fairly to be excused for the contravention and the purchaser is substantially in as good a position as if all the relevant provisions of the Division had been complied with.⁴⁶ The disclosure documents that must be available to prospective purchasers include:

- the contract (with this containing a warning notice whereby both vendor and purchaser have acknowledged their rights and obligations under the legislation);
- a copy of the folio of title;
- a copy of the sub-divisional plan;
- strata details; and,
- a vendor statement.

The vendor statement will be detailed in the regulations⁴⁷ and is divided into sections dealing with:

- Use and Enjoyment (this covering disclosure of council, government, or quasi-government notices, unregistered interests, unsatisfied judgements, title, boundary, flooding, zoning and, interestingly, disclosure of any violent crimes);
- Structural: (this covering plumbing, electrical and standard structural issues)
- Environmental: (this mandating disclosure of asbestos, contaminations and the keeping of hazardous material); and
- Other Outstanding and Hidden Costs.

In addition to the previous, it is an offence to provide false, inaccurate or misleading information;⁴⁸ with the agent obliged to disclose any information the agent knows or

⁴⁶ Ibid s 197.

⁴⁷ At the time of writing this has not been finalised.

⁴⁸ Ibid s 195.

ought reasonably to know is likely to affect the purchaser's decision to buy.⁴⁹ This is tempered somewhat by s 207 which states:

Nothing in this Part relieves a purchaser of the duty to exercise reasonable care to protect himself or herself, having regard to any facts which are known to him or her or reasonably within his or her knowledge.

The Tasmanian and ACT models represents best practice in terms of theory – the information is made available to all prospective purchasers and, if the practice follows the legislative regime, then all potential purchasers will access this body of knowledge at an initial point in their investigations. As will be seen in the next two sections, this represents the ideal in terms of economic efficiency (eg that is prior to any significant allocation of resources in the search process, as well as avoiding duplication by multiple purchasers in obtaining this information) and models itself on what psychologists would see as the critical point for any potential purchaser – the initial time when an emotional connection is made to the property.

6 South Australia

The *Land and Business (Sale and Conveyancing) Act 1994* (SA) provides that at least 10 days before settlement the vendor must serve on the purchaser a statement in the form prescribed by regulation⁵⁰ setting out:⁵¹

- the rights of the purchaser under s 5 (in relation to cooling off periods);
- details of all mortgages, charges and prescribed encumbrances affecting the land;
- if the vendor has obtained title within the last 12 months, all transactions involving transfer of title in that period; and
- any prescribed matters.

⁴⁹ Ibid s 196.

⁵⁰ *Land and Business (Sale and Conveyancing) Regulations 1995*, sch. 1.

⁵¹ *Land and Business (Sale and Conveyancing) Act 1994*, s 7.

For the purposes of vendor disclosure, this last point is the most critical. The forms prescribed by the regulations are of a very detailed nature, essentially requiring the vendor to disclose any matter affecting, presently or prospectively, title to, or possession or enjoyment of the land. Where a vendor makes a defective statement in relation to one of these matters that prejudices the purchaser, the purchaser may apply to the court for an order declaring the contract void and/or awarding damages or making any other order that is just in the circumstances.⁵² Furthermore, failing to comply with these disclosure requirements constitutes an offence punishable by a fine of up to A\$2,500.⁵³ It is a defence in criminal or civil proceedings if:⁵⁴

- the alleged contravention was unintentional and did not result from negligence;
- the alleged contravention was due to reliance on information received from a person or body whom the vendor was required to obtain the information from under the regulations; or
- the purchaser waived compliance with the matter in question after obtaining legal advice on the issue.

The Act also specifically provides that it does not affect the existence of any other civil remedies.⁵⁵

As can be seen from this précis of the South Australian provisions, disclosure is only made in the period leading to settlement. As will be outlined in the next section, the submission will be that information obtained by the purchaser at this stage is likely to be discounted far greater than what it would be the case if the information were made known at an earlier stage. In effect, the qualitative impact of that information is lessened by its late notification.

⁵² Ibid s 15.

⁵³ Ibid s 14.

⁵⁴ Ibid s 16.

⁵⁵ Ibid s 35.

7 Western Australia/Queensland and the Northern Territory

In these jurisdictions,⁵⁶ the limited disclosure that does exist will occur through the standard form contract. For the purposes of this thesis, this will mean that the timing of what disclosure is required will be extremely late in the process of purchase, and any such disclosure is likely to be significantly discounted. From both an economics/law perspective and psychology the information obtained entails an inefficient use of resources and involve a likely rejection of the importance of that information by the buyer.

