STRATA KNOWLEDGE

The Legal Psychology of Disclosure in the Multi-owned Property Context

2018 Australian College of Community Association Lawyers (ACCAL) Conference

The Legal Psychology of Disclosure in the Multi-owned Property Context

Dr Nicole Johnston[1] and Dr Karla Johnston[2]

Introduction

The law's relationship with psychology has had a chequered past. At times friendly, at times estranged.[3] The friendship began with the movement toward university based systems of legal education where legal scholars insisted that an examination and understanding of the social context to which the law was derived was required to fully understand the law itself.[4] The shift from legal formalism to legal realism also aided in enhancing this relationship.[5] The realists advocating that an examination of the law, legal processes and legal decision-making could utilise social science methodologies and perspectives.[6] The happiest times in the relationship occurred between 1920 and 1940 with a brief rekindling in the 1960s and 70s. The friendship didn't extend to all virtues and the law remained fairly myopic only allowing intrusion into aspects of the criminal justice system – the insanity defence, eyewitness testimony, false confessions.[7] Commercial law, on the other hand, has preferred a bachelor's life, fairly autonomous but regularly flirting with the discipline of economics.[8]

[1] Lecturer at Deakin Business School, Deakin University and corresponding author – nicole.johnston@deakin.edu.au
[2] Clinical and Counselling Psychologist
[3] Vanessa Edkins et al, 'Psychology and the Legal System: The Courtroom and Beyond' (2017) 3(2) *Translational Issues in Psychological Science* 117.
[4] James Ogloff and David Finkelman, 'Psychology and Law: An Overview' in Ronald Roesch, Stephen Hart and James Ogloff (eds), *Psychology and Law: The State of the Discipline* (Springer, 1999).
[5] Craig Haney , 'Psychology and Legal Change: On the Limits of a Factual Jurisprudence' (1980) 4(3) *Law and Human Behaviour* 147.
[6] Ibid.
[7] Andreas Kapardis, *Psychology and Law: A Critical Introduction* (Cambridge University Press, 2014).
[8] Christoph Engel and Gerd Gigerenzer, 'Law and Heuristics: An interdisciplinary Venture' in Gerd Gigerenzer and Christoph Engel (eds), Heuristics and the Law (MIT Press, 2014).

It is this flirtation that has had an impact upon some of the laws regulating the multi-owned property environment. Rational choice theory is an economic theory based on the assumption that people 'will process information, make choices, and execute behaviours in a way calculated to maximise their expected utility; that is, to maximise the differential between expected benefits and expected costs.'[9] This assumption requires people to 'infer facts about the world by applying principles of deductive logic to all known, relevant information.'[10] Based on this assumption, policymakers' have favoured the use of information disclosures in a variety of commercial transactions.

The purpose of this paper is to offer insight as to why this assumption is flawed by examining psychological theories and understandings about human behaviour and how these theories and understandings apply in the multi-owned property (MOP) environment. The particular focus is on the use and value of disclosures in aiding purchasing decisions and in mitigating the (potential) harmful effects of conflicts of interest.

The paper is structured as follows. The first part of the paper focuses on pre-purchase disclosures in the sale of MOPs, including an evaluation on the effectiveness of disclosures from a psychological perspective. The second part of the paper focuses on the use and effectiveness of disclosures in conflict of interest situations. The final part of the paper discusses the opportunities available for policymakers to enhance law reform by collaborating with the discipline of psychology and other social sciences.

Part 1: Pre-Purchase Disclosures

The Attraction of Information Disclosure: aiding in the decision to purchase?

The rationale for disclosing information to property purchasers is based on the rational choice theory. Once all is known about the property for sale, the purchaser will make a rational decision based on the information that has been provided. Providing full and frank disclosure about all aspects of the property, theoretically protects the consumer by arming them with the necessary information to make an informed decision and creating a level playing field for

[9] Russell Korobkin, 'The Problems with Heuristics for Law' in Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (MIT Press, 2014).
[10] Ibid.

negotiation. Transparency of information, as opposed to purchaser comprehension, is a key component of this theory.

The best MOP illustration of the utilisation of this theory is the current disclosure regime in Queensland for off-the-plan sales. The provisions require extensive disclosures by the seller (developer) to the purchaser and accords with the objectives of the Act. Section 4(g) of the *Body Corporate and Community Management Act 1997*, requires the legislation to provide an appropriate level of consumer protection for owners and intending buyers of lots included in community titles schemes. The drafters of this legislation clearly were of the view that extensive information disclosure would aid in the decision-making process for purchasers.

