Consumer Property Law Review

Sale of land and business: options for reform

consumer.vic.gov.au

CONSUMER AFFAIRS VICTORIA

About the Consumer Property Law Review

The Consumer Property Law Review (the review) is examining four key pieces of consumer property legislation: the *Sale of Land Act 1962* (Sale of Land Act), the *Estate Agents Act 1980* (Estate Agents Act), the *Conveyancers Act 2006* (Conveyancers Act) and the *Owners Corporations Act 2006* (Owners Corporations Act).

The terms of reference for the review are to:

- assess the four Acts to identify improvements that could be made to the legislation, having regard to the experiences of stakeholders and to developments that have taken place since each of the Acts came into operation
- examine the efficiency and effectiveness of the regulatory arrangements governing the conduct of licensed practitioners involved in the sale of land, real estate transactions and the management of owners corporations
- recommend necessary amendments to improve the operation of the legislative arrangements set in place by these Acts.

Opportunities to modernise and improve the legislation will also be considered.

Between December 2015 and April 2016, Consumer Affairs Victoria (CAV) released three issues papers, which covered:

- licensing and conduct of estate agents, conveyancers and owners corporation managers, and the institutional and regulatory arrangements that govern those licensing schemes (Issues Paper 1)
- the creation, functions, and operation of owners corporations (Issues Paper 2)
- the sale of land and business, specifically issues identified with the Sale of Land Act, including pre-contractual issues and contracts of sale (Issues Paper 3).

The issues papers did not attempt to provide data or evidence to substantiate the existence of issues raised. Rather, the purpose of the papers was to draw out evidence and commentary from stakeholders about the nature of the issues and extent of any problems.

Options for reform of the Owners Corporations Act were released for public consultation in November 2016. The options identified responded to feedback on Part B of Issues Paper 1 and on Issues Paper 2. That options paper received 100 submissions, which are currently being considered.

Feedback on Issues Paper 3 has informed the development of this options paper. Issues Paper 3 received nearly 40 submissions, the most detailed of which were from legal firms, industry representatives, and consumer organisations. This options paper was also informed by a roundtable of stakeholders with expertise in terms contracts and rent-to-buy arrangements, held in conjunction with the Consumer Action Law Centre.

An options paper covering possible reforms to the Estate Agents Act and Conveyancers Act will also be released for public consultation shortly.

Submissions received on all the options papers released as part of the Consumer Property Law Review will inform the government in determining the final suite of legislative reforms. Proposals for amendments to the Sale of Land Act, Estate Agents Act, Conveyancers Act and Owners Corporation Act are planned to be considered by Parliament in 2018.

How to get involved?

We invite your views and comments on the options outlined in this paper.

Until **Friday 28 April 2017** you can make a submission:

By mail:

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

By email:

consumerpropertylawreview@justice.vic.gov.au

Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process. Submissions may be subject to Freedom of Information and other laws. CAV reserves the right to not publish information that could be seen to be defamatory or discriminatory.

Glossary

ACL	Australian Consumer Law
CAV	Consumer Affairs Victoria
LIV	Law Institute of Victoria
REIV	Real Estate Institute of Victoria
VCAT	Victorian Civil and Administrative Tribunal

Contents

Executive summary

This paper responds to submissions received on Issues Paper 3: Sale of Land and Business, released during 2016 as part of the Consumer Property Law Review.

The majority of submissions received in response to Issues Paper 3 focused on changes that could be made to improve the operation of the Sale of Land Act. The overall impression gained from submissions is that stakeholders consider the Act to be fundamentally sound, but needs modernising and some targeted reforms.

To reflect this feedback, this paper presents a package of reform options, which aim to:

- deliver a modern, fit-for-purpose, proportionate approach to sale of land regulation
- ensure the rights of both buyers and sellers are fair and appropriate
- strengthen regulation where there are risks of market failure or consumer detriment
- improve the effectiveness of penalties under the Sale of Land Act.

While submissions raised relatively few serious issues, there were some areas of concern. The most notable issues relate to rent-to-buy arrangements and terms contracts in residential settings. These are high risk arrangements, which can cause significant detriment to vulnerable buyers and sellers. Concerns were also raised about the insertion of special conditions into contracts, the potential risks associated with online auctions, and the early release of deposit moneys.

Options have been identified in the following areas:

- pre-sale disclosure
- offences relating to misleading and deceptive conduct across the Sale of Land Act and Estate Agents Act
- auctions of land
- regulating the content of contracts of sale, including general and special conditions, and the role of estate agents in relation to these contracts
- early release of deposits
- off-the-plan sales
- terms contracts and rent-to-buy arrangements
- land banking
- small business statements and other protections in the Estate Agents Act
- modernisation of the Sale of Land Act
- dispute resolution, and offences and remedies.

For many issues, alternative options are presented. In cases where only one approach is considered feasible, a stand-alone option is presented.

Feedback is sought on these options, and on any related questions that have been included. It would also be helpful for any unintended consequences to be identified. If the status quo is preferred on any issue, views are sought on the rationale for that position. Evidence that supports or refutes a particular option or position would be particularly welcomed.

There are some issues that were canvassed in Issues Paper 3 for which no options have been developed. This is generally because, on balance, regulatory reform does not appear to be justified or, put another way, a case for change has not been made. However, where stakeholders identified potential technical and drafting improvements, these have been noted and may be considered further.

List of options and consultation questions

Pre-sale disclosure

Option 1 – Improve pre-sale disclosures by requiring reasonable estimates of financial liabilities for off-the-plan sales, and ensuring material facts about a property for sale are disclosed appropriately to prospective buyers

1 Are there any material obstacles to a seller complying with the proposed pre-sale requirement to provide prospective buyers with an estimate of financial liabilities applying to a lot in an off-the-plan sale?

2 What should be the consequences for sellers who fail to provide reasonable estimates of financial liabilities? For example, should buyers be entitled to compensation?

Misleading and deceptive statements about land for sale

Option 2 – Retain offences in the Sale of Land Act and Estate Agents Act relating to specific types of conduct but, where appropriate, consolidate those offences into the Sale of Land Act and review and update penalties

Auctions

Option 3 – Clarify the law relating to online auctions, and develop specific additional regulation where necessary

3 What additional requirements, if any, might be appropriate for online auctions, and why? Should there be a requirement to verify the identity of bidders in online auctions prior to commencement, for example?

Option 4 – Introduce reforms to prohibit or limit the conduct of auctions on ANZAC Day

Contract for sale

Option 5A – Retain the standard form contract of sale prescribed in the Estate Agents (Contracts) Regulations 2008, and clarify (by regulatory or non-regulatory means) what constitutes 'filling up' a contract by estate agents

Option 5B – Repeal provisions for the prescribed standard form contract of sale, and clarify what constitutes 'filling up' a contract by estate agents

Option 5C – Repeal the prescribed standard form contract, but prescribe a minimum set of general conditions for inclusion in any contract for residential property sales; and clarify what constitutes 'filling up' a contract by estate agents

4 What are the benefits and risks of options 5A, 5B and 5C relating to standard form contracts of sale? For example, could repealing the prescribed standard form contract of sale result in an increase in the cost of the standard form contract prepared and endorsed by professional bodies?

5 If option 5C was adopted, what general conditions might be appropriate to apply to all real estate contracts, industry wide, without modification? Are there any circumstances in which it would be appropriate to negotiate every aspect of a real estate contract (with commercially sophisticated parties, for example)?

Deposit moneys

Option 6A – Repeal the process for early release of deposits under section 27

Option 6B – Retain early release of deposit moneys, but with amendments to improve and clarify the operation of these provisions

6 If early release of deposits was abolished, what would be an appropriate length of time to transition to the new arrangements, and why?

7 In relation to option 6B:

(a) Are there any additional or alternative amendments that would improve the operation of section 27?

(b) What are the strengths and weaknesses of the proposal that any property with a caveat over it (with the exception of a purchaser's caveat) should be precluded from early release of the deposit?

Off-the-plan sales

Option 7A – Modernise provisions relating to off-the-plan sales, with some improved protections for buyers and sellers

Option 7B – Modernise provisions relating to off-the-plan sales with improved protections for buyers and sellers, as with option 7A, and increase the deposit cap to 20 per cent for investors purchasing off-the-plan sales

8 In relation to option 7A, what might be an appropriate timeframe for a buyer to end an off-the-plan sale after being advised of an amendment to the plan of subdivision?

9 In relation to option 7B:

(a) Can you identify any impacts of increasing the deposit cap to 20 per cent for investors on owner-occupiers buying off-the-plan property?

(b) What should be the penalty for a developer who accepts a deposit of more than 10 per cent from an owner-occupier buyer of property?

(c) To what extent would increasing the deposit cap to 20 per cent for investors increase the ability of developers to raise finance for the development?

Terms contracts and rent-to-buy arrangements

Option 8 – Prohibit all rent-to-buy arrangements, and the use of terms contracts for residential home ownership sales

10 Are there potential risks with prohibiting all rent-to-buy arrangements and the use of terms contracts for residential property sales, and how might they be mitigated?

11 Should commercial property sales be exempt from any of the terms contract provisions in the Sale of Land Act? If so, which provisions and on what basis?

Land banking

Option 9 – Amend the Sale of Land Act to require that moneys paid to buy an 'option' to purchase land in the future be held in trust and the right to exercise the option be limited as to time

12 Does this option address the key risks of land banking schemes for buyers? If not, what other protections should be considered?

13 What should be the time limit on the duration of an option agreement?

14 Can you identify any unintended consequences of proceeding with this option?

Sale of land and business protections within the Estate Agents Act

Option 10 – Relocate small business statement provisions to the Sale of Land Act, and review to ensure information in the statement is relevant and meaningful

15 If this option is adopted, how might the small business statement be improved to make it relevant and useful to buyers, while being reasonable for a seller to prepare?

16 Should requirements to provide a small business statement continue to apply only for businesses valued at up to $350,000? If not, what threshold would be more appropriate?

17 Are there any risks of unintended consequences associated with relocating provisions for the small business statement into the Sale of Land Act?

Option 11 – Generalise requirements to provide financial statements so they apply to any person selling land who makes a promise about finance, and relocate these provisions to the Sale of Land Act

18 Are there any alternative ways of ensuring buyers are well-informed about representations about finance made by estate agents, builders, or other people involved in the sale of land?

19 Are there any risks associated with relocating these provisions into the Sale of Land Act, and broadening their application to any person selling land who makes promises with respect to finance? If so, how might these risks be addressed?

Modernisation of the Sale of Land Act

Option 12 – Modernise the Sale of Land Act and improve its readability and operation

20 Are there any potentially redundant or out of date provisions in the Sale of Land Act that should be considered for repeal or amendment?