II WHY EARLY DISCLOSURE IS CRITICAL

The disclosure regimes have, in those jurisdictions that have introduced mandatory requirements largely focused on the content of disclosure. Little has been made of the timing of disclosure – yet, the overwhelming evidence from the discipline of cognitive psychology is that ‘individuals discount latecoming information and tend to persist in transactions once they have made overt commitments’.⁵⁷ Similarly law and economics would instruct us that if the multiple buyers are all undertaking the same searches of government information, requiring building inspections by their agents, and obtaining pest inspection reports that resources within society are being misallocated through unnecessary duplication. Non-disclosure can therefore inappropriately redistribute the income of vendors and purchasers and is inherently inefficient.⁵⁸ A number of reasons can be put forward to support this.⁵⁹

First, there is significant evidence that the greater the time and expenditure that an individual puts into the search, the higher the discount placed on latecoming information. In the purchase of a house, it is likely that it is the emotional connection made to the initial site and the costs involved with the search process (as noted, this can

⁵⁶ For a summary, see Rossiter, above n 233, 170-3.

⁵⁷ Stern, above n 2, 58.

⁵⁸ Stern, above n 2, 68: ‘Thus nondisclosure that affects prospective buyers’ decisions to purchase – or the price offered – has significant consequences, both in terms of redistribution and efficiency. These concerns are particularly salient in residential real estate sales because of the amount invested in housing purchases relative to a consumer’s other investments.’

⁵⁹ See generally, Stern, above n 2.

involve the engaging of a building inspector, pest reports, council searches, time etc) all lead an individual to persist even though late information, if it had arrived earlier, would have meant that the house did not suit that purchaser's needs.

Allied to this lies in the psychological work on behavioural compliance. A buyer hearing of a problem with a house at the start of the search process will be more 'rationally responsive'⁶⁰ than one who has viewed the house multiple times, and has researched the desirable features of that suburb for their family – this may include consideration of schools, location of public transport, proximity to work. The bias of buyers will be to continue with the transaction rather than to forego her or his investment.⁶¹ In effect, potential purchasers will overweight their initial considerations and underweight later factors. Because of this reason, it is fundamental that a greater range of information be made available at the initial time. By doing this, the initial known variables, such as price and location will not overpower later obtained information – for example, that the area is in a floodplain, on a designated landslip zone, or that the house is built on reactive clay soil. Any concern that vendors will remain deliberately ignorant of problems with their house to avoid later vendor disclosure is likely to be overstated. Homeowners have a practical and economic reason to maintain maintenance and to correct problems associated with their homes. Accordingly, any diminution in the incentive to invest in the house is likely to be marginal.⁶²

A second reason as to why early disclosure is critical lies in the monetary value placed on the land. From an economics perspective, early disclosure is far more likely to see the effect of disclosure already capitalised into the economic value, thus ensuring the correct allocation of resources. In this sense, the efficiency gains to be had from

⁶⁰ Stern, above n 2, 85.

⁶¹ As noted by Stern, above n 2, 85: 'Because this is a bias, not an absolute effect, it does not imply that buyers will automatically persevere in the face of catastrophic defects. Rather, the bias suggests that, taking into account all of the available information, buyers will persevere more often than expected. This psychological dynamic is more likely to tip buyers towards perseverance in the face of moderate or mild defects rather than massive ones. However, even with large defects, there is an enhanced likelihood for perseverance, as illustrated by the empirical research where subjects persisted in decisions despite dramatic changes in costs and benefits.'

⁶² Melvin Eisenberg, 'Disclosure in Contract Law' (2003) 91 *California Law Review*. 1645, 1677.

assigning responsibility to vendors will be significant given how imperfect the consumer knowledge will be due to the complexity of modern home ownership. It also appears that the markets are unwilling or unable to introduce early disclosure.

This possibly due to a number of factors, including:

- Defects in the property are not widely perceived or understood, so there is little consumer impetus for change;
- Purchasers do not realise they are under-informed;
- There may well be a significant time gap between defect and any damage caused.

