

21 March 2014

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Hon Jarrod Bleijie MP  
Attorney-General and Minister for Justice  
GPO Box 149  
Brisbane, Qld 4001

Dear Minister,

**Property Law Review – Issue Paper 1 Seller Disclosure in Queensland**

Thank you for the opportunity to provide comment on the *Queensland Government Property Law Review Issues Paper 1 – Seller Disclosure in Queensland*.

The Property Council supports a move to a legislative seller disclosure framework for Queensland as outlined in Section 5 of the *Issues Paper*.

However, the Property Council recommends a greater focus on buyer due diligence, to ensure both parties are accountable for their responsibilities in the transaction.

The legislative framework must reduce the disclosure requirements placed on a seller, and should reinforce Queensland's caveat emptor purchasing environment.

In addition the framework must provide:

- Unification of the disclosure obligations, remedies and timeframes that currently sit across common law, statutory obligations, contractual obligations and other warranties.
- A reduction in complexity that easily identifies a seller's obligations and reduces opportunities for errors and omissions.
- A process to amend requirements included in all avenues of disclosure concurrently, achieving clarity and consistency.
- A formalisation of the REIQ's standard contract to alleviate issues around currency and the legitimacy of non-standard contracts.

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### The need for guiding principles

The first step in the development of a legislative framework for seller disclosure must be the establishment of guiding principles. This will ensure the framework addresses the appropriate disclosure obligations, timeframes and remedies for Queensland.

The benchmark guiding principles outlined within the *Issues Paper* direct significant protection to the buyer, without adequately considering the resulting impost on the seller.

Therefore, the Property Council would suggest the following amended guiding principles.

- **Information to be provided by the seller to the buyer pre-contract should be within reasonable knowledge for the seller.**
- **Additional information sought by the buyer for their due diligence should be readily available by search at reasonable cost to the buyer.**
- Information should be of value to a buyer in making a decision to purchase. This includes primarily information impacting on title to the property.
- The information should be in an accessible form, easily constructed by the seller and capable of being relied upon by the buyer.
- A single legal framework should be established providing consistency in the form and timing of disclosure and remedies available for a failure to comply.

### Appropriateness of seller disclosure form

As outlined in the guiding principles above, the seller should be tasked with providing information relevant to the title and defects within the title only, with additional information gathered by the buyer, as per their due diligence.

It is evident from the *Issues Paper* that the disadvantages of all forms of disclosure include an inherent level of risk and uncertainty for the buyer, which leads to the buyer often undertaking their own inquiries and searches for this information.

Searches are often unnecessarily duplicated by both parties at different stages of the conveyancing process.

We support a disclosure framework that encourages the buyer to undertake property searches for information outside of that which is reasonable knowledge for the seller, at their own cost. Therefore the Property Council does not support any of the options outlined under Question 14.

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However, failing this approach, we would support Option 2 – Certificates from agencies - with some caveats.

In New South Wales, disclosure is partly through the provision a Section 149 Certificates, which are considered a reasonable model to replicate in Queensland.

In Queensland, an agency certificate must;

- Clearly outline the date from which the certificate is current, and the duration for which it is considered up-to-date.
- Be reliable against the authority, with no ongoing responsibility placed on the seller.
- Be provided in a reasonable timeframe.
- Be provided at a reasonable cost to the seller.

#### Accessing information

Parties seeking to access information needed for disclosure must make inquiries to a range of government departments, tribunals and other stakeholders and the response timeframes vary significantly between these bodies.

To ensure a reasonable opportunity for both parties to reach their required deadlines, the Property Council supports the development of an online 'one-stop-shop' that provides access to relevant government departmental and local council information.

The formation of a 'one-stop-shop' would provide an avenue for unsophisticated buyers to better understand the additional information that is of value to them, and easily access it line with their own timeframes and at reasonable cost.

The Property Council also notes the support for a 'one-stop-shop' in the Queensland Competition Authority Report *Measuring and Reducing the Burden of Regulation* as an opportunity to reduce duplication.

#### Appropriateness of seller disclosure information

The Property Council would support the need for disclosure of information relating to both defects in title and defect in the quality of title by the seller.

Outside of this information the Property Council does not support any further obligations for disclosure. This includes the obligations under local law, as typified in the GCCC local law.

We would support Question 21, Option 1 – the need to provide information only about matters affecting the title to the property.

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The Property Council believes that the alternate options place unreasonable onus of the seller to seek out third party information on the property, including land use implications of local government planning schemes. This information is outside a seller's reasonable knowledge and should form part of the buyer's due diligence.