Dispute resolution

Option 13A – Retain arbitration, but extend VCAT's jurisdiction for some minor disputes

Option 13B – Remove arbitration and extend VCAT's jurisdiction for some minor disputes

21 What would be the advantages and disadvantages of expanding VCAT's jurisdiction to consider a range of minor disputes under the Sale of Land Act?

22 What might constitute a 'minor dispute' under the Sale of Land Act capable of being resolved by VCAT?

Offences and remedies

Option 14 – Address inconsistencies in terminology relating to remedies under the Sale of Land Act and consider expanding the circumstances under which a seller may argue 'honest and reasonable mistake' as a defence

23 Can you provide examples of specific provisions in the Sale of Land Act under which a seller should be able to argue honest and reasonable mistake as a defence to a breach in the circumstances described in option 14?

Option 15 – Retain offences and review penalties

Part A: Sale of land process

This chapter sets out stakeholder feedback in relation to different stages of the sale of land process. Options are presented in the following areas:

- pre-sale disclosures relating to financial information about off-the-plan sales, and material facts about land for sale
- misleading and deceptive statements about land for sale
- regulation of online auctions
- holding auctions on ANZAC Day
- contracts of sale
- early release of deposit moneys.

No reform options are proposed in the areas of cooling-off or damage to land or buildings before sales are completed, because stakeholder feedback did not establish widespread concern, or an evidence base for reform.

1 Before signing a contract of sale

1.1 Pre-sale information

Issues

The Issues Paper asked about the effectiveness of current disclosure requirements relating to items of pre-sale information: due diligence checklists, presence of infrastructure under the land, and financial information for off-the-plan sales. It also invited feedback on suggestions that sellers should be required to provide potential buyers with a building and pest inspection report.

Submissions indicated that, in relation to some of these matters, existing disclosure requirements before a contract of sale is signed are adequate. However, there was feedback that improvements could be made regarding pre-sale financial disclosures about off-the-plan sales.

During the course of the review, it was also suggested that pre-sale disclosure of certain ‘material facts’ about a property, such as violent crimes having been committed on the property, would be beneficial to prospective buyers.

Stand-alone option

- **Option 1 –** Improve pre-sale disclosure by requiring reasonable estimates of financial liabilities for off-the-plan sales, and ensuring material facts about a property for sale are disclosed appropriately to prospective buyers

Background

The Issues Paper sought views on the pre-contractual information stage of the sale of land process, and whether improvements could be made to help minimise post-sale disputes.

Views were also sought on approaches and offences relating to misleading and deceptive statements about land for sale. This is discussed further in section 1.2 below.

Stakeholder feedback

Financial disclosure about off-the-plan sales

There were mixed views about pre-sale financial disclosures in relation to off-the-plan sales. Some stakeholders said this is not an area that requires amendment, while others indicated that disclosure could be improved.

It was noted that it is difficult for developers to provide the financial information required by section 32 of the Sale of Land Act in relation to lots that have not yet been registered. Some stakeholders suggested that amendments could be made to require sellers to provide a reasonable estimate of anticipated total fees or likely future costs for each lot (including, for example, preliminary estimates of owners corporation fees). Other suggestions included providing details about how financial estimates have been made, providing a warning that there will be new rates and other charges once the plan of subdivision has been registered, and providing evidence of the 'best quotes' associated with owners corporation fees.

Other pre-sale disclosure requirements

There was little support for including further information about water infrastructure, over and above what is already required as part of the section 32 statement. It was suggested that this could be a difficult area to regulate, and that potential buyers who are concerned about this should conduct their own due diligence.

Responses in relation to the due diligence checklist were contrasting. Some stakeholders said this has been effective in increasing buyers' awareness of the need to make their own enquiries, while others found it ineffective. The main concern was that the checklist is often made available with the section 32 statement, which occurs too late in the sale process to be of maximum value to prospective buyers.

This appears to be an issue with practice, rather than the regulation. The Sale of Land Act is clear that sellers or their estate agent must make the due diligence checklist available *to any prospective purchaser from the time the land is offered for sale*.[1] This can be done by displaying or offering the checklist during inspections, and providing access on a website where the land is offered for sale. CAV will work with stakeholders to ensure these obligations are being interpreted and applied correctly.

Introduction of mandatory building and pest inspection reports

There was mixed feedback on pre-purchase building and pest inspection reports. A few stakeholders saw merit in sellers providing these reports in certain circumstances, such as for properties sold at auction, without builder's insurance, or managed by owners corporations. However, the general consensus was that inspection reports should not be mandatory.

As noted in the Issues Paper, there are risks and issues associated with mandating the disclosure or provision of property reports by sellers. These relate to:

- how to ensure the integrity and independence of the reports, so they can be relied on by buyers
- circumstances where having an inspection report is likely to be of little value to purchasers, such as for new houses that are under warranty or properties facing demolition
- a buyer's ability to take action against a seller or independent inspector for errors in the report, and whether there should be explicit rights to take action
- the costs of establishing and running a monitoring and enforcement regime for inspectors, along with additional costs for training, certification, and professional indemnity insurance.

Stakeholders made few suggestions on how these issues and risks might be overcome, other than excluding certain properties from any new requirements. Rather, several stakeholders highlighted concerns about introducing requirements for building and pest inspection reports, including:

- the cost implications for sellers associated with obtaining the reports
- the potential to generate litigation, if buyers relied on these reports and defects were found later
- that reports often contain numerous disclaimers, and the quality is not always good
- that most buyers would want their own independent report, rather than one that has been prepared for the seller.

In light of stakeholder feedback, and in the absence of a clear case for regulatory intervention, specific reform options have not been developed at this point.

1 Section 33B of the *Sale of Land Act 1962*.

Other issues

After the Issues Paper was released, another issue arose relating to pre-sale disclosure. Concerns were expressed that the Sale of Land Act may not go far enough to ensuring pre-sale disclosure by agents and sellers of material facts affecting the property, such as violent crimes or other unlawful activities that have occurred on the property. These can be matters that are not easily ascertained by a prospective buyer through independent inquiry or inspection, but might affect a decision to purchase the property.

It is an offence under the Sale of Land Act for any person, with the intention of inducing a person to buy a property, to make any misleading or deceptive statements about the property, or fraudulently conceal any material facts about the property.[2] However, as drafted, this offence arguably does not go far enough to ensure that estate agents and others engaged in the sale of property have a legal obligation to disclose to prospective buyers material facts about a property (that is, facts that would be important to a reasonable person in deciding whether or not to proceed with a particular transaction).

The following option for reform in the areas of disclosure of material facts, and financial information about off-the-plan sales, is presented for feedback.

Option 1 – Improve pre-sale disclosures by requiring reasonable estimates of financial liabilities for off-the-plan sales, and ensuring material facts about a property for sale are disclosed appropriately to prospective buyers

Under this option, there would be specific requirements for sellers of off-the-plan properties to provide buyers with pre-sale information about the estimated future costs associated with the property following registration of a plan of subdivision, including rates, charges, and owners corporation fees.

This aspect of the option reflects stakeholder feedback that pre-sale financial disclosures relating to off-the-plan sales could be improved, while also acknowledging that a seller will be unable to provide accurate figures before a plan of subdivision has been registered.

Appropriate caveats could accompany this requirement; for example, requiring that the estimates of financial liabilities be based on costs at the time the contract is entered into. It would be a defence against allegations of 'unreasonable' estimates having been provided, where the seller has used due care and diligence in determining the estimates.

This option also proposes amendments to ensure material facts about a property for sale are disclosed to a buyer.

As noted above, in Victoria, it is an offence under the Sale of Land Act for any person, with the intention of inducing any person to buy any land, to fraudulently conceal any material facts. This option proposes removing the requirement that there be an element of fraud in any concealment of material facts. The penalty for this offence would also be reviewed. This aligns with the regulatory approach to this issue adopted in New South Wales, though in Victoria the offence would continue to apply to any person, not just to licensed persons (that is, estate agents) as is the case in New South Wales.

As with the approach taken in New South Wales, guidelines could be developed to assist people in determining what might be a material fact. This could include, for example, matters that may attach a psychological stigma to the property, and that might affect the extent to which a person feels comfortable inhabiting the property, as well as its value.

Questions

1 Are there any material obstacles to a seller complying with the proposed pre-sale requirement to provide prospective buyers with an estimate of financial liabilities applying to a lot in an off-the-plan sale?

2 What should be the consequences for sellers who fail to provide reasonable estimates of financial liabilities? For example, should buyers be entitled to compensation?

2 Section 12 of the *Sale of Land Act 1962*

1.2 Misleading and deceptive statements about land for sale

Issues

The Sale of Land Act, the Estate Agents Act and the Australian Consumer Law all address misleading and deceptive conduct.

The offences in the Sale of Land Act and the Estate Agents Act identify and seek to address specific areas of risk in the industry, while the Australian Consumer Law is limited to misleading or deceptive conduct in trade or commerce. Therefore, alone, the ACL would potentially not capture all scenarios in which misleading and deceptive conduct may arise in the sale of land.

Stakeholders acknowledged there may be areas of overlap and inconsistency between the three Acts, but generally favoured retaining offences in the Sale of Land Act and Estate Agents Act.

Stand-alone option

- **Option 2 –** Retain offences in the Sale of Land Act and Estate Agents Act relating to specific types of conduct but, where appropriate, consolidate those offences into the Sale of Land Act and review and update penalties

Background

It is unlawful to misrepresent a property in any way when advertising it. The Australian Consumer Law broadly prohibits false or misleading representations about the sale of land in trade or commerce. Breaches of these obligations can lead to substantial fines of over $1 million for companies and $220,000 for individuals.[3]

The Sale of Land Act establishes a number of specific offences relating to making or publishing misleading or deceptive statements, representations, promises or forecasts about land for sale.

The Estate Agents Act includes specific offences relating to the making or publishing of false or misleading statements, representations and advertisements by estate agents.

The Issues Paper sought views on the approach required to deter misleading and deceptive conduct during the sale of land. It asked whether, in light of the general Australian Consumer Law offences, there is still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act and the Sale of Land Act.

Stakeholder feedback

Stakeholders acknowledged that misleading and deceptive conduct would always be an issue and appropriate deterrents were required.

Stakeholders also acknowledged the value of the Australian Consumer Law as a means to address misleading and deceptive conduct. However, a number of stakeholders advocated that the offences under the Sale of Land Act and Estate Agents Act be retained, with increased penalties, citing the concern that the Australian Consumer Law only applies to conduct in the course of trade or commerce, and therefore does not capture misleading and deceptive conduct by individuals who sell land.

There was some support for addressing any clear duplication of offences between the Sale of Land Act, Estate Agents Act and the Australian Consumer Law.