It is because of this that legislative intervention for early disclosure combined with practical recognition of this would work to improve market outcomes. Furthermore, it would not be difficult to see how the cost of intervention would be less than the benefits obtained. Support for this can be found in a study by Yeo⁶³ of the effects of floodplain disclosure on land values. His finding was that there were significant advantages in floodplain disclosure and that by gaining public acceptance for disclosing as well as closely considering the timing of disclosure, adverse impacts will be minimised.⁶⁴

A third reason as to why information need be disclosed earlier is that without disclosure, potential purchasers will focus on the limited range of information that is available. This will undoubtedly include the location and the price. By focusing on the price, the other factors that could potentially impact on the decision are decreased in significance should later information reveal a concern – examples include that the house is likely to have part of the land resumed, that the foundations are crumbling,

⁶³ Yeo, above n 3.

⁶⁴ Yeo, above n 3, 42. 'The advantages of disclosed floodplain maps for flood risk reduction are, nevertheless undeniable. Gaining a measure of public acceptance for disclosure is the key. This requires best-practice risk assessment – unreliable maps will do nothing for public confidence. Just as important is a well thought-out plan for risk communication. This review suggests that the *timing* of disclosure is significant. The potential for adverse impacts is minimised if flood awareness is already high.'

that rising damp is evident or that the house is infected with termites. The early disclosure of this information allows a more complex set of variables to be part of the mind of the decision-maker, and accordingly downplays the significance of any one aspect. As Stern summarises (a comment worth repeating in detail):⁶⁵

Receiving information in the middle or final stages of a transaction, rather than at the outset, has two primary effects. First, consumers are less likely to negotiate for appropriate discounts in pricing when they receive latecoming information about defects. This has a distorting effect on real estate markets and suggests that consumers will overpay in [those jurisdictions] that allow disclosure to occur midstream or even end-game in a transaction. Second, late disclosure encourages persistence in transactions so that a subset of consumers will complete real estate purchases that they would not otherwise have completed. The cognitive persistence effect is not an absolute or exclusive factor in decision making, but it is an important one. Consumers will consider costs and benefits, market conditions, and personal goals, but will underweight latecoming information in this calculus. These biases are likely heightened by the highly personal nature of home buying and the emotional context of these decisions.

In addition to these factors, by more closely matching the needs of purchasers with the resources and wants they have, early disclosure will provide greater allocative efficiency (by moving assets to people who want them with the least amount of transaction cost), as well as responding to the notion that people are risk averse. To this effect, work in the field of behavioral economics and psychology has shown that a loss will be felt more strongly by an individual than a gain not obtained.⁶⁶ In the context of residential real estate, what this means is that nondisclosure by a seller will result in a loss to a buyer, yet the same action by a buyer will see a gain not obtained by a seller – non disclosure by the buyer sees the seller missing out on a gain, whereas nondisclosure by the seller sees the buyer incurring a loss. ‘Because a loss is felt more

⁶⁵ Stern, above n 2, 81.

⁶⁶ See generally, Daniel Kahneman, Jack Knetsch and Richard Thaler, ‘Experimental Tests of the Endowment Effect and the Coase Theorem’ (1990) 98 *Journal of Political Economy* 1325.

sharply than a forgone gain, there is extra reason to be solicitous about protecting buyers against nondisclosure [by] sellers.’⁶⁷

III DISCLOSURE TO PROSPECTIVE PURCHASERS

A Disclosure prior to contract signing - ACT and Tasmania

The option presented in these two jurisdictions represents the best model in terms of timing. By having disclosure available to potential purchasers, and with the practice likely to be that this information will be routinely sought at the outset of the search process, the potential purchaser will have a range of information on which they can make their original impressions and consider whether to continue the investigative process. The suite of information that will be supplied to potential purchasers in these jurisdictions will allow the house-hunter to determine whether they wish to invest more time and resources into the search process (thus ensuring less waste in the investment effect flowing from the initial decision); similarly, repeated costs that may be incurred by multiple potential buyers (such as building inspections, termite inspections etc) should be reduced and the process of initial matching will be more refined (by ensuring that no one factor, such as price becomes the dominant and overriding consideration). Furthermore, from a resource allocation perspective, to require many purchasers to undertake similar costs must necessarily involve a misallocation of resources, when information is, arguably available to the vendor.

The disadvantages of early disclosure, (such as the purchaser overreacting to information that the estate is in landslip zone, or that a mining interest is registered, or that the land is in a floodplain), is no doubt real, but probably need not be over emphasised. Once it becomes common practice that this information is part of the mindset of disclosure its effect is likely to be factored into the market price. As Yeo points out:⁶⁸

Nonetheless, acceptance of disclosure is contingent upon responsible reporting. The impression from [an analysis of disclosure of Sydney floodplain information] is that

⁶⁷ Melvin Eisenberg, ‘Disclosure in Contract Law’ (2003) 91 *California Law Review* 1645, 1676.