The extent to which information relating to the body corporate is disclosed varies greatly from state to state. For the sale of existing lots, the States of Queensland, South Australia and Western Australia require the seller to disclose prescribed body corporate information to the purchaser and includes for example, the amount of the annual levy contribution, contents of bylaws, information relating to insurances, register of assets.[11] In Victoria, the information to be disclosed is more extensive than the other states.[12] The new Western Australian reforms appear to favour a more onerous disclosure regime then the current regime provides.[13]

In order to assess the value of disclosure information in the purchasing decision, it would be prudent for policymakers to understand how mental processing and consumer behaviour works when people make investment decisions. It is re-assuring that consideration has been given to psychological theories and understandings in Queensland's final report for seller disclosure.[14] The members of the Commercial and Property Law Research Centre (being scholars) have applied consumer behaviour understandings in their recommendations.

---

[11] *Body Corporate and Community Management Act 1997* (Qld) s 206; *Land and Business (Sale and Conveyancing) Act 1994* (SA) s 7; *Strata Titles Act 1985* (WA) s 69 and 69A.
[12] See *Sale of Land Act 1962* (Vic) s 32; *Owners Corporations Act 2006* (Vic) s 151.
[13] Landgate, *Better Buyer Information* https://www0.landgate.wa.gov.au/titles-and-surveys/strata-reform/better-buyer-information.
[14] The Commercial and Property Law Research Centre, *Final Report: Seller Disclosure in Queensland* (2017) http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/536748/final-report-seller-disclosure-in-queensland.pdf. See also paper referred in final report: Sharon Christensen, William Duncan and Amanda Stickley, 'Behavioural Biases and Information Disclosure Laws Relating to Residential Property Sales: Narrowing the Gap between Existing Laws and Calls for Future Reforms' (2009) 9 *Queensland University of Technology Law and Justice* 251.

The psychology of how people make purchasing decisions

The decision to purchase

Cognitive psychology is the science to explain how humans make decisions using a range of mental functions such as perception, attention, memory, and language. Fascinatingly, these functions have a specified role to play, each with its gains and limits, in the processing of data. When visually examining the brain itself, high-level reasoning is performed in the left prefrontal cortex (frontal lobe), which is highly interconnected with the other parts of the brain. Without understanding what influences the prefrontal cortex it would be easy, yet imprudent, to conclude pure rationality is an acceptable expectation when making complex decisions. Next, a simplistic narrative describing the multilayered (unconscious) brain experience of purchasing property is imagined.

The emotional centre of the brain, the amygdalae (found in the limbic system) and the associated neurochemicals required for neural activity (e.g. serotonin, dopamine), indubitably over activates in a property purchase, thus compromising critical reasoning. Emotional affect and communication causes a blurriness particularly where compensatory behaviours (e.g. emotional regulation, reflection, and coping skills) are not employed to counter a natural fight/flight/freeze anxiety response. The rudimentary yet essential amygdala responsible for this anxiety overreaction momentarily suspends access to the *thinking* part of the left brain, so that other self-protective behaviours can be availed to minimise *extinction*. It does this by making rapid and crude appraisals of an event/situation in order to find equilibrium (or restoration) hurriedly. This in turn results in paying more attention to salient data supportive of survival. Effectively this biased view alters one's perception of a situation via the adoption of error-prone mental short cuts (cognitive heuristics) and therefore often, limits objectivity in problem-solving capacity.[15] Although this atavistic biological process stems from our primitive ancestors (whose survival instinct allowed them to fend off wild animals), the experience of purchasing property, particularly for the novice and inexperienced, is a contemporary version of the fight/flight/freeze experience. In effect, the limbic structures are a warning system that needs to be nurtured by carefully considering and examining external evidence before making life-changing decisions on an emotional whim. Attention and memory are key components in

[15] Adam K Anderson, 'Feeling emotional: the amygdala links emotional perception and experience' (2007) 2(2) *Social cognitive and affective neuroscience* 71; Gerd Gigerenzer and Wolfgang Gaissmaier, 'Heuristics Decision Making' (2011) 62 Annual Review of Psychology 451.

the assessment of a legal agreement (contract), the next step, after an emotional commitment to buy has been engrained in one's psyche.