A stand-alone option to address these issues is presented for feedback.

Option 2 – Retain offences in the Sale of Land Act and Estate Agents Act relating to specific types of conduct but, where appropriate, consolidate those offences into the Sale of Land Act and review and update penalties

This option acknowledges that the offences relating to misleading and deceptive conduct in the Sale of Land Act and the Estate Agents Act seek to address specific areas of risk in the industry and to ensure that the range of offences available continues to be sufficiently broad to capture individual sellers. However, it also acknowledges that a review

3 At the time of writing this paper, the Australian Consumer Law is subject to a review, which is due to report in March 2017. This review may result in changes being made to the offences and penalties currently in place under the Australian Consumer Law.

of those offences and associated penalties could, where appropriate, result in greater consistency in the use of language and concepts across the legislation dealing with misleading and deceptive conduct.

Under this option, the specific offences in section 42 of the Estate Agents Act relating to falsely representing that a particular property is for sale, or that a property has been sold or a deposit held, would be relocated to the Sale of Land Act, so that they apply to any person who sells property, whether an individual or estate agent. Existing offences in the Sale of Land Act would be retained to ensure misleading and deceptive conduct of individuals would continue to be captured, and associated penalties would be reviewed.

2 Auctions

2.1 Auction rules for private and online auctions

Issues

The Sale of Land Act regulates public auctions (auctions that have been publicly advertised), but not so-called 'private' auctions. Stakeholders have suggested that provisions applying to public auctions should cover all auctions, as the risks to bidders are similar. Further, additional provisions may be warranted to protect buyers and sellers in online auctions.

Stand-alone option

- **Option 3 –** Clarify the law relating to online auctions, and develop specific additional regulation where necessary

Note that this option responds to issues and feedback relating to online auctions only. It is not proposed to extend current auction regulations to 'private' auctions, due to a lack of evidence that reform is warranted.

Background

The Sale of Land Act regulates conduct at *public* auctions: that is, auctions that have been publicly advertised. Public auctions are regulated to ensure fairness in the auction process, and transparency about the conditions under which the auction will be conducted and during the bidding process. Land sold at auction is sold unconditionally (without 'subject to …' clauses in the contract of sale), and there is no cooling-off period for the successful bidder.

The Issues Paper sought stakeholder views on whether rules applying to public auctions should be expanded to encompass all auctions, such as so-called 'private auctions' (auctions that are only open to bidders by invitation, for example). Private auctions are currently treated in the same way as other private sales (to which cooling-off rights apply).

Feedback was also invited in relation to online auctions. These may increase in popularity in the future, but are not currently separately regulated under either the Sale of Land Act (which was developed on the premise of a 'physical' auction) or the Estate Agents Act (which determines who can conduct an auction of real estate).

Identified issues relating to online auctions include:

- the extent to which the operator of an online auction, or others who engage in an online auction process, should be captured by the licensing requirements for estate agents
- effective regulation of online auctions, given their lack of a 'physical' location and in circumstances where auctioneers and operators are not located in Victoria
- the dissemination of information and the conditions of the auction to bidders before the auction starts
- ensuring the 'bona fides' of bidders engaging in the auction.

Stakeholders were asked to consider:

- whether the risks to buyers and sellers at an online auction differ from the potential harms experienced at a traditional, physically-based auction
- how online auctions should be regulated, and the limits of intervention

- whether there should be any barriers to entry for operators of online auctions, or other people who host an online auction site, such as licensing requirements.

Stakeholder feedback

There were relatively few submissions addressing the issues and questions in the Issues Paper.

Most stakeholders expressed support for extending the rules that apply to public auctions to encompass all auctions. A number of stakeholders made the point that the risks to bidders in private auctions are similar to those faced by bidders in a public auction. It was also noted that it can sometimes be difficult to determine when a private auction becomes 'public'. However, no details or examples of how this is an issue in practice were provided, and there was no evidence of unfair conduct occurring in private auctions, which cooling-off rights are inadequate to address.

There was support for ensuring that current regulation clearly encompasses online auctions. Stakeholders canvassed the potential for this kind of auction to attract new or greater risks than traditional auctions, meaning parties may need additional protection, although as was the case for private auctions, no evidence or actual examples of consumer detriment were cited.

Stakeholders agreed that current requirements for an online auctioneer to be a licensed estate agent or agent's representative are appropriate. There was little support for extending licensing to capture people who only 'host' online auction sites, by providing the technological infrastructure used to carry out the auction.

Option 3 – Clarify the law relating to online auctions, and develop specific additional regulation where necessary

Under this option, the Sale of Land Act would be amended to clarify that existing provisions relating to auctions, including offences, apply to online auctions. Provisions referencing the physical nature and settings of auctions would not apply to online auctions, and alternative requirements designed to be suitable for the online environment would be included in the Act.

This approach would not only clarify existing requirements relating to online auctions (including that an online auctioneer must be a licensed estate agent or agent's representative), but also future proof the regulatory framework for these kinds of auctions.

Other provisions affecting public auctions would not be amended. While several stakeholders expressed support for extending current auction regulations to 'private' auctions, as indicated above, the nature and extent of the specific risks associated with these types of auction has not been established. There is no evidence that consumers are experiencing harm when participating in private auctions that is not addressed through existing cooling-off rights.

Question

3 What additional requirements, if any, might be appropriate for online auctions, and why? Should there be a requirement to verify the identity of bidders in online auctions prior to commencement, for example?

2.2 Other matters relating to the operation and regulation of auctions

Issues

Stakeholders provided feedback on several issues relating to the regulation of auctions.

Stakeholders had mixed views on the need for greater regulation, and no evidence of specific issues or detriment was put forward. However, there was a general consensus that auctions should not be conducted on ANZAC Day, particularly before midday.

Stand-alone option

- **Option 4 –** Introduce reforms to prohibit or limit the conduct of auctions on ANZAC Day

Background

The Issues Paper invited feedback on a range of other matters relating to the regulation of public auctions, as outlined below.

Stakeholder feedback

Roles and responsibilities of the auctioneer

Currently, before a public auction commences, the auctioneer must ensure a copy of the conditions under which the auction will be conducted is available for inspection at the place where the auction is being conducted. Several stakeholders suggested it is unreasonable and impractical to expect the auctioneer to be responsible for meeting these requirements, given that they travel from auction to auction, and are at individual properties for only a short time. A number of stakeholders favoured transferring this responsibility to the estate agent, or making this a joint responsibility between auctioneers and estate agents.

There was insufficient evidence put forward that supports a case for change. It is appropriate that the auctioneer, as the person conducting the auction, and responsible for the conduct of the auction, should be responsible for ensuring the correct rules are available for inspection. It is a matter for the auctioneer how compliance with that legal responsibility is ensured.

Seeking compensation at VCAT for loss or damage from prohibited auction practices

Stakeholders had limited experience regarding buyers seeking compensation at VCAT for loss arising out of prohibited auction practices. However, it was generally accepted that the provisions are serving their intended purposes and, therefore, no changes are required.

Disruption of auctions

There were mixed views about the circumstances in which the behaviour of non-participants at auctions should be regulated. Some stakeholders said that this is not a matter that can, or should, be regulated. Other stakeholders supported the extension of current provisions and penalties, which apply to bidders only, so these capture everyone who attends an auction.

Evidence did not suggest this is a sufficiently significant issue to support reform.

Disclosure of ‘side deals’

There were also mixed views about whether ‘side deals’ agreed between potential buyers and the seller of the property should be disclosed to all bidders before an auction commences (for example, to extend a settlement period or accept a lower deposit). Some stakeholders considered that current provisions are satisfactory and disclosure is not required. Other stakeholders thought disclosing side deals might be a fair approach, but it might not be straightforward to implement, particularly very far in advance of the auction commencing. On the basis of this feedback, no options have been developed to address this matter.

Auctioneer and estate agent behaviours that affect a buyer’s experience at auction

A notable theme in submissions was under-quoting by estate agents. The Victorian Government has already taken steps to address concerns about this practice, through the *Estate Agents Amendment (Underquoting) Act 2016*, and it is not proposed to develop additional reforms.

Auctions conducted on ANZAC Day

Stakeholders were generally of the view that, like general shop trading, public auctions should not be held on ANZAC Day.

Some stakeholders supported the introduction of regulation to prohibit auctions from occurring, particularly during the morning. One stakeholder proposed amending the *Shop Trading Reform Act 1996* to include estate agents, thus limiting trade during the morning of ANZAC Day and bringing real estate businesses in line with other businesses. Other stakeholders suggested regulation is not necessary, as estate agents should take a common sense approach.

An option to address this matter is presented below for feedback.

Option 4 – Introduce reforms to prohibit or limit the conduct of auctions on ANZAC Day

Prohibiting auctions on ANZAC Day appears to have broad community support and is an issue raised regularly with the Victorian Government. Prohibiting or limiting the conduct of auctions on ANZAC Day would involve relatively minor legislative reforms. There are a number of ways in which regulation could be introduced. These avenues will be explored further with relevant agencies and stakeholders to determine the most appropriate regulatory mechanism.

3 Cooling-off

Issues

Stakeholders indicated that the cooling-off provisions in the Sale of Land Act are still needed and are generally working well.

The Victorian Government has already introduced the *Consumer Acts Amendment Bill 2016* to address and clarify the matters raised in *Tan v Russell*, and there was widespread support for continuation of the other cooling-off provisions.

No reform is proposed.

Background

In Victoria, a cooling-off period applies to private sales of residential and small rural properties. Buyers of such properties who sign a contract of sale have three clear business days to withdraw from the contract. If a buyer wishes to exercise their cooling-off rights, the buyer must give the seller a written notice stating that they want to end the contract.

Cooling-off rights do not apply to sales at a publicly advertised auction or to private sales entered into in the three days before or after a publicly advertised auction. They also do not apply where the purchaser is an estate agent or a corporate body.

The Issues Paper invited feedback from stakeholders on the continuing need for cooling-off provisions, and their effectiveness in assisting buyers to undo impulsive purchases.

Stakeholder feedback

The majority of stakeholder feedback indicated the current cooling-off provisions are still needed and are generally working well, subject to the specific comments and requests for clarification outlined below.

Several stakeholders referred to the Supreme Court of Victoria decision in *Tan v Russell* [2016] VSC 93. This decision related to whether purchasers of a property had validly exercised their cooling-off rights in circumstances where the cooling-off notice was provided to the seller's estate agent.[4] Provisions in the *Consumer Acts Amendment Bill 2016*, propose to amend the Sale of Land Act so that a cooling-off notice can be given to the seller, an agent of the seller, or an estate agent engaged or appointed by the seller to sell the land (or left at the address of one of these parties).[5] These amendments are intended to remove any doubt about this matter.