#### **Timing for disclosure obligations**

There is currently no consistency between the timing of disclosure obligations either under a standard contract or within a seller's statutory requirements.

The Property Council supports a harmonized timing structure as outlined in Question 18, Option 2 – Disclosure after a contract has been signed, but before settlement. As is the case in South Australia.

The Property Council does not support any legislative process that requires disclosure obligations by a seller on a non-contracted property.

Additionally, the seller's obligation to provide an s.213 notice should be addressed as part of this review. Timeframes for this obligation should be extended to a period of time that is reasonable for the seller. The Property Council would support extending this timeframe to 30 days.

#### **Remedies**

The Property Council believes that current remedies are not proportionate to the level of contract default they stipulate.

Ensuring contract default is only applied in appropriate situations is critical to avoiding contract termination or buyer compensation over trivial issues.

Therefore the Property Council supports proportionate remedies based on the severity of the seller's breach of disclosure obligation.

These provisions can be extended to include a 'make good' period during which a contract is not terminated if a seller can provide missing or incomplete information to a buyer.

The Property Council does not support the introduction of the ability for a buyer to rescind a contract of sale as exists under the legislative frameworks in New South Wales, Victoria, and the Australian Capital Territory. Equally, the Property Council does not support the ability of a buyer to avoid a strata title contract, as exists in Western Australia.

Additionally there is currently no uniformity to the terminology used when outlining remedies for failing to meet contract or statute obligations.



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This terminology must be reviewed to establish a single set of terms for use within the legislative framework.

### **The ability to contract out of the disclosure regime**

The Property Council supports the opportunity for parties to contract out of their disclosure obligations, as is the case in Tasmania.

The Tasmanian process includes caveats to protect the buyer and would not create undue risk to either party.

### **Exemptions from the disclosure regime**

Currently the Queensland disclosure regime does not accommodate the inclusion of exemptions for certain transactions or categories of property.

The Property Council supports the complete removal of the small business and commercial categories from the disclosure framework.

These sales are often carried out by sophisticated parties, and overseen by legal representatives who have ample experience with large scale transactions.

Additionally, in cases where two sophisticated parties are participating in residential or rural sale, the seller should be exempt from the disclosure regime.

Under the legislative framework the Property Council also supports the inclusion of the three exclusion categories utilised in the Australian Capital Territory; mortgagee sales, sale by Court order and sale by registered or official trustee under the Bankruptcy Act 1966.

### **Ongoing obligation**

The Property Council does not support any extension to the current 'ongoing' statutory disclosure obligations in Queensland.

A 'fresh statement' approach, similar to that undertaken in South Australia would require a seller to onerously monitor the circumstances outlined within the statement until contract settlement.

### **Associated costs**

The most significant driver of transaction costs relating to seller disclosure are the duplication of searches undertaken by a buyer to verify a seller's information.

By providing a 'one-stop-shop' for buyers to easily access this information and removing the requirement for sellers to provide information outside their own reasonable knowledge, much of this cost burden will be avoided.

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Additionally, the current staged introduction of electronic conveyancing will provide the opportunity for lower costs and improved process efficiency.

Currently there is no intent to introduce the electronic delivery of disclosure statements. During the ongoing rollout of electronic conveyancing the Property Council would support the option to provide disclosure documents electronically. This would drastically reduce costs for the seller and reduce timeframes for all parties involved in the sale.

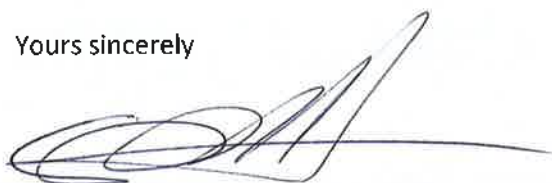
### Conclusion

A legislative seller disclosure framework will improve the sale and conveyancing process in Queensland. The model alleviates many of the issues with the current regime raised in the *Queensland Government Property Law Review Issues Paper 1 – Seller Disclosure in Queensland*.

However, the Property Council strongly supports appropriate disclosure obligations that recognise the significant obligation currently placed on the seller.

The Property Council would like to thank you again for the opportunity to provide comment on this issues paper. If you have any questions regarding the Property Council or this submission, please do not hesitate to contact me on 07 3225 3000, or [cmountford@propertyoz.com.au](mailto:cmountford@propertyoz.com.au).

Yours sincerely



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