



Section 32 statements: the basics

IT TAKES PRACTICE, UNDERPINNED BY SOUND RISK MANAGEMENT, TO COMPLETE A SATISFACTORY SECTION 32 STATEMENT. WHAT PRACTITIONERS OFTEN GET WRONG – AND HOW TO AVOID IT – IS DETAILED BY **HEATHER HIBBERD AND PHILLIP NOLAN**

Providing satisfactory disclosure to meet the standards set by the *Sale of Land Act 1962* (Vic) (SLA) for every property transaction that crosses your desk requires significant legal knowledge and training backed up by good systems, processes and precedents.

This article contains details of some of the important aspects of the disclosure requirements to assist those preparing s32 statements.

The law

Section 32 of the SLA requires a vendor of real estate to provide certain written information to the purchaser before the purchaser enters into the sale contract. This is colloquially called a “section 32 statement” or a “vendor statement”.

In practice, this usually means the vendor’s legal representative prepares the s32 statement and provides it to the selling agent who ensures the signed statement is given to the purchaser before the contract is signed.

This summary of the delivery process may

give the impression that the preparation of a s32 statement is straightforward. Given LPLC regularly receives claims each year about defective s32 statements, the data says this couldn’t be further from the truth.

The content requirements of the s32 statement are prescribed in ss32A to 32J of the SLA, which will be discussed in detail in this article.

The consequences of not complying with these requirements are set out in ss32K and 32L. Most importantly, non-compliance may allow a purchaser to rescind the contract at any time up until settlement. It may also constitute an offence under the SLA and result in 60 penalty units for individuals and 300 penalty units for body corporates.

Appreciating the importance of a s32 statement, combined with good risk management when preparing one, will give practitioners the best chance of avoiding a claim.

Preliminary steps

The following three foundational steps are essential for those preparing their first s32 statement.

- Read the disclosure obligations in the SLA.
- Familiarise yourself with the form of statement. This might be the Law Institute of Victoria (LIV) form, one you have drafted, or one used as a precedent by the firm.
- Develop and use a checklist to collect information from the client about the property to be sold. LPLC has a Key risk checklist: sale of land questions for the vendor¹ which can be

SNAPSHOT:

- Preparing s32 statements well requires good online resources or current books on conveyancing in Victoria, keeping up to date with the case law and doing regular training on current property issues.
- Develop and use a checklist to collect information from the client about the property to be sold. Regularly review the checklist.
- The big hot spots are owner builder requirements in s137B of the *Building Act*, providing descriptions of drainage easements and covenants, attaching land information, planning and water encumbrance certificates, clarifying with clients what services are connected and whether they have a septic tank.

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used or adapted.

To step up your efforts to deliver a first-rate s32 statement consider:

- collecting and reviewing s32 statements prepared by other firms and note anything from them that you can use to improve your own s32 statements.
- tag teaming with a colleague and agreeing to critically review each other's s32 statements to find the items which need improving.

Deeper dive

Invest in some good resources or current books on conveyancing in Victoria² and consult them regularly.

Take some time to read cases about vendor disclosure obligations.

When reading the cases think about whether you need to amend your practice to ensure you avoid the issues raised in the cases.

Disclosure obligations

The following is a list of ss32A–32I of the SLA which contain the key disclosure obligations for a vendor. They have been married up with the items in the standard s32 statement issued by the LIV to help those doing a s32 statement for the first time to identify the sections of the SLA as they relate to the items in the LIV form.

Section 32A – item 1

Disclosure of financial matters including rates, taxes, charges or other similar outgoings affecting the land such as council and water rates, land tax and owners corporation fees.

It is usual for this financial information to be contained in certificates attached to the s32 statement. See s32J about attaching certificates, notices or other documents.

Tip: Don't forget to check for and include details of charges over the land, especially land tax charges and details of the fire services levy pursuant to the *Fire Services Property Levy Act 2012* (Vic).

Section 32B – item 2

Disclosure of the vendor's "damage to or destruction of the land", including building insurance where the property is at the risk of the purchaser from the day of sale; and owner builder insurance.

Tip: The owner builder insurance requirements stem from s137B of the *Building Act 1993* (Vic). When these provisions apply can often be difficult to determine but LPLC's July 2011 LJ article,³ "Owner-building danger zone", helps clarify this.

This section specifies that an owner builder must not enter into a contract to sell unless they are covered by any required insurance and have given the intending purchaser particulars of the insurance.