Other specific suggestions made by individual stakeholders were to extend the period of cooling-off, and exclude the 'corporate body' exception.

Given the general support for the existing cooling-off provisions in their current form, options for reform have not been developed.

4 The Court of Appeal recently allowed an appeal against this decision, finding that the purchasers had validly terminated the contract of sale; *Lo v Russell* [2016] VSCA 323.

5 The Bill was passed by the Legislative Assembly on 23 February 2017.

4 Contract of sale

Issues

A prescribed standard form contract of sale is provided for use by estate agents, under the *Estate Agents (Contracts) Regulations 2008*. Options have been developed in response to three key issues:

- suggestions that some estate agents are doing more than 'filling up' the standard form contract
- the prescribed contract appears to be of limited value given the widespread use of the REIV/LIV standard form contract
- concerns that an extensive number of special conditions are sometimes being added to the standard form contract, which amend and undermine the protections offered by general conditions.

Alternative options

- **Option 5A –** Retain the standard form contract of sale prescribed in the Estate Agents (Contracts) Regulations, and clarify (by regulatory or non-regulatory means) what constitutes 'filling up' a contract by estate agents
- **Option 5B –** Repeal provisions for the prescribed standard form contract of sale, and clarify what constitutes 'filling up' a contract by estate agents
- **Option 5C –** Repeal the prescribed standard form contract, but prescribe a minimum set of general conditions for inclusion in any contract for residential property sales; and clarify what constitutes 'filling up' a contract by estate agents

Background

Contracts of sale are drafted by legal practitioners and licensed conveyancers. Estate agents may 'fill up' contracts of sale (that is, insert details such as the names of the parties and the purchase price). However, they must use the standard form contract of sale prescribed in the *Estate Agents (Contracts) Regulations 2008*, or a contract prepared by a legal practitioner or conveyancer (including the REIV/LIV standard form contract).

The Issues Paper noted that, in practice, it appears many legal practitioners and conveyancers also rely on and use a standard form contract when putting together contracts of sale for clients.

The Issues Paper also noted that adjusting the prescribed standard form contract requires an amendment to the regulations. This can be a lengthy process, particularly if the changes required are extensive or complex. In contrast, contracts prepared by lawyers and conveyancers (or their representative bodies) can be created and adjusted relatively quickly.

Special conditions may be added to the prescribed standard form contract of sale. While this may be necessary to address particular aspects of the transaction, concerns have been raised about a practice of adding an extensive number of special conditions, which amend the general conditions and which can substantially alter the protections offered by the standard form contract.

There were concerns that this practice is particularly prevalent in off-the-plan sales. However, it has also been suggested that some of the general conditions in the prescribed standard form contract may not be appropriate for off-the-plan sales.

Guidance from the Victorian Legal Services Board indicates that estate agents who are simply filling out a standard form contract or a contract prepared by a legal practitioner or licensed conveyancer are unlikely to be considered to be engaging in legal practice. As such, the exemption under section 53A of the Estate Agents Act (which protects estate agents from being prosecuted for engaging in legal practice in those circumstances) may be unnecessary.

The Issues Paper invited feedback on several questions relating to the contract of sale, namely, whether:

- the prescribed standard form contract has merit, or if there is a better way to set general conditions to which all sales are subject
- there should be any constraints around the addition of special conditions to a prescribed standard form contract of sale

- there is a better way to regulate the conditions under which a sale of land takes place
- there is a need to regulate the conditions that are inserted into contracts for off-the-plan sales
- any issues would arise if the exemption for estate agents filling out contracts (in section 53A of the Estate Agents Act) is removed.

Stakeholder feedback

There was broad support for the standard form contract of sale used by estate agents. Stakeholders representing the legal, conveyancing, and real estate professions all saw merit in this approach. However, there were mixed views about the insertion of special conditions into contracts, and whether there should be any constraints on this practice.

Most stakeholders were of the view that parties should be free to negotiate and agree contractual terms, with legal advice, and that there should be no constraints on special conditions, providing these do not derogate from minimum standards. Further, curtailing the practice of adding special conditions would limit the ability of legal practitioners and conveyancers to adapt to changes in the law or property market.

However, other stakeholders were concerned about this practice, on the basis that it potentially dilutes the effectiveness of the general conditions and makes it difficult for buyers to understand the contract. It was suggested that general conditions should be mandated in legislation and not able to be amended by special conditions.

There was considerable support for continuation of the exemption for estate agents provided by section 53A of the Estate Agents Act. Several stakeholders suggested that the presence of the exemption reminds estate agents of the limits of their role. However, in contrast, there was also anecdotal evidence in submissions that there are many estate agents who, despite the presence of the exemption, do more than just fill in the details of the contract. There were reports, for example, of estate agents drafting special conditions, or removing or amending conditions that were originally inserted by a conveyancer or a lawyer.

Finally, many stakeholders recognised that contracts for off-the-plan sales can be particularly complex, and special conditions are often included. There were differing views on whether specific regulation is needed, though. Some stakeholders suggested general conditions or a separate standard form contract could be developed for off-the-plan sales, while others argued that these contracts do not need to be treated differently from other residential sales.

While reform options have been developed to address many of the points made by stakeholders, it is not proposed to make any specific regulatory changes relating to contracts for off-the-plan sales. There was no clear evidence of specific problems, and there was not significant support for additional regulation. However, in recognition of stakeholder feedback about the complexities of conditions in off-the-plan contracts, a stakeholder panel could be established to examine the common issues associated with this type of contract.

Option 5A – Retain the standard form contract of sale prescribed in the *Estate Agents (Contracts) Regulations 2008,* and clarify (by regulatory or non-regulatory means) what constitutes 'filling up' a contract by estate agents

This option is a continuation of the status quo, in that the prescribed standard form contract of sale would be retained. This is one of three ways in which estate agents can comply with section 53A of the Estate Agents Act. This approach reflects a commonly-held view that the prescribed contract has been the industry standard since the regulations were first introduced.

However, this option (like the others presented below) also seeks to clarify the role of estate agents when it comes to using a standard form contract. Clarification would be provided, through regulatory or non-regulatory means, as to what constitutes 'filling up' a contract.

This proposal responds to stakeholder concerns and anecdotal evidence that some estate agents are doing more than filling in the administrative details relevant to the sale, thus going beyond the limits of the section 53A exemption. It also acknowledges the widespread support in submissions for this exemption being retained.

Option 5B – Repeal provisions for the prescribed standard form contract of sale, and clarify what constitutes 'filling up' a contract by estate agents

Under this option, the standard form contract for the sale of real estate prescribed under the Estate Agents (Contracts) Regulations 2008 would be repealed.

Although stakeholders expressed support for standard form contracts of sale, it is unclear how much of this support was for the *prescribed* contract, or for the standard form contract negotiated and prepared by REIV and LIV, which is commonly used by estate agents as well as legal practitioners and conveyancers.

This option acknowledges that the *prescribed* standard form contract is now of limited value (other than being free of charge and easily available), and there is no need for the government to carry on prescribing a contract for the sale of land. Estate agents have access to alternative contracts, including the standard form contract approved by REIV/LIV, and contracts prepared by legal practitioners and licenced conveyancers. Given the extent of the current usage of the (industry approved) standard form contract, it is anticipated that professional bodies would continue to develop and make available a standard form contract of sale for use by the industry.

Option 5C – Repeal the prescribed standard form contract, but prescribe a minimum set of general conditions for inclusion in any contract for residential property sales; and clarify what constitutes 'filling up' a contract by estate agents

This option has the same features as option 5B, but would mandate, through regulation, conditions that would apply to all residential contracts of sale, which could not be altered through the use of special conditions.

This option responds to concerns that special conditions can undermine important general conditions, and may be unreasonable or hard for buyers to understand. It may also allow for the contract of sale to be shortened considerably, increasing readability for buyers and sellers. It also acknowledges that most stakeholders were of the view that no constraints should be placed around the addition of special conditions to standard form contracts.

This option offers a 'middle ground' between the other two options presented above, though proceeding with it carries some risks. At this stage, there is no indication of market failure or that this level of intervention is needed. Developing and agreeing a set of general conditions, which are appropriate for *all* real estate contracts, is likely to be a long and complicated process. Making these general conditions compulsory for the whole industry would increase 'red tape', and would limit the ability of legal practitioners and conveyancers to respond quickly to changes in the law or property market.

Questions

4 What are the benefits and risks of options 5A, 5B and 5C relating to standard form contracts of sale? For example, could repealing the prescribed standard form contract of sale result in an increase in the cost of the standard form contract prepared and endorsed by professional bodies?

5 If option 5C was adopted, what general conditions might be appropriate to apply to all real estate contracts, industry wide, without modification? Are there any circumstances in which it would be appropriate to negotiate every aspect of a real estate contract (with commercially sophisticated parties, for example)?

5 Deposit moneys

5.1 Payment of money and early release of deposits

Issues

While there continues to be strong support for the regulation of deposit moneys before settlement, stakeholders had contrasting positions on the provisions that enable early release of the deposit. Stakeholders' experiences of the early release provisions indicated this is a highly contentious and problematic area, which warrants reform.

Alternative options

- **Option 6A –** Repeal the process for early release of deposit moneys under section 27
- **Option 6B –** Retain early release of deposit moneys, but with amendments to improve and clarify the operation of these provisions

Background

The Sale of Land Act regulates the receipt and release of deposit moneys before settlement. Sellers are required to pay deposits to their legal practitioner, conveyancer or estate agent, or place the money in a special purpose account in the joint names of the seller and the buyer, within seven days of signing a contract. However, there is no direct remedy available to the buyer if the seller does not meet these obligations, and the maximum penalty is only 10 penalty units.

Any deposit money paid must be held until it is determined which of the parties is to receive it. The general principle is that a deposit must not be released to the seller until settlement or, in the case of a terms contract, until the buyer becomes entitled to possession or to the rents and profits. However, the Sale of Land Act allows for the deposit to be released to a seller before this time if certain conditions are met.

Stakeholders were asked to provide feedback on:

- whether there is still a need to ensure deposit moneys are preserved until settlement
- what remedies should be open to a buyer in circumstances where a seller does not pay over the deposit to their estate agent, conveyancer or legal practitioner within seven days of signing a contract, as required (such as being able to end the contract)
- whether the buyer's right to end the contract and recover deposit moneys should be absolute if the seller misleads them about the details of mortgages and caveats over the land, and whether there are any circumstances where a seller may make an honest and reasonable mistake
- what information is essential to assist a buyer in determining whether or not to release the deposit before settlement
- the effectiveness, or otherwise, of the early release provisions.

Stakeholder feedback

Payment of deposit moneys

All stakeholders indicated there is still a need to ensure deposit moneys are preserved until settlement.