Common sense and science tells us that for most people, time pressure is likely to impede good decision-making performance.[16] Research has demonstrated three idiosyncratic responses to time pressured negotiation including: acceleration (of processing rate); enhanced selectivity (such as giving more weight to certain types of information); and differing combinations of strategies (e.g. simple rather than complex). Response selection (or increased impulsivity) is likely determined by how one perceives time pressure severity. For example, where time pressure feels insufferable, a decision could be evaded or result in a lower quality of evaluation. Resultantly, generating concessions, lower demands for advice/consultation, and quicker agreements, which are all later, regretted.[17] Further still, time pressure fosters prima facie cooperative behaviours perhaps obfuscating much needed and desired rigorous discussions and explorations. This evidence confirms why some many people sign a contract prior to receiving legal advice and the importance of cooling-off periods. So what happens in the best-case scenario?

Even where advice (legal or other) is provided, if contrary to expectations or likely to undermine a highly desired property purchase, susceptibility to the psychological phenomenon of escalation of commitment ensues.[18] In other words, some won't know when to pull the plug because they risk feeling like a failure (shame is a powerful determinant) particularly in situations involving social status and self-esteem. Paradoxically, humans can be locked into a certain course of action and even continue to supply more resources, such as money or obtain supportive second opinions, despite being aware of the likely negative consequences. Self-manufacturing a feeling of hope (or magical thinking) ostensibly creates a belief that a disastrous problem can actually turn around and yield a hard-fought gratification. That type of thinking is usually indicative of the escalation of commitment paradigm. How do humans overcome this problem? Awareness is critical, as we know that if we can see what the brain

[16] Alice F Stuhlmacher and Matthew V Champagne, 'The impact of time pressure and information on negotiation processes and decisions' (2000) 9 *Group Decision and Negotiation* 471.
[17] Ibid.
[18] Joel Brockner, 'The escalation of commitment to a failing course of action: Toward Theoretical Progress' (1992) 17(1) *Academy of Management* 39.

does, then we can change what the brain does (or put a different way, naming it automatically contains/tames it).[19]

The role of information – how effective are disclosure statements?

Most purchasers, uneducated in the law, are likely to experience ennui, specifically inattention, boredom or even a freeze anxiety response, when reading a property contract and disclosure documents. A sign of an unengaged mind is observed where eyes glaze over (a sort of strabismus) and pages are flicked and initialled at a mighty speed (reinforcing the desire for the reinstatement of central nervous system equilibrium, at any cost). Even when paying effortful attention, individuals can only remember about seven, plus or minus two, chunks of information in short-term memory. This famous and magical calculus, which could be overly inflated (meaning others have found four chunks might be more accurate), is further discombobulated depending on familiarity with language used.[20] This means the comprehension of a legal lexicon further attenuates attention and it's closely related cousin memory, in limited problem solving capacity for the unlearned. Complicating comprehension, in a time-pressured situation, is the yet unstudied application of sequential versus global learning styles in understanding what you have accepted and are agreeing to.[21] Sequential, meaning information is understood in linear steps allowing for connections at a slower pace. As opposed to a global learner, who will tend to solve problems quickly by seeing the bigger picture and circumventing important connections in between until later or too late. If all of these potential limitations occur in every brain, what then happens if we speed things up and enforce quick and pressured decision-making?

Seeking expert advice

In Australian culture, there is a tacit societal and behavioural norm that professionals have a moral obligation to tell the truth to their client, company, and themselves. Since our formative years, truth-telling (with varying degrees of disclosure) is absorbed as a cardinal rule for building and developing trustworthy relationships.[22] For the brain, differentiating contexts and

---

[19] Daniel Siegel, *Brainstorm: The Power and Purpose of the Teenage Brain* (Scribe Publications, 2014).

[20] George A Miller, 'The magical number seven, plus or minus two: Some limits on our capacity for information processing' (1956) 63 *Psychological Review* 81; Nelson Cowan, 'The magical number 4 in short-term memory: A reconsideration of mental storage capacity' (2000) 24 *Behavioral and Brain Sciences* 87.

[21] Richard E Felder and Barbara A Soloman, Learning Styles and Strategies http://www4.ncsu.edu/unity/lockers/users/f/felder/public/ILSdir/styles.htm

[22] David Strutton, J. Brooke Hamilton, III and James R Lumpkin, 'An Essay on What to Fully Disclose in Sales Relationships: Applying Two Practical Guidelines for Addressing Truth-Telling Problems' (1997) 16 (5) Journal of Business Ethics 545.

