Serviced Strata Schemes: Real Property or A Financial Product?

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Abstract:

Over the last two decades, serviced strata schemes have become a popular investment vehicle for many people aspiring to enter the real estate market. On one level, serviced strata schemes are based on an acquisition of a strata title unit, regulated according to state conveyancing laws. Yet, serviced strata schemes are also a way of pooling resources and are additionally regulated as managed investment schemes under the Corporations Act 2001 (Cth). These dual layers of regulation are primarily, although not exclusively, based on disclosure mechanisms. The purpose of this paper is to examine those mechanisms to determine the compatibility of state/territory laws to commonwealth objectives and also to determine the extent to which the present regime meets the needs of investors. It is concluded that lack of uniformity amongst state and territory laws is at odds with the unified approach fostered by the Corporations Act 2001 (Cth). This discrepancy potentially undermines the protection of investors. We therefore argue that the way forward should encompass Australia-wide standards applying to vendor disclosure in conveyancing transactions.

1 Introduction

Over the last twenty years or so, the acquisition of units in serviced strata schemes has become a popular way for investors to enter the real estate market. Indeed, the popularity of these shcemes has helped fuel a substantial increase in the number of serviced strata units available to investors. One recent study has revealed that '*the numbers of serviced apartments has increased dramatically from 32,000 in 2001 to 41,000 in 2004. This represents a 28% increase in three years…*'(Guilding, Ardill, Warnken, Cassidy, & Everton-Moore, 2006).

The types of properties that are classified as serviced strata schemes vary enormously. They range from schemes involving a hotel, or resort, to apartment blocks located in popular holiday destinations. A strata unit is likely to be considered part of a serviced strata scheme when the investor or owner of the unit has a right (by agreement or understanding with the promoter) to a return which depends, in whole or in part, on the use of other investors' strata units (as opposed to common property). The arrangement or understanding could depend on the pooling of income or the fair allocation of tenants. In some cases, the investor could expect to receive a fixed or indexed return provided that the investor agrees to permit his or her unit being used as part of a serviced strata arrangement.

The regulatory regime applying to the acquisition of serviced strata schemes involves two levels or layers of regulation. The first operates within state and territory jurisdictions as part of vendor disclosure in conveyancing transactions, with respect to real property. The second layer of regulation operates at the Commonwealth level and is based on disclosure, with respect to the acquisition of an interest in a serviced strata scheme as a financial product. In the latter case, disclosure also extends to the provision of financial services advice.

At the Commonwealth level, investor disclosure builds on vendor disclosure established by the states and territories. Yet, the nature and extent of disclosure in these latter jurisdictions is not uniform. The purpose of this paper is to study this dual regulatory model, to determine the compatibility of state/territory laws to commonwealth objectives and also to determine the extent to which the present disclosure regime meets the needs of investors.

The paper commences by outlining what is meant by a serviced strata scheme and then continues by setting out the different approaches to disclosure amongst the states, territories and the Commonwealth. It is argued that lack of uniformity within state and territory laws is at odds with the unified approach fostered by Commonwealth regulation. The paper concludes with the proposal that in order to assist investors to make better informed decisions, consideration should be given to the adoption of uniform vendor disclosure provisions applying to conveyancing transactions throughout Australia that act in synergy with disclosure under Commonwealth regulation.

2 What is a Serviced Strata Scheme

Generally speaking, serviced strata schemes (SSS) are a type of managed investment scheme (MIS). As such, they are a composite of two types of investments: the first comprising the acquisition of an interest in property, which in the case of a SSS, is an interest in real property – a strata title unit; the second, comprising the pooling of that property into a fund. The aim of pooling property is to acquire rights produced by the fund (that is, any gain resulting from increased performance of the underlying fund) in circumstances where members do not have day-to-day control over the operations of the scheme (Donnan, 2002). The person who has day-to-day control of the scheme is known as the operator of the scheme.

2.1 Property Law Approach

First and foremost, ownership of an interest in a serviced strata scheme comprises ownership of a strata title unit. Strata title, itself, stems from ownership of air space. In the landmark decision of *Bernstein v Skyviews & General Ltd [1978] QB 479* the court held that a person who owns land, also owns as much air space above the surface of land that is necessary for his or her reasonable use and enjoyment of the land. The issue of what amounts to a reasonable use and enjoyment of the land is determined by reference to criteria that include the zoning of the land and the type of building that can be constructed on the land. At the very least, a landowner owns all the air space above the surface of the land as far upwards as the tallest building it might be possible to build on the land.