Most stakeholders agreed that remedies should be open to a buyer if a seller fails to meet their obligations to pay over the deposit. Many stakeholders suggested these remedies should include the ability to end the contract, though there was also a contrary view that this would be going too far.

Issues relating to offences and remedies are dealt with more broadly in Part F of this paper.

Consequences of providing false information

In relation to a buyer's right to end the contract if they receive misleading information from the seller, most stakeholders considered that this right should not be absolute. The right should apply where the seller has been deliberately misleading, but should acknowledge that a seller may make an 'honest and reasonable mistake'. One stakeholder suggested that the test should be whether the buyer has been materially and adversely affected by the false information.

The ability for a seller to rely on a defence of 'honest and reasonable mistake' is dealt with more broadly in Part F of this paper.

Early release of deposits

Stakeholders generally supported current requirements relating to the information that buyers need to determine whether or not to release the deposit before settlement. Some stakeholders also suggested additional provisions be included, such as an undertaking from the seller that they will not further encumber the title, and information on the maximum money to be owed at the time of settlement.

There were mixed views on the effectiveness of the early release provisions, and on the practice of releasing deposits. Submissions indicated that real estate agents, in particular, support this practice. It benefits sellers who depend on the deposit money to put towards securing another property.

However, most stakeholders, particularly from the legal and conveyancing sectors, expressed concern about the early release of deposits. They highlighted the considerable administrative burden associated with this process, and

the undue stress it causes for all parties. One stakeholder described this as a contentious area that causes the most problems relating to the Sale of Land Act; another viewed it as potentially the greatest practical problem in conveyancing.

A problem identified with early release is that an expectation has been created that sellers will be able to access the deposit before settlement. It was reported, anecdotally, that estate agents often advise sellers that deposits will be released automatically, 28 days after the date of the contract.

One stakeholder noted that some legal practitioners and conveyancers acting for buyers routinely recommend that their clients do not agree to release the deposit, even if there is a small, or no, mortgage over the property. Another stakeholder noted that some practitioners try to use general conditions in the contract to prevent early release.

Stakeholders provided several suggestions to improve the operation of the deposit release provisions. Some stakeholders went further and suggested removing these provisions altogether.

Other, specific issues with the early release provisions noted in submissions included:

- uncertainty regarding the impact of early release of the deposit on the buyer's acceptance of title in circumstances where the buyer has not given notice under section 27(4)
- the impact of new requirements[6] for foreign residents to pay a tax of up to 10 per cent of the purchase price to the Australian Taxation Office and, specifically, the risk to the purchaser if the deposit is released early and there are insufficient funds at settlement to cover the mortgage after the tax is deducted
- a lack of clarity about what should happen if the seller's and purchaser's representatives disagree on whether the deposit should be released.

In light of stakeholder views, two options for reform are presented for feedback.

Option 6A – Repeal the process for early release of deposits under section 27

Under this option, section 27 would be repealed. As a result, sellers would not be able to access the deposit before settlement, and would have to make alternative arrangements for financing deposits needed to secure another property. This is similar to other jurisdictions, where sellers use bridging finance, for example, and there are no indications that this has caused significant difficulties in those jurisdictions.

This option responds to stakeholder feedback that the process for early release is a problematic and complicated area, which can cause considerable stress for buyers and sellers. Repealing this process would remove a significant area of complexity from the sale of land process. Sellers would be clear about this situation from the start, rather than waiting to find out whether or not they can access the deposit before settlement (and facing problems if they have made commitments that rely on early release, and this money is not available). Benefits would flow to legal practitioners and conveyancers acting for both sellers and buyers as they would not need to determine whether the deposit is suitable for early release.

A further merit of this approach is that it recognises there are risks to buyers associated with having a portion of the purchase price directed to the seller before the transaction is completed and settlement occurs. The Issues Paper noted that the current information provided to a buyer does not necessarily protect them from a fraudulent or dishonest seller who fails to disclose unregistered mortgages. A reason that some legal practitioners and conveyancers automatically object to early release of the deposit is that 'redraw facilities' can allow a seller to withdraw money from the mortgage loan account. This can make it difficult to determine exactly how much a seller will owe on a mortgage between the date the contract is signed and the date of settlement.

If this option is to be adopted, there would need to be a period of adjustment to allow the property market to adapt to the new arrangements.

Abolishing early release would have implications for estate agents, who may currently deduct commission and other expenses from the deposit once it is released. The impact would be that access to such funds would be delayed until settlement.

6 Subdivision 14-D of Schedule 1 to the *Taxation Administration Act 1953* (Cth), which commenced on 1 July 2016 and applies to properties with a market value of $2 million or more.

Option 6B – Retain early release of deposit moneys, but with amendments to improve and clarify the operation of these provisions

Under this option, the Sale of Land Act would be amended to incorporate proposed improvements and respond to issues identified in stakeholder submissions. These changes would:

- enable early release of the deposit in circumstances where the seller has clear title, and provides a written undertaking to the buyer that the seller will not further encumber the property
- clarify that, once the contract of sale has become unconditional (that is, no further action is required by the seller to the benefit of the buyer), the buyer should not prevent early release of the deposit
- clarify the effect of early release on acceptance of title by the buyer, by stating that the deposit may be released provided the buyer has accepted title or has not given prior notice of an objection to the title that remains unsatisfied
- streamline the information that a seller seeking early release of a deposit must supply to a buyer in respect of mortgage details, by requiring that the seller need only provide a statement from their mortgagee:
  - attesting that the balance at settlement is sufficient to discharge the mortgage
  - ensuring that in making such an assessment the impact of any foreign ownership withholding tax has been included
  - ensuring that in making such an assessment there is no capacity for further funds to be released to the seller further encumbering the property.

The interaction between section 27 and general condition 12.1 of the standard form contract of sale, currently prescribed under the Estate Agents (Contracts) Regulations, would also require examination as part of any reforms to section 27 (assuming that this section remains in place).

It has also been suggested that any property with a caveat over it, with the exception of a purchaser's caveat, should be precluded from early release. Views are sought on the merits of this approach.

Questions

6 If early release of deposits was abolished, what would be an appropriate length of time to transition to the new arrangements, and why?

7 In relation to option 6B:

(a) Are there any additional or alternative amendments that would improve the operation of section 27?

(b) What are the strengths and weaknesses of the proposal that any property with a caveat over it (with the exception of a purchaser's caveat) should be precluded from early release of the deposit?

5.2 Use of bank guarantees and deposit bonds

Issues

The Sale of Land Act does not regulate the use of bank guarantees and deposit bonds.

Stakeholders had mixed views on the need for regulation of bank guarantees and deposit bonds, and did not present evidence demonstrating this is an area in need of reform.

No reform is proposed.

Background

Some buyers will provide a bank guarantee or a deposit bond instead of a cash deposit. Under these instruments a financial institution, such as a bank or an insurance company, agrees to pay an amount of money (which may be all or a part of the deposit) on demand to the beneficiary of the instrument, who is usually the seller.

The Sale of Land Act does not regulate the use of bank guarantees and deposit bonds. Similarly, the prescribed contract of sale under the Estate Agents Act does not mention bank guarantees or deposit bonds.

The Issues Paper noted issues that have been raised in relation to bank guarantees and deposit bonds, including:

- that a lack of clarity or understanding about these instruments has led some estate agents to advise sellers to refuse offers from buyers who wish to use a bank guarantee or deposit bond, or to suggest the seller accept a lower deposit if this is provided as cash
- the practice of making the beneficiary under the guarantee or bond the seller's legal practitioner may raise risks for that practitioner, if a dispute arises and they are joined in an action brought by the buyer to prevent the guarantee or bond being accessed for the seller's benefit
- that a replacement bank guarantee is needed if the beneficiary is the seller's legal practitioner, and there is a change in legal representation before the contract is settled.

Feedback was sought on whether the use of bank guarantees and deposit bonds in the sale of land process should be regulated.

Stakeholder feedback

There were mixed views on the potential regulation of bank guarantees and deposit bonds. Some stakeholders thought no changes are necessary because there is already sufficient regulation. Other stakeholders indicated that the points noted in the Issues Paper are important and they support regulation of these financial instruments, albeit there was no clear consensus about the reforms required. However, there was little evidence of consumer detriment occurring as a result of a lack of regulation, and it is unclear how frequently deposit bonds and bank guarantees are used in Victoria.

The main changes suggested by stakeholders were accommodating the acceptance of deposit bonds and bank guarantees in the standard form contract of sale, and ensuring bank guarantees are in the name of the seller.

Given stakeholders had mixed views on the need for regulation, and there was a lack of evidence for the need for reform, no options have been developed.

6 Damage to land or buildings before sale is completed

Issues

The Sale of Land Act protects buyers from loss resulting from damage occurring to the land or buildings they are buying before the transfer of land is complete. Stakeholders were asked to provide feedback on the effectiveness of these provisions, given they have been in the Act for over 30 years without review.

The general view in submissions was that current arrangements work well, and this is not a priority area for review or reform.

No reform is proposed.

Background

Certain provisions in the Sale of Land Act protect buyers from loss resulting from damage occurring to the land or buildings they are buying before the transfer of land is complete.

The Act provides that during the period between the making of the contract and the buyer taking possession of the property, the seller's insurance policy will operate for the benefit of the buyer. As the level of protection is largely dependent on the seller's insurance coverage, particulars must be disclosed in the section 32 statement (if the contract of sale does not provide for the land to remain at the risk of the seller until settlement).

A buyer of a property with a 'dwelling house' (including a flat, unit, or outbuildings) can end the contract of sale if the dwelling house is destroyed or damaged so as to be unfit for occupation before the contract is completed. This right applies irrespective of whether the contract of sale provides for the property to remain at the seller's risk. A buyer exercising this right must do so within 14 days of becoming aware of the damage or destruction.

Stakeholder feedback

The general view in submissions was that current arrangements work well, and this is not a priority area for review or reform. Given this feedback, no options have been developed.

However, a few stakeholders raised issues in relation to the operation of these provisions, which will be considered further as part of the proposed modernisation of the Act, as set out in Part E of this paper. The main points were:

- the legislation is unclear because sellers are not legally required to hold insurance between the signing of the contract and settlement
- it is unclear which party would be liable for the excess on the insurance policy
- whether the provisions apply to terms contract or rent-to-buy arrangements, where the seller holds the home insurance policy
- that 14 days may be too short a time period to exercise the right to end the contract of sale if the dwelling house is destroyed or damaged, and a slightly longer period could be considered (21 or 28 days, for example).