settings where the absolute truth is muddied (for both good and bad reasons), becomes a minefield of if/then rules. As mentioned previously, cognitive heuristics provide insight into why blind faith is proffered to lawyers and their associates (bank managers) in a property purchase. In addition to an absolute belief in the just world hypothesis, where it is assumed that good is always rewarded and evil is always punished, a plethora of cognitive heuristics have been described in psychological literature.[23] These rules of thumb help us make decisions efficiently, if we didn't use them, it would take longer amounts of time to make even the simplest decision. Similar to sentencing judges or magistrates who develop tariffs for penalties they impose on offenders. Applicable biases encountered here are likely to include: availability (how quickly other successful examples come to mind e.g. previous property purchases); anchoring (sticking to your initial impression in spite of contrary data); framing effects (decisions are made depending on how information is presented e.g. told this is a standard normal process everyone else complies with or the accepted status quo); blind obedience (people are often obsequious (and stop thinking) when confronted by authority figures (e.g. lawyers); and premature closure (several alternatives are not pursued e.g. because the emotional commitment has already occurred). The glaringly obvious problem in taking short cuts is the probability of error increasing and what, if anything, we do about it.

Optimising decision-making

It is hypothesised that the interaction between a face-to-face meeting with relevant stakeholders and improved disclosure and assessment of relevant information is likely to impede cognitive errors, ultimately resulting in a win/win situation (ongoing business, if not right now, but at some point). Other human factors such as rapport-building, relatability, fairness (sound ethical decision making) and felicitous explanations are likely to improve competent and amicable decision making.

The literature has well established that everyone learns more effectively when information is presented both visually and verbally.[24] For example, visual learners remember best by seeing pictures, diagrams, and flow charts. Whereas, verbal learners find written and spoken

[23] See for example, Gerd Gigerenzer and Wolfgang Gaissmaier, 'Heuristics Decision Making' (2011) 62 *Annual Review of Psychology* 451; Christoph Engel and Gerd Gigerenzer, 'Law and Heuristics: An interdisciplinary Venture' in Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (MIT Press, 2014).
[24] Richard E Felder and Barbara A Soloman, Learning Styles and Strategies http://www4.ncsu.edu/unity/lockers/users/f/felder/public/ILSdir/styles.htm

explanations most useful to their critical reasoning. Given that most people are visual learners it would be advantageous to have important legalise presented via this method. Further, active learners tend to retain and understand information best by discussing, applying or explaining their learnings to others. Reflective learners prefer to think about it quietly first. Everybody is both an active and reflective learner at different times. It is the combination of the two that produces the better results in comprehension and application (timeframes and method of delivery are important). In sum, the understanding of a contract and associated disclosure documents is optimal where presented verbally, visually, and actively engaged with time appropriately allocated for reflective thinking.

Although there are barriers that impede upon the value on information disclosures, they do play an important and valuable part in the purchase of a MOP. The issue perhaps is that the rationale for disclosure is flawed and misplaced. The rationale being that purchasers should be able to read and understand the information in order to make the optimal purchase decision is contrary to how purchasers are able to mentally process the information. Furthermore, even if purchasers were able to overcome some or all of the barriers identified, assessing the appropriateness and accuracy of the information would be difficult without experienced legal advice. For example, most purchasers would be unable to make an assessment of the accuracies of the levies without reviewing the budgets and understanding the condition of the commonly owned equipment and infrastructure. Taking this into account, there is a great opportunity for legal advisers, especially conveyancers, to become more informed about MOP disputes and the common issues that impact schemes and to re-structure the mechanisms used to convey advice in clients.

Part 2: Conflict of Interest Disclosures

Conflicts of interest in the MOP environment

There is no overarching definition of conflicts of interest. Scholars have been unable to agree on specific wording and the term is rarely defined in legislation. As a consequence there is this general understanding of what may constitute a conflict of interest. A well-rounded definition has been advocated by Thomas Carson:

A conflict of interest exists in any situation which an individual (I) has difficulty discharging the official (conventional / fiduciary) duties attaching to a position or office they hold because either: (i) there is (or I believes that there is) an actual or potential conflict between their own personal interests and the

interests of the party (P) to whom they owe those duties, or (ii) I has a desire to promote (or thwart) the interests of (X) (where X is an entity which has an interest) and there is (or I believes there is) an actual or potential conflict between promoting (or thwarting) X's interests and the interests of P.[25]

Considering Carson's definition, the threshold for what constitutes a conflict of interest (COI) is low[26] and captures many commercial situations and transactions where a duty bound person is confronted simultaneously with their responsibility to the duty owed and their own personal interest. In the MOP environment, many stakeholders are regularly confronted with COI situations. Committee members, developers, managers and lawyers all grapple with conflicts of interest.

The Legal Position by Jurisdiction[27]

Most of the legislation regulating this area has focused on conflicts of interest arising by committee members. As the laws are reformed, there is more emphasis on other stakeholders particularly developers, body corporate and resident managers.