⁶⁸ Yeo, above n 3, 42.

adverse impacts were felt, less as a result of the floodplain maps, and more due to a fearful frenzy that was induced in part by irresponsible electioneering. Perceptions do exert an influence on property values. Those who influence perceptions ought to be co-opted as partners in risk communication.

B Disclosure Around, or at Time of Contract Signing - NSW, Vic

This is less advantageous than what exists in the ACT and Tasmania, but does go some way to addressing the concerns of late disclosure. Whilst disclosure by annexure, or at the time of formally preparing the contracts, will mean that some unrecoverable and possible repeated sunk costs are incurred in the search process by multiple potential buyers⁶⁹ and the investment effect of discontinuing a course of committed action may be less likely to occur, there is no doubt that this timing of disclosure is still preferable to later or no disclosure. The role that disclosure plays in the mindset of a purchaser in New South Wales and Victoria will largely depend on the purchaser's own willingness to accept risk and the degree of activity in the market – one would suspect that the 'hotter' the residential property market, the more likely that adverse disclosure at around the time of contract formation will be downplayed, the buyer in a 'cooler' market more judiciously receptive to knowledge of a defect.

***C Disclosure through the Standard Form Contract – Northern Territory,
Queensland and Western Australia***

Given what has been said, not only is this option poor in terms of what is likely to be disclosed, but in terms of timing; the late information disclosed is likely to be discounted, the foregone investment if the purchaser steps away from the transaction significant, the misallocation of resources high and the reliance on a smaller number of variables (such as price and location) in the decision making process more possible. This model will lead to less than optimum decision making.

⁶⁹ See, eg, *Butcher v Lachlan Elder Realty Pty Ltd* (2004) ATPR 42-033; [2004] HCA 60.

D Disclosure after signing of Contract and before Settlement- South Australia

Disclosure at this time, despite the depth of disclosure, presents major problems. The buyer will have invested significant time and resources prior to placing an offer⁷⁰ and will have made that public commitment to purchase. Accordingly, the 'fact that buyers [may] have the legal right to withdraw late in a transaction process [and in many cases this will not be possible] does not mean they have the psychological flexibility to withdraw'.⁷¹

IV CONCLUSION

In many jurisdictions in Australia, vendor disclosure has come a long way from its traditional common law position. In these territories where substantive change has been made, ACT, Tasmania, New South Wales, Victoria and South Australia – a far greater range of information relevant to the decision making process will now be given to purchasers. However, whilst this development is a significant improvement from the historical genesis, a focus purely on content, and not on time is less than optimal. Early disclosure brings innumerable benefits to conveyancing practice. Decision making by potential purchasers will be more propitious, and the search process far more refined. Potential purchasers will enjoy a suite of information from which they can then undertake further investigate work if they so desire. The types of searches that are currently undertaken by all potential purchasers will also be minimised. Given this, the legislative regimes adopted in the ACT and Tasmania represents best practice in terms of depth of disclosure and time of disclosure. The caveat being of course the conveyancing practice will need to match legislative intent. Whilst there is no doubt that imposing these obligations on vendors will entail some costs, most vendors will then subsequently become buyers, and thus from a

⁷⁰ As an example of the problems that can occur without detailed disclosure, see *Mitchell v Valherie* [2005] SASC 350. A newspaper advertisement concerning the property described it as 'cosy-immaculate.' A brochure by the agent stated 'Nothing to Spend – Perfect Presentation'. Inspections subsequent to purchase revealed that the house was built on reactive clay soil and the house had significant structural damage. As to whether this would have disclosed in a regime of vendor disclosure at time of placing the house on the market, would depend significantly on the content of what was required to be disclosed.

⁷¹ Stern, above n 2, 86.

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microeconomic perspective, there should be a less wasteful allocation of resources within the industry. In addition, for a psychological perspective, better decisions will be made by purchasers if all, or most of the information relevant to their decision is available at an earlier stage. New South Wales, South Australia and Victoria could easily be improved by having the theory of disclosure aligned with an earlier practice, so that potential purchasers routinely view the information as part of the initial search enquiries, whereas for the remaining jurisdictions in Australia, the principle is still very much of caveat emptor.