Yet, even before the decision in *Bernstein v Skyviews & General Ltd*, a number of states in Australia had introduced strata title legislation that permitted subdivision of a building into units or lots. (Conveyancing (Strata) Act 1961(NSW), *Strata Titles Act 1966* (WA), Strata Schemes (Freehold Development) Act 1973 (NSW). Although initially applying to residential properties, the use of strata title soon spread to other uses, such as, commercial and retail. Legislation now exists in every state in Australia permitting the creation of strata schemes for a variety of uses. As already noted, one of the most popular applications for strata title is the creation of serviced strata units. A serviced strata unit or serviced apartment, as it is sometimes known, is a furnished unit or apartment designed for short-term stays. Serviced strata units often form the basis of resorts, hotels and holiday apartment blocks. In these latter cases, the acquisition of the unit also represents an opportunity for investors to pool their units and maximise returns. This pooling also leads to the possibility that serviced strata schemes are managed investment schemes.

2.2 Serviced Strata Schemes and Managed Investment Schemes

The Corporations Act 2001 (Cth) provides for a unified system of regulation and disclosure, with respect to corporations throughout Australia. In addition, the Act also regulates serviced strata schemes administered as part of the law relating to managed investment schemes.

Section 601ED of that Act specifies that managed investment schemes need to be registered and administered in accordance with the Corporations Act, if the schemes have more than twenty members, or if they are schemes promoted by people who are in the business of promoting managed investment schemes. ASIC, the Australian Securities and Investment Commission, is responsible for administering the Corporations Act, including determining the types of schemes considered to be MIS.

In a practical sense, a strata scheme is likely to be classified as a managed investment scheme where it is a *serviced* strata scheme and part of a hotel, motel, resort or serviced apartment complex. Primarily, ASIC considers that a serviced strata scheme should be classified as a managed investment scheme, where an investor's right to a return depends (totally or partially) on the use of other investors' strata units for that return. (ASIC, 2000). In reaching this classification, ASIC has placed importance on four criteria: interdependency between owners; dependency on the serviced strata arrangement; deferred pool or common enterprise; and, pre-packaged sale of interests (ASIC, 2000).

Interdependency between Owners

Interdependency between owners refers to the situation when an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return, which depends, in whole or in part, on the use of other investors' strata units (as opposed to common property). For example, the investor's return might depend on an arrangement for pooling income, or for fairly allocating tenants.

Dependency on the Serviced Strata Arrangement

Dependency on the serviced strata arrangement refers to those situations where an investor in a strata unit has a right (including by agreement or an understanding with the promoter) to a return, which depends, in whole or in part, on an investor's strata unit being used as part of a serviced strata arrangement. For example, the investor may depend on the serviced strata arrangement to receive a return that might be proportionate, fixed or indexed. Where the return is proportionate, the investor receives a percentage share of the profits from the whole complex, proportional to his or her ownership. ASIC regards this type of arrangement as a common enterprise, because the return to each investor is likely to depend on the success or failure of the serviced strata arrangement a whole. For similar reasons, a fixed or indexed return, where an investor receives a nominated amount, is also regarded by ASIC as a common enterprise.

Deferred pool or common enterprise

In a deferred pool or common enterprise arrangement, the serviced strata scheme may not commence immediately. The promoter and investor, for example, may agree or come to an understanding that a common enterprise or pool will operate at some time after the strata unit is first made available to the operator. ASIC would generally consider that this type of arrangement functions as a serviced strata scheme; and, moreover, one that exists from the time when the investors first conclude an agreement or understanding that they have a prospective interest in the serviced strata scheme. This approach is consistent with the definition of "interest" in s9 Corporations Act that extends to "…a right to benefits produced by the scheme…", which has no regard to whether the right is actual, prospective or contingent.

Pre-packaged Sale of interests

A pre-packaged sale of interest arrangement provides that a serviced strata scheme may exist even where the interests in the scheme are sold as part of a pre-packaged resale of interests. Such would be the case where an interest initially issued to a promoter is resold. This means that the concept of a serviced strata scheme as an MIS remains constant, whether the strata units are being issued, sold or resold.