Queensland:

Although there is no definition of conflicts of interest in the legislation, committee members (including proxy holders) must disclose and refrain from voting on a motion involving the conflict.

Section 53 of the *Body Corporate and Community Management (Standard Module) Regulation 2008* provides that:

> (1) A member of the committee must disclose to a meeting of the committee the member's direct or indirect interest in an issue being considered, or about to be considered, by the committee if the interest could conflict with the appropriate performance of the member's duties about the consideration of the issue.

[25] Thomas L Carson, 'Conflicts of Interest' (1944) 13 *Journal of Business Ethics* 387, 388.

[26] Nicole Johnston, An examination of how conflicts of interest detract from developers upholding governance responsibilities in the transition phase of multi-owned developments: a grounded theory approach (PhD Thesis, Griffith University, 2016).

[27] Although we acknowledge the role of fiduciary duties in conflict of interest situations, for the purpose of this paper we have chosen to focus on legislative provisions only.

(2) If a member required under subsection (1) to disclose an interest in an issue is a voting member, the member is not entitled to vote on a motion involving the issue.

There is also a provision excluding managers and caretakers from accepting an engagement from another scheme if their duties or interests conflict with the original scheme's interests.[28]

New South Wales:

Under the recent NSW reforms, a committee member must also disclose and refrain from voting however, the interest relates only to a pecuniary interest. It is unclear whether the provision was intended to include only financial interests or other material benefits.

Schedule 2, clause 18 of the *Strata Schemes Management Act 2015* provides that:

(1) If:

(a) a member of a strata committee has a direct or indirect pecuniary interest in a matter being considered or about to be considered at a meeting, and

(b) the interest appears to raise a conflict with the proper performance of the member's duties in relation to the consideration of the matter, the member must, as soon as possible after the relevant facts have come to the member's knowledge, disclose the nature of the interest at a meeting of the strata committee.

Maximum penalty: 10 penalty units.

(4) After a member has disclosed the nature of an interest in any matter, the member must not, unless the strata committee otherwise determines:

(a) be present during any deliberation of the strata committee with respect to the matter, or

(b) take part in any decision of the strata committee with respect to the matter.

(7) Without limiting subclause (1), a person has an indirect pecuniary interest in a matter if a person connected with the person has a direct interest in the matter.

There is also a provision excluding developers and leasehold lessors from voting on matters concerning building defects.[29]

[28] *Body Corporate and Community Management Act 1997*, Code of conduct for body corporate managers and caretaking service contractors, Sch 2 cl 9.
[29] *Strata Schemes Management Act 2015* (NSW) s 15.

Victoria:

Arguably, Victoria has the most stringent conflict of interest provision relating to committee members. There is an overarching duty to avoid conflicts of interest.

Section 117 (c) of the *Owners Corporation Act 2006* provides that:

> A member of a committee or sub-committee of an owners corporation—must not make improper use of his or her position as a member to gain, directly or indirectly, an advantage for himself or herself or for any other person.

Western Australia:

It appears likely that the new laws will require committee members to inform the strata council of any conflicts of interest. It is unclear whether there will be an obligation to refrain from voting on the decision. Both managers and developers will have more onerous obligations in respect to conflicts of interest. Managers will need to disclose any financial benefits that arise including commissions.[30] Developers must disclose any commissions relating to service contracts entered into on behalf of the strata company.[31]

The Lawyers

The Australian Solicitors' Conduct Rules have been adopted in South Australia, Queensland, Victoria, New South Wales and the Australian Capital Territory.[32] The rules were made under the *Legal Profession Uniform Law* to assist lawyers to act ethically. In relation to conflicts of interest, there are separate rules for situations relating to former clients, current clients, and the lawyer's own interests. Although there are overarching avoidance rules, there are many exemptions. In relation to conflicts concerning current clients, disclosure and consent from both clients negates the avoidance provision. If the conflict also relates to confidential information, disclosure, consent and an effective information barrier is sufficient to overcome the conflict.[33] In relation to conflicts concerning the lawyer's self-interest, a lawyer can overcome the avoidance provision regarding 3rd party referrals by disclosing the commission or benefit and obtaining the client's consent.[34]

---

[30] Ibid.
[31] Ibid.
[32] Law Council of Australia, *Australian Solicitors Conduct Rules* (24 August 2015) https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf.
[33] Ibid Rule 11.
[34] Ibid Rule 12.