Part B: Buying property ‘off-the-plan’

This chapter sets out stakeholder feedback and presents options that address the following issues concerning buying property ‘off-the-plan’:

- improving the prominence of off-the-plan sales as a common and frequently used form of contract for the sale of land
- treatment of deposit moneys and progression payments
- disclosure of works, amendments to the plan of subdivision and other issues affecting the land
- rights to end an off-the-plan sale
- owners corporation insurance.

Issues

While there was strong support in submissions for the protections currently in place for off-the-plan sales, several stakeholders suggested changes could be made to modernise and clarify the operation of the legislation.

Alternative options

- **Option 7A –** Modernise provisions relating to off-the-plan sales, with some improved protections for buyers and sellers
- **Option 7B –** Modernise provisions relating to off-the-plan sales with improved protections for buyers and sellers, as with option 7A, and increase the deposit cap to 20 per cent for investors purchasing off-the-plan sales

Background

An off-the-plan sale is one where a person buys a ‘lot’, such as an apartment or a unit, in a plan of subdivision before the plan is registered by the Registrar of Titles and before building has been completed or, in some cases, commenced.

In general, the Sale of Land Act prohibits off-the-plan sales unless the contract of sale includes specific protections for the buyer, which are that:

- the deposit moneys must be paid to a legal practitioner, conveyancer or licensed estate agent and held in trust for the buyer until the plan of subdivision is registered
- the deposit moneys do not exceed 10 per cent of the purchase price for the lot.

The provisions in the Sale of Land Act that regulate off-the-plan contracts are not prominent, sitting within a broader division that sets out general provisions relating to the sale and subdivision of land. The current location of these provisions, and their characterisation as a specialised type of contract, does not reflect that these contracts are now very common, given the increasing demand in Victoria for multi-dwelling construction.

The Issues Paper identified a number of issues raised by stakeholders about the current provisions relating to off-the-plan sales, which are lengthy and complex, and which have not been subject to substantial review for 30 years.

Stakeholder feedback

There was strong support for the protections in place for off-the-plan sales. However, stakeholders also provided feedback that changes could be made to modernise and clarify the operation of the legislation. Feedback on specific issues is summarised below.

Improving the prominence of off-the plan sales as a common and frequently used form of contract for the sale of land

Some stakeholders commented that sections of the Sale of Land Act dealing with off-the-plan sales should be re-written using modern terminology. This includes reviewing the use of the term 'prescribed contract of sale' to describe off-the-plan sales, and considering adopting the more recognised term of 'off-the-plan contract of sale'.

Treatment of deposit moneys and progression payments

Stakeholders generally considered that the current arrangements were appropriate given the risks facing those who buy off-the-plan. There was strong support for the current practice of requiring payments to be held in trust until the plan of subdivision is registered. There was also broad consensus that the Sale of Land Act should allow for the transfer of the deposit moneys between the seller's agent and legal practitioner.

There was divergent commentary about the 10 per cent cap on deposit moneys. Most stakeholders considered that the current maximum of 10 per cent for a deposit was appropriate and strikes a balance between what is reasonable for a buyer to commit given the property does not yet exist and the seller (developer) who relies on deposits to secure finance. A number of stakeholders submitted that the current 10 per cent cap was appropriate given there were different risks for purchasers of off-the-plan sales compared with purchasers of established homes.

However, there was some comment that, in relation to off-the-plan developments, the market has changed and a 10 per cent cap was no longer appropriate. Providing management of the deposit was regulated, potentially giving purchasers the benefit of interest earned on deposits prior to registration of the plan of subdivision, some stakeholders submitted that the current cap should be lifted. This would enable either a higher deposit to be agreed between the parties or capped at a higher rate. Some stakeholders pointed to the Queensland approach of allowing deposits up to 20 per cent for off-the-plan sales.

Stakeholder views on whether progression payments should be permitted were also mixed. A number of stakeholders did not support progression payments on the basis that it increased the risk to buyers. Other stakeholders considered that it would assist sellers to obtain finance, could be linked to completion of certain stages of the works and, providing the payments were held in trust until settlement, could be permitted.

Disclosure of works, amendments to the plan of subdivision and other issues affecting the land

Disclosure requirements had a mixed response. Some stakeholders were comfortable with the status quo, while others suggested that disclosure of works affecting the land should be limited to sales of vacant land and off-the-plan buildings under two or three storeys. It was thought this information was much more relevant in those cases, given that the soil type and structure could affect the foundations and overall cost of construction. These issues were considered to be largely irrelevant to high-rise developments.

There were mixed views about the continuing relevance of the warning notice for off-the-plan sales. Some stakeholders considered it to have an important role assisting buyers to understand and undertake their own due diligence prior to entering into a contract. There was concern that many buyers did not read or take the warning notice seriously. Some stakeholders considered it to have little value. It was suggested that its value and prominence may be improved if it was provided separate to the contract. There were also suggestions that it could be expanded to include information regarding changes that may be made to the lot between the point of purchase and settlement, and warnings about stamp duty.

There was considerable feedback that sellers should be obliged to summarise changes to plans of subdivision to assist buyers in understanding what changes have occurred and determining the impact of those changes on their particular lot.

Rights to end an off-the-plan sale

Stakeholders were generally comfortable with existing rights to end an off-the-plan sale; however, there were mixed views on whether the current timeframes were reasonable and appropriate.

A significant number of stakeholders considered that 14 days was not sufficient time for a buyer to receive notice of an amendment to the plan of subdivision and to consider those amendments and obtain advice. Whilst some stakeholders considered that 14 days was sufficient, providing that the seller provides a summary of the principal changes to the plan, others suggested extending the timeframe to 21 or 30 days.

Stakeholders agreed that buyers should have the right to end a contract if changes to design, specifications, fittings and finishes materially and adversely affect the use and enjoyment of the property.

There were mixed views about whether some of the buyer's rights to end an off-the-plan sale should be time limited where they currently are not. A number of stakeholders were comfortable with the status quo, whilst some considered that providing the seller had provided full disclosure of the issue giving rise to the right to end the off-the-plan sale, the buyer's right to terminate should be limited to 60 days in order to provide the seller with certainty.

There was broad support for enabling the buyer and seller to extend the date specified in the contract of sale for the registration of the plan of subdivision. It was thought that if both parties agreed to a revised date, that should be able to be facilitated by exchange of letters between the buyer's and seller's legal practitioners or licensed conveyancers.

Stakeholders did not consider there to be a widespread problem with sellers manipulating buyers to terminate off-the-plan sales in order to take advantage of increased property prices (an issue that has arisen in New South Wales). However, there was acknowledgement by some stakeholders that this can occur. One stakeholder considered that the 'most common' method of manipulation of buyers by sellers was to delay construction so that the date by which the plan of subdivision is required to be registered expires. Another stakeholder considered that whilst manipulation of the buyer by the seller did occur, it was not necessarily to sell at a higher price but to allow a different type of development that, for example, would change the number of lots that could be sold. Both instances give the buyer the right to terminate the contract.

The New South Wales Government recently passed legislation to address the increased incidence of developers, operating in a rising market, delaying projects until the sunset date is reached, terminating the contract and reselling the property for a higher price.[7] The increased reports of this conduct in New South Wales that resulted in regulatory intervention can perhaps be attributed to the fact that, under New South Wales legislation, either the seller or the buyer can terminate the contract if the plan of subdivision has not been lodged by the sunset date. This is not the case in Victoria, which protects buyers by only giving the buyer the right to terminate a contract in circumstances such as those described in the preceding paragraph. Given the existing protections in place, and the general view held by stakeholders that seller manipulation of buyers in Victoria is not widespread, no regulatory reform is proposed.

Owners corporation insurance

Whilst there appeared to be a general consensus amongst stakeholders that owners corporations failing to obtain insurance was an uncommon occurrence, there was acknowledgement that where a seller failed to obtain owners corporation insurance within the first six months of registration of a plan of subdivision as required, buyers were put in a difficult position.

Suggestions put forward by stakeholders for addressing this issue included giving the buyer the right to avoid the contract if the seller has not complied with the obligation to obtain owners corporation insurance, or to not settle until such time as insurance is in place. An alternative solution was that the Land Titles Office should not approve the plan of subdivision until the seller provides evidence that an owners corporation has been established, an owners corporation manager appointed, and insurance put in place. However, given the general view that this is an uncommon issue, no regulatory reform is proposed. It is also noted that there are a number of remedies available to the buyer, including avoiding the sale before settlement and, if after settlement, applying to VCAT for determination of a dispute (which can include where an owners corporation has failed to obtain the required insurance).[8]

Option 7A – Modernise provisions relating to off-the-plan sales, with some improved protections for buyers and sellers

This option acknowledges feedback from stakeholders who were generally comfortable with the current protections applying to off-the-plan sales but sought some improvements in the protections for buyers and sellers.

Defining features of off-the-plan sales would be retained, including:

- requiring all deposit money to be held in trust for the buyer until the plan of subdivision is registered

7 Conveyancing Amendment (Sunset Clauses) Bill 2015 (NSW).

8 Section 11 of the Sale of Land Act and section 163 of the Owners Corporation Act respectively.

- current disclosure requirements to inform buyers about:
  - works that could adversely affect the land while the property is being built
  - amendments to the plan of subdivision
- the warning notice to potential buyers
- specific remedies that allow the buyer to terminate the sale in certain circumstances (for example, where an amendment to the plan of subdivision materially affects the lot to which the contract relates)
- the 10 per cent deposit cap.

However, all provisions relating to off-the-plan sales would be modernised and given greater prominence within the Sale of Land Act. This would include replacing current terminology that refers to a 'prescribed contract of sale' with the more commonly understood terminology 'off-the-plan contract of sale', and placing all provisions relating to off-the-plan sales within a specific Division or Part within the Sale of Land Act.

The Issues Paper noted that there was some uncertainty about whether the current provisions allow deposit moneys to be transferred between trust accounts held by the seller's estate agent and other parties acting for the seller who hold trust accounts, namely conveyancers and legal practitioners. Some stakeholders disagreed that there was any uncertainty, stating that the Act does permit this practice to occur.

To address any uncertainty, it is proposed that the transfer and release of payments made by the buyer could be specifically structured as follows:

- payments can be transferred between parties acting for the seller (for example, from the seller's estate agent to the seller's legal practitioner or conveyancer) but must continue to be held in trust until the plan of subdivision is registered
- once the plan of subdivision is registered, all payments held in trust would be treated as deposit moneys and be subject to the general provisions of the Sale of Land Act relating to deposits until settlement occurs.

Disclosure requirements relating to works affecting the land would be retained, including for high rise developments, on the basis that changes to the natural surface-level could lead to structural issues which affect all lot owners in those developments.

The requirement to disclose amendments to plans of subdivision before they are registered would also be retained. However, the seller would also need to provide the buyer with a summary of the changes made to assist the buyer in determining how the changes affect the lot they are buying.