The approach taken by ASIC is to interpret the Corporations Act as applying to a broad range of serviced strata schemes. ASIC's objectives, as set out in ASIC Policy Statement 140, are to regulate schemes involving strata units in accordance with the managed investment provisions of the Corporations Act, where those arrangement have the characteristics of a managed investment scheme (ASIC, 2000). This brings us to the next part of the discussion, an examination of how the law aims to protect those who acquire an interest in serviced strata schemes.

3 A Dual Level Regulatory Model

In the context of investor protection, the hybrid nature of serviced strata schemes has resulted in dual levels of regulation, one as real property and the other as a financial product. This part of the paper examines how the dual level regulatory model operates with respect to the furnishing of disclosure – a key feature in the protection of purchasers and investors.

3.1 Serviced Strata Schemes as Real Property

The first layer of regulation stems from state and territory laws requiring vendor disclosure as part of conveyancing transactions. Different states have different conveyancing practices and requirements.

NSW

In New South Wales, vendors are under comparatively strong disclosure obligations. They must annex prescribed documents to the contract for sale of land, which include copies of strata plans, the folio identifier for the common property, and copies of by-laws. ("Conveyancing Act ", 1919). The contract for sale is also subject to an implied statutory warranty in favour of the purchaser ("Conveyancing (Sale of Land) Regulation ", 2005). If a prescribed document is not annexed to the contract, the purchaser has 14 days from the date of the contract to rescind; and if the warranty is breached, the purchaser may rescind at any time before settlement.

Victoria

Unlike the procedure in NSW, Victorian vendors do not need to attach prescribed documents to the contract for sale. Instead, disclosure is undertaken by means of a signed vendor statement disclosing matters such as the location and description of easements, the applicability of planning instruments and the amount of rates and taxes levied on the property ("Sale of Land Act ", 1962). If the information in the vendor statement is incorrect or is not supplied, then the purchaser may rescind any time before settlement ("Sale of Land Act ", 1962). An exception is provided by s32(7) of the Sale of Land Act 1962 (Vic), where the vendor has acted honestly and reasonably and the purchaser is in as good a position as if the vendor statement had been accurately made.

ACT

In the ACT, the Civil Law (Sale of Residential Property) Act 2003 provides for vendor disclosure by obliging the vendor to attach 'required documents' to the contract. ("Civil Law (Sale of Residential Property) Act ", 2003). These documents, set out in section 9 of the Act, include copies of the crown lease and title documents relating to a strata unit. Section 11 of the legislation contains statutory warranties included in every contract for sale of residential property. Where there are material errors with the disclosure, the purchaser has a choice of rescinding the contract, or completing the contract and claiming damages where the errors are not material ("Civil Law (Sale of Residential Property) Act ", 2003). By way of contrast to NSW and Victorian laws, the ACT disclosure provisions only apply to residential property and not to commercial or industrial property.

Tasmania

In Tasmania, disclosure in conveyancing transactions is dealt with by Division 2 of Part 10 of the Property Agents and Land Transaction Act 2005. Section 186 of part 10 of that Act specifies that 'relevant disclosure documents' should be available to the purchaser, Such documents include title and strata scheme information ("Property

Agents and Land Transaction Act ", 2005 -a). In addition, the contract for sale of land is subject to implied warranties that the property is free from encumbrances other than as disclosed ("Property Agents and Land Transaction Act ", 2005 -b). If disclosure documents are missing from the contract, the purchaser can rescind at any time prior to settlement. In similarity with the Victorian legislation, a vendor has a defence to an action for rescission if the vendor acted honestly and the purchaser is in as good a position as if the disclosure provisions had been complied with.

South Australia

In 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 setting out any matter affecting title to or possession or enjoyment of the land and any charges and prescribed encumbrances affecting the land ("Land and Business (Sale and Conveyancing) Act ", 1994). In addition, where the property is held under strata title, further regulations prescribe that the vendor must provide strata title and strata scheme information ("Land And Business (Sale and Conveyancing) Regulations ", 1995). Where a vendor makes a defective statement the purchaser can rescind or sue for damages ("Land and Business (Sale and Conveyancing) Act ", 1994).