Denial, Avoidance and Management of COIs

As highlighted above, there are various legal mechanisms that can be adopted when dealing with conflicts of interest. However, the starting point is the acknowledgement that a COI exists. When confronted with a potential COI situation, a duty bound person can either accept or deny the existence of the COI. Once they accept that there is a conflict (whether potential or actual), the situation can be avoided (opting out of participating in the situation) or managed.

One approach to combat COIs would be to simply prohibit duty bound people from committing COIs. It is evident that in some areas of the MOP law, certain activities that have the potential to result in a greater level of harm have been prohibited. However, not all COI situations lead to the same level of harm or harm at all. Presumably, legislatures are of the view that most COI situations can be managed to minimise any harmful effects. The most frequently used mechanism to manage COIs are information disclosures.

Disclosure is an easy mechanism as it requires limited substantive change. It works well in an environment predicated on the belief that conflicts of interest are unavoidable.

> Disclosure, it seems, promises something for everyone. To professions facing conflicts of interest, disclosure promises minimal disruption from the status quo; it does not require professionals to sever financial relationships or change how they get paid. To regulators and policy makers, disclosure absolves them of some of their responsibility to limit market exploitation by transferring to advice receivers the responsibility of looking out for themselves. And to advice receivers, disclosure promises to give them the tools they need to look out for their own interests.[35]

Disclosure is seen as the ultimate panacea for COIs. Theoretically, disclosure creates a level playing field whereby the duty owed person upon receiving information about the conflicted interest can discount the information or advice to the extent that it appears contaminated. The information serving as an alert, warning the duty owed to discount the advice appropriately in

[35] Daylian M Cain, George Loewenstein and Don A Moore, 'Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest in Don Moore et al (eds), *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (Cambridge University Press, 2010) 108.

order for a better judgement and decision to be made. The theory aligns well with the rational choice theory.

However, numerous empirical studies have been undertaken on the effectiveness of disclosure in COI situations. Although not in the MOP context, the general conclusion is that "disclosure cannot generally be assumed to be an effective solution for the problems created by conflicts of interest; it may even make matter worse."[36] The reason why disclosure may not be an effective mechanism is that people tend to have difficulties adjusting their beliefs once a COI is disclosed and duty bound people may be unable to act outside their self-interest or may give more biased advice to compensate for the disclosure.

The psychology of disclosing a COI – perspective of duty owed

It is assumed that disclosure automatically alerts the duty owed person to the conflicted interest and in return the duty owed person is able to discount the advice or information provided by the duty bound person to the extent that an optimal decision will be made. Unfortunately, this assumption does not consider how a person mentally processes the biased information. Studies have shown that people have difficulty in judgemental correction, that they fail to discredit or unlearn false and misleading information and there is a correspondence bias.

Difficulty of judgemental correction

In order for a duty owed person to evaluate and discount corrupted or biased information, preconditions must be met. The person must be motivated enough to make correct judgements, they must be aware of the potentially distorting influence, and they must have an understanding of the direction and magnitude of the influence.[37] These preconditions are however rarely met. Estimating or calculating the magnitude of the bias is extremely difficult. That is, it is difficult to determine the effect that the conflict of interest has in any given situation. Although it might be apparent that caution should be taken, there is uncertainty around how much a person needs to be cautious.

[36] Ibid 105.
[37] Ibid.

Failure of evidentiary discreditation

Even when people are given clear instructions to discredit or discount information, people have trouble unlearning false or misleading information.[38] People continue to be influenced by discredited information and over time, the false information can become believable. That is, unreliable information may lose its efficacy over time such that the source is forgotten.[39]

Lay dispositionism and the representativeness heuristic

The known character or disposition of the duty bound party plays a role in how the duty owed person responds to disclosed information. "[P]eople have a tendency to assume that behavioural outcomes are representative of the dispositions and character of the individuals who commit them, underplaying the role that the situation had in determining the behaviour."[40] The disclosure of a COI by a duty-bound person who is considered or perceived as ethical and upstanding may have little or no impact on the decision being made. Trust in the duty bound person plays an important role. If the party with the conflicted interest appears candid and honest then disclosure may serve as an assurance of trustworthiness. As a result biased information may be ignored.

The Psychology of disclosing a COI – the duty bound

At the centre of any COI is the question whether those owing duties are able to set aside their own self-interest for the benefit of others. Many professionals will argue that they have the ability, once confronted with a situation where they may benefit, to act solely in the interests of another. Believing you are an ethical person may not be enough to eliminate acting in a self-interested manner.

Disabling self-interest: can it happen?