Section 32C – item 3

Disclosure of matters relating to land use. These are more specifically described as any easements, covenants or other similar restrictions affecting the land. This would include both

registered and unregistered easements. The section requires a description of the restriction and any particulars of existing failure to comply. There is also a requirement to disclose certain information about the land if it is in a bushfire prone area as described in s192A of the *Building Act 1993*.

The most common restrictions are drainage easements or covenants that are referred to on the title, such as a single dwelling covenant. These are also the ones that are most often missed in s32 statements.

The other mistake practitioners make is attaching a copy of a plan or certificate that contains only the word "covenant" or "easement", but no "description" as required by the section. The description or diagram showing the easement is often in another document or plan that is not attached. Providing a document that refers to the easement or covenant but nothing else does not satisfy the requirement for a description.

A description of a covenant might be: A single dwelling covenant registered number xxxxxxxx.

A description of an easement might be: One metre wide drainage easement at rear of property.

There is no requirement to provide a copy of the covenant. Section 32I(a) states that a vendor needs to attach a Register Search Statement, ie, a title search, but this does not include the "instrument" containing the covenant. The vendor "may" provide certain certificates, notices and other documents pursuant to s32J.

Tips: Sometimes clients are not aware of all the easements which may affect the property, some of which may be unregistered easements and will be disclosed in a water encumbrance certificate or plan of subdivision. You should always obtain a water encumbrance certificate.

Best practice is to give a description of the easement or covenant and attach the relevant certificate, document creating the easement or covenant, or plan of subdivision.

If using your own precedent, ensure the wording about bushfire prone areas is up to date.

The wording in s32C(d) was amended by s78 of the *Building Amendment (Registration of Building Trades and Other Matters) Act 2018* (Vic). The amendment took effect on 30 October 2018.

The new wording is "if the land is in an area that is designated as a bushfire prone area under s192A of the *Building Act 1993*, a statement that the land is in such an area".

Item 3.3 in the LIV September 2018 vendor statement form has been updated to include the new wording.

Section 32D – item 4

This is arguably the most complicated section dealing with disclosure given the long list of things which must be disclosed. The vendor must give "particulars of any notice, order, declaration, report or recommendation of a public authority or government department or approved proposal directly and currently affecting the land ... which the vendor might reasonably be expected to have knowledge".

A similar disclosure is required for anything relevant to livestock disease or chemical contamination as well as an intention to compulsorily acquire the land.

There is some debate about what "directly and currently

affecting the land” means. Commentary on this can be found in *Sale of Land in Victoria*.⁴ What “public authority” means is discussed in a recent LPLC blog.⁵

Tip: Always attach a land information certificate in the s32 statement as this certificate may contain details of notices, orders, declarations, reports, recommendations or approved proposals caught by s32D of the SLA.

Section 32E – item 5

A vendor must disclose particulars of any building permits issued in the previous seven years where there is a dwelling on the land.

Tip: Ask the vendor whether they have done any works in addition to whether they have obtained any building permits. The works may be classified as owner builder works even where no building permit is required or obtained.

Remember how important it is that the vendor complies with the owner builder requirements, given a purchaser may avoid the contract for the failure to comply.⁶

Section 32F – item 6

A vendor has several options when dealing with the owners corporation disclosure obligations. They can either attach a current owners corporation certificate or provide the information required in an owners corporation certificate as set out in s151(4)(a) of the *Owners Corporation Act 2006* (Vic) (OC Act). They must also attach the owners corporation rules, the prescribed information for purchasers, copies of any resolutions made at the last annual general meeting and any other documents prescribed as set out in s151(4)(b). Make sure the client’s instructions about owners’ corporation information are confirmed in writing.

Where an owners corporation is inactive and the s32 statement states this, the vendor does not need to include the information above. An inactive owners corporation is described in s32F(2) to include an owners corporation that has not held an annual general meeting, fixed any fees and has not held any insurance in the previous 15 months.

Warning: Only two lot subdivisions are exempt from the insurance requirements pursuant to s7 of the OC Act. Any other owners corporation is required to have:

- public liability insurance for any common property. See s60 of the OC Act.
- reinstatement and replacement insurance where ss59 and 61 of the OC Act apply.

Where insurance is obtained the result will be that the owners corporation no longer qualifies as “inactive” for the purposes of s32F.