Queensland, Western Australia and the Northern Territory

Queensland, Western Australia and the Northern Territory do not have a dedicated disclosure regime, although partial disclosure and warranties apply in some respects. In Queensland, for example, the standard contract provides for contractual warranties with respect to government notices and resumptions (Christensen, Duncan, & Stickley, 2007). In Western Australia, legislation imposes disclosure obligations on the sale of a strata lot ("Strata Titles Act ", 1985). Purchasers must be given a copy of the strata plan, details of the unit entitlement and by-laws for the strata scheme ("Strata Titles Act ", 1985). Where the vendor is the developer, the vendor is under additional disclosure obligations that extend to details of service contracts over the lot and details of any pecuniary interest that the vendor has in those service contracts (Griggs, 2006). The Northern Territory has the lowest level of disclosure, with very few demands made upon vendors (Christensen et al., 2007). In 2004, a proposal was made to amend the Law of Property Act (NT) by introducing the Law of Property Amendment Bill 2004. The amendments would have included a new division 5 to regulate sales of residential property with an enhanced disclosure regime. The motion to introduce the Bill however was negatived on 5 October, 2004 (TOYNE, 2004)

This brief exposition of vendor disclosure under state and territory jurisdictions indicates that disclosure requirements vary considerably amongst the states. New South Wales and the ACT have the most stringent level of disclosure while Western Australia and the Northern Territory have the lowest. This variation also leads to a lack of uniformity (Christensen et al., 2007) that may be contrasted with regulation applying pursuant to the Corporations Act.

3.2 Serviced Strata Schemes as a Financial Product or Financial Service

The Corporations Act

The Corporations Act provides for a uniform and comprehensive regulatory regime, with respect to managed investment schemes. Those who are involved in operating serviced strata schemes, selling interests in those schemes, or who provide advice with respect to those schemes need to ensure compliance with appropriate provisions of the Corporations Act. A pivotal feature of the legislation turns on the provision of disclosure.

Both product disclosure and financial services disclosure primarily apply to ‘retail’ clients as opposed to ‘wholesale’ clients or ‘sophisticated’ investors. A person is presumed to be a retail client unless they meet the wholesale client criteria (section 761G of the Corporations Act). In the latter case, the client needs to hold assets exceeding $2.5 million, or have an income of more than $250,000 per annum. A client is also not a retail client if the client has paid more than $500,000 to acquire, or be issued with, the financial product (Kingsford-Smith, 2004). A sophisticated investor is one who has had previous experience in the financial product and services sector, which allows the client to assess the value, merits and risk of the investment (section 761GA of the Corporations Act).

The Corporations Act envisages two types of disclosure based on three disclosure documents. The first type of disclosure relates to product disclosure, and is based on a Product Disclosure Statement; while the second type of disclosure relates to services disclosure, and is based on the Financial Services Guide and the Statement of Advice.

Product disclosure is required in accordance with part 7.9 of the Corporations Act whenever a ‘regulated person’ supplies financial products. A regulated person includes a person who is required to hold an Australian Financial Services Licence or AFS licence, as well as a person who has been exempted from holding such a licence. Consequently, a person who is exempt from holding an AFS licence may still be required to provide disclosure ("Corporations Act ", 2001). The obligation to give a disclosure statement applies when the financial product is first issued, as well as where a person conducts secondary trading in the product ("Corporations Act ", 2001). Accordingly, in the case of serviced strata schemes, product disclosure applies to real estate agents engaged by a developer to sell strata title units off the plan, as well as to real estate agents who act for subsequent vendors. Moreover, where the sale of a strata unit in a serviced strata scheme involves a recommendation with respect to the purchase of the unit, section s1012A of the Corporations Act specifically provides that a product disclosure statement must be provided to the purchaser.

The product disclosure statement needs to contain a wide range of information, including: the benefits that the holder of the financial product will or may become entitled to; the risks associated with holding the product; information about the cost of the product; amounts payable in respect of the product after its acquisition; information with respect to fees, charges and expenses; as well as general information about significant taxation implications ("Corporations Act ", 2001).

In accordance with part 7.7, division 2 of the Corporations Act 2001 (Cth), a similar regime of disclosure applies with respect to financial services in relation to managed investment schemes. The first disclosure document, the Financial Services Guide is a statement given to customers that sets out the types of financial products that the holder of an AFS licence is able to provide, the fees charged and details of dispute resolution mechanisms. The second disclosure document, the statement of advice includes information on how the service provider takes into account the personal circumstances of the client and the basis of the advice given to a retail client.