Business standards require truth-telling only to the extent of compliance with the law and where it obviates unfavourable public opinion (moral turpitude). The conflict between absolute truth

[38] Ibid.
[39] Ibid.
[40] Ibid 113.

telling and realistic selling behaviours is a grey area non-immune to an ethical slippery slope.[41] Ethical slippery slopes can seem ambiguous, ill-defined, rapidly unfolding, novel, complex and often lacking a single solution path.[42] As a consequence, and with no decision-making stepwise model and enforceable regulatory authority, the power of reward will drive insidious behaviour. History has repeatedly demonstrated that rewards or the anticipation of rewards, specifically money and/or power, are the key determinant variables in behaving ethically or unethically.[43] To determine if it will be worth it, humans engage in a risk/reward calculation, where risk is contemplated from detection through to anticipated punishment, and reward derived from the likelihood of accumulated benefits. Some risks will be evaluated as simply not worth taking because cheating someone of knowledge or another resource could result in a negative self-image and poor reputation that sticks in long-term memory. Others will encounter a self-serving bias.[44] This approach occurs where we stand to make a (substantial) gain from reaching a certain conclusion that we unknowingly assimilate evidence in a way that favours that conclusion (undue influence). Even more problematic is the myopic blind spot bias that often follows the discovery and awareness of a self-interest exposure. Paradoxically, such exposure makes us feel more confident in our own judgement in seeing self-serving biases in others rather than ourselves.[45] It would be remiss not to highlight here, that just as a purchaser is unconsciously prone to amygdalae dysregulation (as overviewed earlier) so too are all humans, even those performing professional roles, such as lawyers or managers. In other words, emotional influences, not always rational and heuristically error prone, limit all stakeholders' capacity to respond with neutrality.

Furthermore, studies have shown that duty bound people give more biased advice after disclosing a COI.[46] Disclosure can compound the problem due to strategic exaggeration and moral licensing. Strategic exaggeration occurs when a person fears that the disclosure will lead

[41] David Strutton, J. Brooke Hamilton, III and James R Lumpkin, 'An Essay on What to Fully Disclose in Sales Relationships: Applying Two Practical Guidelines for Addressing Truth-Telling Problems' (1997) 16 (5) *Journal of Business Ethics* 545.
[42] Minna-Maaria Hiekkataipale and Anna-Maija Lämsä. 'What should a manager like me do in a situation like this? Strategies for handling ethical problems from the viewpoint of the logic of appropriateness' (2017) *Journal of Business Ethics* 145(3) (2017) 457.
[43] Diana C Robertson, Christian Voegtlin and Thomas Maak, 'Business Ethics: The Promise of Neuroscience' (2016) 144(4) Journal of Business Ethics 679.
[44] Jason Dana, 'How psychological research can inform policies for dealing with conflict of interest in medicine' in Marilyn Field and Barnard Lo (eds), Conflict of interest in medical research, education, and practice (National Academies Press, 2009) 358.
[45] Ibid.
[46] Daylian M Cain, George Loewenstein and Don A Moore, above n 33.

to the advice or information being discounted and in order to counteract the effect, they compensate by further skewing the advice.[47] Moral licensing is the subconscious phenomenon whereby increased confidence and security in one's own self-image tends to make that individual worry less about consequences of subsequent immoral behaviour and therefore more likely to make immoral choices and act immorally, in other words selfishness.

The use of disclosure as the main mechanism to combat conflicts of interest is at odds with how humans digest (mentally) such information. Duty owed people are unable to easily discount conflicted information due to a variety of factors. Furthermore, duty bound people are unable to easily act in a manner that does not serve their self-interest. A further compounding factor is mental processing is automatic and unconscious. We are simply unable to make neutral judgements not because we are not ethical but because our mental processing makes it difficult.

The role of codes of practice

It is argued that unethical behaviour is stymied when adherence to a code /oath is transparently policed by superiors, peers, and public opinion in a systematized and fair way. For a case in point, the medical profession is paramount in illustrating how the demand for ethical behaviour has accorded since its inception. For medical practitioners and allied health professionals protecting the public is a sine qua non. Non-maleficence and beneficence infiltrate decision making at all times and is open to robust critical evaluation and (severe and shame-based) legal punishments by the regulatory body (Australian Health Practitioner Regulation Agency) or health practitioner ombudsman (depending on jurisdiction). Ethical decision-making frameworks are not arbitrary but deeply rooted and ineluctable in the helping professionals' education, training, protocol, governance (at work and by the Board), and culture. Moral concepts such as respect (informed consent), propriety (professional responsibility), and integrity (multiple roles/conflict of interest) are well reflected, examined, and applied via case studies prior to real-life experience and explored at work via a supervisory arrangement.[48] Notification of deviating or pernicious behaviour, even when potentially vexatious, is not only taken seriously and acted upon but actively promoted through various channels including by the practitioner themselves (for example, a client charter providing a complaints phone number