Section 11 of the SLA says the failure to obtain any necessary owners corporation insurance gives a purchaser the right to avoid the contract.

Section 32G – item 7

Specific disclosure is required where the land is in a “contribution area” as described in s201RC of the *Planning and Environment Act 1987* (Vic). This is generally growth area land zoned for urban use and development. The land in this area will

often be affected by a growth areas infrastructure contribution (GAIC) requirement and it is these details that must be disclosed, including attaching any relevant GAIC certificate(s).

The standard LIV form lists the relevant GAIC information which must be included in the s32 statement.

Details about the contribution area and GAIC certificates can be found on the State Revenue Office website⁷ and apply to land within the municipalities of Cardinia, Casey, Hume, Melton, Mitchell, Whittlesea and Wyndham.

Section 32H – item 8

Only electricity, gas, water, sewerage or telephone services that are not connected need to be disclosed.

Claims arise every year where a vendor misleads a purchaser as to what services are connected. Most commonly they get the sewerage connection wrong. Many vendors think that if they have a flushing toilet, they have sewerage connected, even if they have a septic tank. You need to clarify that a septic tank does not constitute connection to sewerage and should be disclosed.

Tip: A number of these claims could have been avoided had the practitioner asked the vendor client whether they had a septic tank. The issue can also be picked up by looking at the client’s water bill which will not contain any charge for sewerage, or the water certificate, where the plan attached to the encumbrance certificate shows no sewer pipes running to the property.

Section 32I – items 9 and 10

Disclosure of certain title documents by attaching them to the s32 statement. The documents include:

- a Register Search Statement (title search)
- diagram location in the Register Search Statement that identifies the land and its location
- certain plans of subdivision
- evidence of right to sell where the vendor is not registered on the title.

Tip: The common scenarios where the vendor is not registered on title are where a purchaser is looking to on-sell before settlement, a mortgagee sale and a deceased estate sale.

The evidence of right to sell is commonly a copy of the head contract with the price redacted; a copy of the notice of default served on the mortgagor; and the grant of probate.

Section 32J – item 13

This section clarifies that if any information is required by the sections referred to above it can be provided by attaching a certificate, notice or other document that contains the information.

Tip: Common documents attached for this purpose are planning certificates, land information certificates and water encumbrance certificates. In many of the claims made against conveyancing practitioners, if these certificates had been attached the relevant information would have been disclosed and avoided the claim. Make a practice to obtain these certificates for all sales.

As mentioned above, just attaching certificates may not satisfy the requirement of s32C to provide a description of easements,

covenants or other similar restrictions.

Attention to detail

Recognise that preparing a s32 statement requires attention to detail. Information provided by a vendor must be compared for consistency and accuracy against the searches and certificates obtained as part of the due diligence when preparing a s32 statement.

Send the vendor a draft of the s32 statement together with a copy of all searches and certificates and direct the vendor to read the documents and give written confirmation about their accuracy or otherwise.

Case study – combined drain easement

An executor instructed his practitioner about the sale of the deceased's former principal place of residence.

The property was serviced by a combined sewerage drain but this was not disclosed in item 3 of the s32 statement, in breach of s32C.

The purchaser discovered the easement and rescinded the contract pursuant to s32K(2). The vendor refused to return the deposit, so the purchaser issued proceedings. The vendor subsequently joined his practitioner to the proceeding, alleging he had failed to prepare an adequate s32 statement.

The practitioner had not obtained a water encumbrance certificate, which would have disclosed the combined sewer, and had not thought to look for the easement on the plan of subdivision.

The proceeding was settled with the deposit released to the purchaser. The practitioner was required to make a substantial payment to the vendor to cover the lost deposit and the extra selling expenses.

Conclusion

While on the surface complying with the requirements of ss32 to 32J of the SLA may seem a simple, almost administrative task, there is in fact a lot of legal complexity that this article has only just touched on. A “charge over the land”, an unregistered easement, a notice directly and currently affecting the land, are just a few issues to beware of. The significant body of case law and commentary about these disclosure requirements is evidence enough of the complexity.

Anyone who practises in conveyancing needs to have good reference material, regularly updated precedents and a good knowledge of the case law and legislation in this area. This should be maintained with regular training. Well thought through questionnaires for vendors to answer, and extensive checklists for practitioners to make sure everything is done, are essential tools.

Every s32 statement needs to be prepared after asking the right questions and exercising due diligence. Treat each one as if it is unique, which in most cases it will be. ■

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