The time the buyer has to end an off-the-plan sale after being advised of an amendment to the plan of subdivision would be increased from 14 days to either 21 or 30 days, in response to stakeholder feedback that 14 days is not sufficient.

Where an issue arises under the contract of sale that gives rise to a right to end the contract on the part of the buyer, providing the seller has fully disclosed the issue to the buyer, in order to provide the seller with certainty the buyer's right to end the contract would expire within 60 days of all relevant information relating to the issue being disclosed to the buyer.

The Act would also be amended to clarify that the buyer and seller may extend by agreement the date for registration of the plan of subdivision.

Option 7B – Modernise provisions relating to off-the-plan sales with improved protections for buyers and sellers, as with option 7A, and increase the deposit cap to 20 per cent for investors purchasing off-the-plan sales

This option includes the reforms proposed under option 7A, and would also enable developers/sellers to seek a deposit of up to 20 per cent for investors purchasing off-the-plan sales. The current deposit cap of 10 per cent would remain in place for owner-occupiers purchasing off-the-plan.

This variation to option 7A acknowledges feedback from some stakeholders that the current deposit cap of 10 per cent limits developers' ability to raise finance and that raising the cap to 20 per cent would allow greater flexibility for developers/sellers to set a deposit based on their strategy and risk profile. However, this option proposes to limit increasing the deposit cap to 20 per cent to investors purchasing off-the-plan sales in order to reduce the impact on housing affordability and access to the property market for first home buyers.

There exists the risk that this option would distort the market, potentially to the disadvantage of owner-occupiers, by driving inappropriate incentives in favour of investors (domestic or foreign). It is also worth noting that deposits paid pursuant to off-the-plan sales, as with all property sales, can be lost in certain circumstances (for example, where a buyer withdraws from the contract before settlement). Increasing the deposit cap to 20 per cent for investors significantly increases the financial commitment and risk to that category of buyers.

Questions

8 In relation to option 7A, what might be an appropriate timeframe for a buyer to end an off-the-plan sale after being advised of an amendment to the plan of subdivision?

9 In relation to option 7B:

(a) Can you identify any impacts of increasing the deposit cap to 20 per cent for investors on owner-occupiers buying off-the-plan property?

(b) What should be the penalty for a developer who accepts a deposit of more than 10 per cent from an owner-occupier buyer of property?

(c) To what extent would increasing the deposit cap to 20 per cent for investors increase the ability of developers to raise finance for the development?

Part C: Terms contracts and other specialised sale of land contracts

This chapter sets out stakeholder feedback and a stand-alone reform option relating to terms contracts and rent-to-buy arrangements. Feedback was provided through submissions on the Issues Paper, and during a meeting of stakeholders with expertise on these topics that was hosted by CAV, in conjunction with the Consumer Action Law Centre, in July 2016.

Stakeholder feedback and an option relating to another specialised form of sale, land banking, are also covered in this chapter.

7 Terms contracts and 'rent-to-buy' arrangements

Issues

Stakeholders raised significant concerns about rent-to-buy arrangements, the use of terms contracts in residential home ownership sales, and the conduct of intermediaries who broker these arrangements.

Stand-alone option

- **Option 8 –** Prohibit all rent-to-buy arrangements, and the use of terms contracts for residential home ownership sales

7.1 Terms contracts

Background

A terms contract for the sale of land is a contract where a seller and buyer agree that the buyer will pay the purchase price of the property in instalments prior to the seller completing a transfer of land in the buyer's favour. They are sometimes called 'vendor terms' contracts or 'vendor finance' contracts.

While selling property under terms contracts has been part of the Victorian property market for many years, it has been suggested that this form of sale is being misused, and there has been an increasing trend for terms contracts to be brokered between financially stressed sellers and buyers. In these circumstances, there are risks to both the seller and the buyer that the current remedies under the Sale of Land Act do not necessarily address.

The Issues Paper invited feedback on whether:

- there is a continuing place for terms contracts
- there should be greater levels of scrutiny or regulation applied to terms contracts 'brokered' by intermediaries, who introduce the parties to each other and organise the sale
- current restrictions on sellers under terms contracts should be expanded to encompass debt that is not linked to the property, but which may affect the seller's capacity to pass title to the buyer.

Stakeholder feedback

Stakeholders generally supported terms contracts as a useful and appropriate arrangement for the sale of property. Examples cited were the sale of commercial property and rural land, and offering people who may not get mainstream finance an entry point into the property market.

An argument was presented that the success of terms contracts in the rural and commercial spheres was due to the presence of:

- the contract being formed by professional and financially literate parties with relatively equal bargaining power

- in some cases, a pre-existing relationship between the parties that promotes good will in relation to the contract (such as a family relationship).

However, there was a strong view that the use of terms contracts in residential settings, where contracts were being signed by vulnerable and financially stressed people, leads to significant harm. It was noted that these parties tend not to obtain legal or financial advice, and are often taken advantage of by intermediary brokers, who have minimal exposure to the risk of financial loss inherent in these kinds of transactions.

It was submitted that, in relation to terms contracts for residential property purchases:

- there is significant ongoing harm to disadvantaged buyers, and some sellers, who enter into these types of arrangements
- the risks associated with these arrangements are significant and far outweigh the possible advantages, particularly for vulnerable people who pay large amounts towards the promise of owning their own home
- the restrictions on terms contracts under the Sale of Land Act are narrow and largely do not operate to prevent harmful contracts
- disadvantaged buyers would be highly unlikely to proactively use the buyer protections under the Sale of Land Act, including the 'transfer with mortgage back' requirement.

Suggestions for potential reforms included:

- there is merit in the approach taken in South Australia to render terms contracts void
- prohibiting terms contracts for any property subject to a mortgage: this would eliminate terms contracts as an option for mortgaged stressed vendors
- requiring money paid under a terms contract to be held in trust until settlement: this would address the issue of high risk agreements and the potential for money paid to disappear before it can be recovered by the purchaser
- requiring full disclosure from the parties about the extent of their respective financial positions, and for this to be independently verified by the holder of an Australian financial services licence
- requiring that all terms contracts be amortised so there is a zero loan balance at the end of the term: this recognises that consumers may be able to afford regular payments, but not a much larger, final ('balloon') payment
- requiring owners and purchasers to obtain independent legal advice and/or engage the services of a vendor finance broker (holding an Australian credit licence) before executing a terms contract involving a residential property: this reflects that the average person is unlikely to have the expertise needed to manage this process successfully.

There was general support for greater levels of scrutiny of intermediaries who broker terms contracts. Some of the suggestions put forward by stakeholders included:

- subjecting intermediaries to the same level of scrutiny as estate agents
- requiring a certificate of independent legal advice to be obtained before an intermediary brokered deal could proceed
- treating terms contracts brokered by intermediaries as 'financial products' that require prior approval by the Australian Securities and Investments Commission
- making it a mandatory requirement that intermediaries hold an Australian financial services licence
- prohibiting brokered transactions that are not covered by the National Consumer Code
- requiring the intermediary to sign off on the financial viability of the contract they have brokered, with a right for the parties to withhold the payment of fees if the deal falls through.

There was a mixed response from stakeholders on the extent to which the purchaser should be made aware of other debts owed by the seller that may have an impact on the seller's capacity to transfer clear title. While some stakeholders supported providing purchasers with further protections against seller bankruptcy, others commented that it would be difficult to determine and administer, particularly in relation to debts incurred after the contract was entered into.

Some stakeholders suggested refreshing the regulatory framework to ensure it continues to be appropriate and relevant, given terms contracts and the mortgage market have evolved. One stakeholder suggested that there should

be exemptions from some provisions for higher value terms contracts (for example, $2 million and above), and for terms contracts less than 12 months in duration. This would enable commercially-based transactions to proceed without unnecessary regulation.

7.2 Rent-to-buy contracts

Background

A form of contract that is not directly regulated by the Sale of Land Act is the rent-to-buy contract. This generally involves two main components:

- the 'rent part', which is a residential tenancy agreement allowing the tenant/buyer to occupy the property for a fee
- the 'buy part', which takes the form of a sale option or sale deed. The tenant/buyer must pay an upfront fee to secure the option to buy the property and then pay ongoing option fees, at the same time as the rent is paid, over an agreed period.

There are a number of risks for the tenant/buyer in entering into rent-to-buy arrangements, including the loss of 'option fees' if they do not proceed with the purchase. Similar issues to those associated with terms contracts have also arisen with intermediaries, who are bringing together sellers desperate to sell their house and buyers who are struggling to obtain mainstream finance to fund the purchase of a home.

The Issues Paper noted that, in South Australia, rent-to-buy contracts can be ended at the option of the buyer, and the buyer is entitled to the return of any moneys paid that were over and above the rent paid on the property. It has also been suggested that any money paid to the seller under a rent-to-buy contract, aside from market rent, should be held in trust for the buyer.

Views were sought on applying such approaches to rent-to-buy contracts in Victoria. Submitters were also asked about their experiences of rent-to-buy contracts, and to provide examples of the successful use of this method to purchase a property.

Stakeholder feedback

There was widespread concern about rent-to-buy arrangements from stakeholders. Submissions included little evidence of the successful use of these arrangements, and substantial feedback that this method of sale has caused significant financial and personal distress for buyers, as well as some sellers, and is particularly problematic for vulnerable people.

It was also suggested that rent-to-buy arrangements may be established to circumvent the protections available under a terms contract. There were concerns that, even in jurisdictions that regulate rent-to-buy specifically, contracts were being structured in ways that fall outside of the regulations.

Stakeholders made three main suggestions for how rent-to-buy arrangements could be regulated:

- prohibiting rent-to-buy arrangements outright
- conferring similar protections to those provided to purchasers buying under a terms contract, in acknowledgement that the risks arising from both approaches are similar for purchasers who pay large sums of money before they receive clear title to a property
- providing more certainty as to how the 'option' component of the rent-to-buy arrangement is regulated, to give purchasers clarity about their rights and potential remedies.

Option 8 – Prohibit all rent-to-buy arrangements, and the use of terms contracts for residential home ownership sales

This option includes three key elements:

- rent-to-buy arrangements would be prohibited outright
- terms contracts would be prohibited in relation to the sale of residential property

- the use of terms contracts to sell commercial or rural agricultural property would continue to be possible, subject to existing regulation. (The definition of residential property would require careful drafting to ensure farms sold with a residence were not inadvertently caught by the prohibition proposed above.) However, the existing regulatory framework would be reviewed to ensure it remains appropriate for commercial and rural property sales. This could include, for example, considering whether some provisions should no longer apply to high-value or short-term commercial transactions.