[47] Ibid.
[48] The Australian Psychological Society, *Code of Ethics* (2007) https://www.psychology.org.au/getmedia/67370669-e701-4b1d-9ef9-c5b8e0011da8/Code-of-Ethics-APS.pdf

is commonly visible on practice walls). In other words, dealing with the feeling of always being on notice in clinical and ethical decision-making is the status quo and a shared experience. Given the proportionately low number of practitioners investigated and incriminated after notification, it is logical to conclude disciplinary actions by powerful regulatory bodies serve to dissuade the majority from employing unhanded behaviours. A further deterrent is that under certain conditions, a misconduct record is publishable to the public, likely to prejudice further irreverence, and opprobrium. A propensity for taking the high road is of course, not without disagreement and the medical/allied health professions are not without fault or questionability but certainly, offer a traditional framework (guide) applicable to other professional industry. In the MOP context, lawyers are the only professional group that must follow a code of conduct in relation to ethical behaviour. Although Queensland provides a code of conduct for committee members and managers in the *Body Corporate and Community Management Act 1997*, the punishments for breaching the code are not severe nor generally enforced. Developers, arguably the most problematic group when it comes to COIs,[49]do not need to adhere to a specific ethical code of conduct.

Part 3: Collaboration Opportunities - from Exclusion to Inclusion

The MOP environment is highly regulated particularly in relation to the management and governance of schemes. The federal system of government in Australia has enabled disparate laws to be enacted in each jurisdiction. Although some areas of the law have been better aligned cross-jurisdictionally, laws regulating MOPs and their accompanying bodies corporate lack consistency in many areas. The various terms used in each of the jurisdictions to describe this property type and the governing entity is but one example.[50]

At this time of writing this paper, the regulatory environment relating to MOPs is in many jurisdictions in a state of flux. New South Wales has recently completed an extensive review of the MOP laws and implemented a number of changes. The States of Victoria, Queensland and Western Australia are currently in the process of reforming the law in this area. The MOP environment is not stagnate and law reform is needed to ensure the law is updated, improved

[49] Above n 24.
[50] Examples of terms used in Australia: Strata title, community title, subdivision with an owners corporation, unit title, body corporate, strata council, owners corporation, association.

and developed as new technologies and new building designs emerge and more people integrate in this property type.

However, in order to ensure effective reforms, we need to consider and invest in applied empirical research rather than relying purely on anecdotal stakeholder evidence and theoretical understandings. Interdisciplinary empirical research has the potential to lead to greater and more consistent reforms. We need to stop just theorising and start applying theories empirically to the given context, being MOPs.

Conclusion and future direction

In a demand driven market, the typical property buyer does not undertake extensive due diligence, process all available information, and seek expert advice when making an informed decision whether to purchase or not. The reality is that buyers of property are emotional, adopting error-prone mental shortcuts, and are influenced by time pressures which impede good decision-making. Although disclosures are often used by policymakers as a mechanism to aid in decision-making, the bombardment of written information may have the opposite effect. Detailed disclosures in particular may have a place, if the buyer is prudent enough to seek the assistance of a legal adviser, prior to signing a contract, who has the expertise to advise on MOPs and who can tailor advice in such a way that the different learning styles are considered.

In relation to COIs, the law either prohibits activities that may lead to a COI or uses mechanisms, like disclosure, to manage them. As noted in this paper, disclosure may be an ineffective mechanism in the management of COIs. For stakeholders confronted with COIs, all attempts should be made to avoid the conflict even if there is a law or rule that provides for the management of the conflicted interest. Disclosing is not necessarily a panacea for managing COIs. The conflicted interest remains, whether disclosed or not, and the effects may be just as corrosive. Irrespective of the law, COIs are an ethical issue for all duty bound persons. Stakeholders need to consider the impact of their actions before involvement in a situation.

Although this paper has offered theoretical insights, investment in empirical research should be a priority in order to fully understand the phenomenon being regulated. In the MOP context, empirical research could be undertaken to better understand: the role of pressurised selling in

purchasing decisions; purchaser regret; the level and type of information that is understood by MOP purchasers; the impact that codes of practice have on stakeholders confronted with COIs; the nature and effects of COIs etc. Pre and post testing of purchasers and the use of eye tracking technologies could be utilised in this area.

The law, and those reforming the law need to not only consider the virtues of other social science disciplines, like psychology, but also empirically test theories in given contexts, like MOPs.