Exemptions

While the registration, licensing and disclosure requirements provide a precise and comprehensive regime for the regulation of managed investment schemes, ASIC has mitigated these requirements in some circumstances. Relief is given either in the form of class orders, or on a case-by-case basis. For example, ASIC has given licensing exemptions to real estate firms who sell strata units that are part of a serviced strata scheme, unless the real estate agent is issuing the interests (that is the sale is not a secondary trade); is inducing buyers to become members of a scheme; or is giving financial advice with respect to the interests in the scheme (ASIC, 2000).

However, while ASIC has given relief from strict compliance with respect to registration and licensing requirements, relief has not been extended to disclosure requirements (ASIC, 2000). Indeed, in some instances, licensing exemptions, such as those applying to operators of managed rights schemes, are dependant upon the operators giving adequate disclosure to prospective investors prior to the investor joining the serviced strata scheme (ASIC, 2005) .

3.3 Disclosure and Managed Investment Schemes

A number of conclusions may be drawn about the role of disclosure in the regulation of managed investment schemes. First, it is self-evident that disclosure is regarded as a significant component of investor protection. Not only does the Corporations Act provide for a comprehensive disclosure regime, but also exemptions given by ASIC with respect to strict compliance with the Corporations Act have not been extended to product and service disclosure.

Second, the broad definitions of 'financial product' and 'financial services' signals a policy approach at the Commonwealth level to set comprehensive and uniform standards in the regulation of managed investments (Kingsford-Smith, 2004). This policy is underscored by the issuing of one licence, the AFS licence, for providers and operators of financial products and services. Third, the nature and extent of disclosure are designed to meet minimum standards, both with respect to the content of disclosure and also with reference to the timing of disclosure. As one commentator has noted:

'It is through commonality in the requirements of form, presentation to client, content and liability flowing from these documents that the single financial services disclosure regime is constituted'(Kingsford-Smith, 2004).

Fourth, an important feature of investor disclosure with respect to serviced strata schemes is that it builds on vendor disclosure applying in conveyancing transactions at the State and territory level. ASIC itself, has conceded that disclosure in this context not only emanates from disclosure mandated by the Corporations Act, but may also '*form part of, or accompany, any disclosure required under State or Territory legislation about the scheme or strata unit.'* (ASIC, 2000)**.** However, given that the states and territories do not have uniform vendor disclosure laws, a crucial issue is whether these differences impact detrimentally upon policy objectives advanced at the Commonwealth level.

4 Consistency and the Dual Regulatory Model

Those who purchase serviced strata schemes make one investment choice that involves consideration of two matters: a decision to buy a strata unit, and a decision to become part of a managed investment scheme.

The investor makes one decision because he or she will not be able to decide whether to join the serviced strata scheme independently from the decision to acquire the unit. Accordingly, if the aim of Commonwealth legislation is to protect investors who acquire an interest in serviced strata schemes, state and territory laws relating to vendor disclosure need to act in synergy with Commonwealth laws. Moreover, broader economic considerations, such as the market value and likely capital gain of the unit, will be influenced by the value of the unit as an item of real property as well as the effect upon that value by the way the serviced strata scheme is being managed (ASIC, 2000).

4.1 Disclosure as a Means of Protecting Investors

Generally speaking, appropriate disclosure accomplishes a number of objectives that include enabling investors to make informed decisions and enhancing the integrity of property and financial markets. (Pearson, 2006). Essentially, vendor disclosure in conveyancing transactions, and disclosure for financial products and services under the Corporations Act 2001 (Cth), are both designed to arm purchasers and investors with sufficient information to enable them to make better decisions. Both forms of disclosure also envisage that the purchaser or investor makes the final decision.

In conveyancing transactions for example, disclosure is seen as a cost-effective way of reducing the information asymmetry between vendor and purchaser. By reducing the information gap, the law is said to achieve balance between the bargaining power of the parties, allowing purchasers to negotiate better and ultimately make a more informed decision with respect to the acquisition of the property (Christensen et al., 2007). Indeed, legislative strengthening of vendor disclosure is often based on this premise ("Law of Property Amendment Bill 2004 (NT)," 2004)

Disclosure with respect to managed investment schemes fulfils similar but not identical functions. As with conveyancing transactions, disclosure protects investors by reducing information asymmetry. Again, disclosure is seen as a way of achieving balance between the interests of buyers in being appropriately informed and the financial burden to the party making disclosure. Importantly, understanding financial markets may be complex and difficult, perhaps more so than understanding property markets; therefore, appropriate disclosure assumes special significance. (Pearson, 2006). In the context of financial markets, disclosure makes relevant information publicly available and enhances both the transparency and operation of these markets (Pearson, 2006).

However, each layer of disclosure deals with a different aspect of the transaction, which means that the two types of disclosures should complement each other. Vendor disclosure under state and territory law deals with the acquisition of a strata unit as real property, while disclosure under the Corporations Act deals with the acquisition of a financial product.

As such, disclosure under conveyancing legislation provides purchasers with information concerning the title and use of the property; while disclosure under the Corporations Act provides information sufficient for the investor to evaluate the cost of the product, the fees and charges payable, with respect to the product, the risks involved with investing in the product and its suitability to the investor. (Pearson, 2006). (Kingsford-Smith, 2004). In essence, disclosure under the Corporations Act should alert investors to intrinsic risks associated with acquiring an interest in a serviced strata scheme, and thereby give them sufficient information to determine whether the risk associated with the investment is '*greater than [the] investor can bear.*'(H. H. Cohen, 1978)

Yet, disclosure is still considered an imperfect mechanism. As one commentator has indicated: '*…disclosure does not give investors sufficient protection; they often do not read disclosure documents and, even if they do, the material is too complicated for most laymen and too voluminous for the rest…disclosure has been shown to work imperfectly…* '(Cassidy & Chapple, 2003; Cohen, 1978)

Regardless of these imperfections, statutory disclosure does at least provide a baseline of uniform and relevant information. In particular, the uniformity mandated by the Corporations Act allows investors to make comparisons with respect to financial products and services. This comment brings us to the question at hand, whether the differing regimes at the state and territory levels undermine objectives to protect investors.

4.2 Disclosure - Link with State and Territory Laws

The inconsistent approach of state and territory laws is important in at least three areas of regulation: the content of disclosure, the timing of disclosure, and the type of investor that is protected.

With respect to the content of disclosure, the lack of uniformity amongst the states and territories means that the extent and quality of disclosure is conditional upon the state or territory where the unit is located. Therefore, depending on the jurisdiction, purchasers will recieve a great deal of information, or very little information on their prospective purchase. This uneven approach is at odds with the high degree of uniformity created by the Corporations Act. As already noted, that legislation establishes one disclosure regime applying throughout the whole of Australia and across a range of financial products and services. It allows investors to compare products and services, making it easier for them to pinpoint investments most suitable for them. (Kingsford-Smith, 2004).

Uniformity is also important where an investment comprises an amalgam of products and services as occurs with serviced strata schemes (Kingsford-Smith, 2004). Where disclosure is uniform with respect to only one part of the investment, it may be difficult for investors to compare products and services, making it less likely that they will reach informed decisions. (Pearson, 2006). Such an outcome, of course, militates against the rationale of the Corporations Act to protect investors by promoting informed decision making. On a more pragmatic level, investors may purchase units in serviced strata schemes located in different states or territories from the one where they reside. The differing disclosure regimes potentially create confusion, thus further impeding effective decision-making.

The second issue relates to the timing of disclosure. Under the Corporations Act, disclosure needs to be made at the time or prior to the investor acquiring a financial product or service ("Corporations Act ", 2001). Yet, under state and territory regulations, purchasers in a conveyancing transaction acquire information at different times.

In those states and territories, such as New South Wales and the ACT, where documents must be annexed to the contract for sale, disclosure is available at an early stage in the transaction and closely mimics disclosure under the Corporations Act. However, in other cases, such as occurs with Victorian and Tasmanian legislation, disclosure is made by way of a vendor warranty. Although breach of a vendor warranty gives the purchaser the right to rescind or claim damages, practical disclosure occurs when the purchaser obtains his or her searches and associated documentation. More often than not, this will occur after the decision to acquire the unit.

Yet, as Griggs has pointed out, disclosure at an earlier point in time, notably when the decision to purchase is being made, is more effective than disclosure after the contract has become binding (Griggs, 2006). Certainly if the aim is to balance the information asymmetry between vendor and purchaser and enhance investor decision-making, the timing of disclosure needs to be harmonised – both with respect to the acquisition of the strata unit and with respect to the acquisition of the interest in the managed investment scheme. Moreover, harmonisation should tend towards early disclosure in accordance with the Corporations Act, rather than later disclosure, as occurs in some state jurisdictions.

Finally, an anomaly potentially exists with the type of purchaser or investor that each regime protects. While both regimes contemplate that certain purchasers or investors require greater protection than others, there is little agreement as to who these investors should be. At the state and territory level, the ACT mandates disclosure only with respect to 'residential properties', while other states, such as New South Wales and Victoria, have adopted vendor disclosure for all types of properties. The approach of the ACT contradicts the spirit and objectives of the Corporations Act, which specifies that disclosure be given to 'retail' investors, irrespective of whether the property is residential or commercial.

One must be cautious, however, against an inflexible regulatory approach that does not acknowledge necessary differences amongst the states. For example, in setting the benchmark for disclosure at $500,000, the Corporations Act may not adequately take into account whether a fixed benchmark is appropriate for the acquisition of an interest in real property. To start with, investors may perceive an investment in real property to be more stable than an investment in shares and may thus be more inclined to spend $500,000 on real property, compared to shares. Indeed, since the 1990s, *'investors seeking independence for their retirement, have [increasingly] poured billions of dollars into the supply side of unit accommodation'* (Guilding et al., 2006).

Moreover, in those serviced strata schemes, where the purchaser retains the right to use the unit for several weeks a year, this factor may provide an additional incentive to acquire the unit, something that is unlikely to occur with the acquisition of shares. In reality, more research is needed to determine whether the $500,000 cut-off is too low as a criterion for interests in serviced strata schemes.

Finally, using one benchmark for real property located Australia-wide may create unintended consequences. Unlike securities that have a consistent value throughout Australia, the median prices of real property, including units, varies considerably in different geographical areas (Australian Property Monitors, 2008). This variation is magnified when prices in less populated geographical areas are compared with prices in heavily populated areas, such as capital cities and holiday towns.

Yet this important point does not seem to have been taken into account in the formulation of the monetary benchmark. Indeed, it is a matter of some irony that while this paper has highlighted a number of disadvantages stemming from lack of uniformity, a comparable disadvantage can stem from lack of acknowledgement that differences amongst the states may sometimes also need to be taken into consideration.

5 Conclusion

Legislation at the Commonwealth level, together with legislation implemented by the states and territories is important in ensuring that disclosure in serviced strata schemes provides purchasers and investors with sufficient information to make informed decisions. It has been argued that disclosure at the state/territory level should act in synergy with disclosure at the Commonwealth level. This is an important point, as in the context of serviced strata schemes, Commonwealth regulation builds upon vendor disclosure in state and territory conveyancing transactions. Accordingly, vendor disclosure should not only be adequate for conveyancing purposes, but should also provide a sound base for objectives advanced by the Corporations Act. Unfortunately, the inconsistency of disclosure amongst the states and territories does not present such a case – hence the authors conclusion that a more cohesive disclosure regime is called for. The table below sets out a summary of the major issues and potential solutions discussed in this paper.

Table 1
Summary of Major Issues and Potential Solutions

Issue	**Current Situation**	**Potential Solution**
Extent of disclosure	Corporations Act establishes a uniform regime. States and territories vary in levels of disclosure.	States agree on uniform conveyancing code. The nature and extent of disclosure to be harmonised with disclosure under the Corporations Act for managed investment schemes.
Timing of disclosure	Under the Corporations Act, disclosure needs to be made at the time or prior to the investor acquiring a financial product or service. States and territories vary in timing of practical disclosure.	The timing should accord with the requirements of the Corporations Act as they apply to managed investment schemes. Therefore, disclosure needs to be made at the time of, or prior to, the investor acquiring the strata unit.
Which investors are protected?	Under the Corporations Act, the disclosure provisions apply to 'retail clients'. This is determined by specific monetary amounts and values. The states' and territories' requirements vary in accordance with whether the property is residential or non-residential.	There needs to be agreement among the states, territories and Commonwealth on which investors should be protected. More research is needed on whether the uniform monetary limits set by the Corporations Act are appropriate for a product that is based on the acquisition of real estate, which can vary in value across Australia.

This paper does not advocate the adoption of a particular level of disclosure. However, whatever level is adopted, it should represent a unified response and one that is appropriate to the best interests of purchasers, vendors and investors.

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