Intermediaries would not be subject to any additional regulatory requirements under the Sale of Land Act or the Estate Agents Act. This is not necessary if terms contracts are limited to commercial or agricultural property, where the parties are likely to have legal advisers. However, it would be unlawful to:

- arrange or broker a terms contract for residential sales or a rent-to-buy arrangement, or encourage parties to enter into such contracts
- advertise the sale of residential properties by instalment payments or rent-to-buy.

This option addresses stakeholder concerns about rent-to-buy arrangements and terms contracts in relation to residential properties. It is designed to respond to feedback that these are generally high risk transactions with a high failure rate, and evidence[9] of significant harm to vulnerable buyers and sellers (for example, the loss of huge sums of money when a buyer is unable to make the high repayments required, is unable to refinance, and is subsequently evicted). However, it also accommodates submissions that terms contracts continue to be an appropriate form of transaction for commercial and rural agricultural sales. These contracts are commonly formed by professional and financially literate parties, and no evidence of detriment was provided in relation to these kinds of sale.

Potential risks with this option are that, despite a ban on terms contracts and rent-to-buy arrangements, third party intermediaries will continue to offer such arrangements to unsuspecting buyers and sellers. The proposed prohibition on advertising, arranging and brokering such contracts is designed to mitigate these risks. Offences and significant penalties would apply in relation to breaches of these provisions.

This option would remove a potential form of finance for people who want to buy a home and face difficulties obtaining traditional finance products. Difficulties of this type are generally due to an established mortgage provider having undertaken a professional assessment about the risks of a person with limited capacity to service a loan taking on significant debt.

Potential improvements to the Sale of Land Act suggested by stakeholders were considered as an alternative to prohibiting rent-to-buy arrangements and terms contracts for residential properties. However, there was no clear consensus on the legislative reforms needed.

None of the suggested changes appear likely to be of assistance in protecting vulnerable buyers and sellers from entering into contracts they cannot afford, and which will not lead to home ownership in most cases. For example, stakeholders presented a strong case that vulnerable people tend not to be aware of, or use, the protections that are currently in the Sale of Land Act, and do not proactively seek independent advice.

Further, despite the disclosure requirements in the Act, there was evidence that vulnerable buyers are being encouraged to enter into unaffordable and high risk agreements, without fully understanding the documents that are disclosed to them and without obtaining independent expert advice. These buyers also face barriers to using other provisions in the Act intended to protect their interests. For example, the relatively complex ‘transfer with mortgage back’ provision requires access to legal advice and money to cover associated costs, which would be unaffordable for a buyer on a low income.

It follows, therefore, that vulnerable buyers would be unlikely to take advantage of any additional provisions that might be included in the Sale of Land Act (to either supplement existing terms contracts provisions or regulate rent-to-buy arrangements), and would continue to enter into risky and unaffordable arrangements that are unlikely to be successful.

The nature of these transactions also means sellers are reliant on immediate access to funds and, therefore, holding buyers’ payments in trust is not feasible. Other potential changes are equally unlikely to be of assistance to the buyers and sellers who are in greatest need of protection. For example, requiring disclosure of financial positions, or

9 See, in particular, *Fringe Dwellings: The vendor finance and rent-to-buy housing black market*, Consumer Action Law Centre, October 2016

that terms contracts be amortised, would not address the problem of people entering into arrangements they cannot afford, and losing money when things go wrong.

A number of the potential mechanisms for regulating intermediaries suggested by stakeholders fall within the jurisdiction of the Australian Securities and Investments Commission, and are therefore beyond the remit of CAV and this review.

Prohibition is the clearest reform option, given the evidence of serious harm arising from rent-to-buy arrangements and the use of terms contracts for residential properties. However, terms contracts would still be available where they have been shown to work; that is, for commercial and rural properties.

Questions

10 Are there potential risks with prohibiting all rent-to-buy arrangements and the use of terms contracts for residential property sales, and how might they be mitigated?

11 Should commercial property sales be exempt from any of the terms contract provisions in the Sale of Land Act? If so, which provisions and on what basis?

8 Other forms of sale: Land banking and private property sales conducted online

Issues

Due to the speculative nature of land banking, buyers of land under land banking schemes assume additional risks to other property investors. Whilst the Sale of Land Act applies to purchases of existing land parcels or lots subject to a plan of subdivision, it is less clear whether all the protections under the Sale of Land Act apply to the purchase of an option to buy land in the future. In particular, it is unclear whether moneys paid under an 'option agreement' are subject to the same or similar protections afforded to deposits under section 9AA of the Sale of Land Act.

Stand-alone option

- **Option 9 –** Amend the Sale of Land Act to require that moneys paid to buy an 'option' to purchase land in the future be held in trust and the right to exercise the option be limited as to time

Background

'Land banking' is an approach whereby an investor purchases a block of undeveloped land in the expectation of selling it in the future when its value has increased significantly. This can include property developers subdividing undeveloped land into small blocks and offering it to buyers as an investment opportunity. Investors typically buy either a small plot of land or buy an 'option' to purchase a plot of land. The option agreement is generally triggered when the land has been approved for development by the relevant planning authority (usually the local council).

The Issues Paper noted several circumstances in which buyers under land banking schemes may be vulnerable:

- the land may be unsuitable for re-zoning and therefore development
- where the land is subdivided and then sold, the subdivided blocks may be too small to appeal to a developer
- there is a focus on the potential future value of the land against the current selling price, but no guarantee this future value will eventuate
- when developers sell the plot of land from 'concept' plans, there is no guarantee the plot of land the investor has an option to purchase is the one they will ultimately buy.

These issues point to the high risk nature of land banking schemes and the importance of buyers/investors obtaining independent legal and financial advice before entering into land banking schemes.

Stakeholders were asked whether there should be additional protections provided to buyers who purchase property under land banking schemes, beyond the existing protections under the Sale of Land Act and, if so, where the risks lie and how they might be mitigated.

The Issues Paper also looked broadly at issues associated with buying and selling property privately online (rather than online auctions specifically, as covered in Part A of the paper). Some websites offer the opportunity to sell properties privately, without the need to employ an estate agent.

Feedback was sought on this emerging area of property sales. Stakeholders were asked about their experiences with this market place, and whether the Sale of Land Act inhibits online sales. There was little feedback, though, with stakeholders reporting very little experience with this area, and so it is not explored further in this paper.

Stakeholder feedback

Whilst only a relatively small number of stakeholders provided feedback about the issue of land banking, those that did considered that additional protections for buyers of property under land banking schemes are required. Particular areas of concern raised by stakeholders included that:

- option fees are not being held in trust, and there is no obligation for the money paid to go towards developing the land
- option holders are unable to lodge a caveat over the land
- sites are often a significant distance from existing facilities and towns, which could make them hard to sell once developed.

Reference was made to the 2016 report on land banking by the Senate Economics References Committee. This report included a recommendation that state and territory governments consider requiring that moneys paid to purchase an option in a land banking scheme be held in trust, consistent with the requirements for off-the-plan developments.[10] It is also worth noting that since this report was released the Federal Court of Australia has found a number of land banking developments to be managed investment schemes subject to the *Corporations Act 2001* (Cth).[11]

The Sale of Land Act, and the protections it affords buyers, already applies to land banking schemes that relate to the purchase of existing land parcels or land off-the-plan. The concerns raised by stakeholders therefore appear to be more relevant to those land banking schemes involving an 'option' to purchase land in the future; for example, subject to development approval.

Whilst the current definition of 'sale' in the Sale of Land Act includes the giving of an option to purchase, it is unclear whether all of the protections provided under the Sale of Land Act would apply in these instances. In particular, it is unclear whether moneys paid under an 'option agreement' would constitute deposit moneys under section 9AA of the Act and therefore be required to be held in trust.

Option 9 – Amend the Sale of Land Act to require that moneys paid to buy an 'option' to purchase land in the future be held in trust and the right to exercise the option be limited as to time

Under this option, the Sale of Land Act would be amended to require that moneys paid under an 'option agreement' be paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor, and held in trust for the buyer until the option to purchase the land was exercised (for example, upon registration of the plan of subdivision) or the buyer ends the option agreement.

An option agreement would expire if the event triggering the right to exercise the option does not take place within a certain amount of time (for example, within five years), and the buyer would be entitled to the money held in trust. This approach is consistent with the regulatory approach for dealing with deposits for off-the-plan sales.

Limiting the duration of an options agreement would provide greater clarity over the risk profile of the investment for both the seller and the buyer, as well as increased protection for buyers by preventing money being tied up indefinitely.

10 Senate Economics References Committee, *Scrutiny of Financial Advice – Part 1 – Land banking: a ticking time bomb* (February 2016). Recommendation 4.

11 Australian Securities and Investment Commission v McIntyre [2016] FCA 1276.

Questions

12 Does this option address the key risks of land banking schemes for buyers? If not, what other protections should be considered?

13 What should be the time limit on the duration of an option agreement?

14 Can you identify any unintended consequences of proceeding with this option?

Part D: Sale of land and business protections within the Estate Agents Act

The Estate Agents Act contains some longstanding provisions that are designed to ensure inexperienced buyers of real estate and small businesses are provided with sufficient financial information prior to making a decision.

This chapter sets out stakeholder feedback and options relating to small business statements, and the provisions for statements concerning finance that apply to estate agents, auctioneers, builders and subdividers of land.

9 Small business statement

Issues

The small business statement is a longstanding provision identified by stakeholders as in need of review.

Stand-alone option

- **Option 10 –** Relocate small business statement provisions to the Sale of Land Act, and review to ensure information in the statement is relevant and meaningful

Background

A small business statement is required for the sale of a small business valued at up to $350,000. The seller of the business or their estate agent must provide the statement to the purchaser prior to signing the contract agreement, using a form prescribed under the Estate Agents Act. The statement provides a due diligence guide for the buyer and sets out the financial performance of the business over the previous two years.

The Issues Paper sought feedback on the continuing relevance of requiring disclosure at the point a small business is sold, and whether such disclosure should form part of an Act that is largely focused on the licensing and conduct of estate agents.

Stakeholder feedback

There were mixed views on the small business statement.

Many stakeholders expressed strong support for retaining this statement. The general view was that this still offers an important protection, but the statement could be reviewed to ensure it continues to be relevant and useful.

In contrast, other stakeholders said the small business statement is no longer required. They suggested that prospective buyers can now use the internet to do their own research and due diligence prior to purchasing a business, and modern accounting packages make it relatively easy to find more financial data than is included in the small business statement.

Option 10 – Relocate small business statement provisions to the Sale of Land Act, and review to ensure information in the statement is relevant and meaningful

In light of stakeholder feedback, this option would retain the small business statement, but review the information it contains to ensure this is meaningful and relevant to buyers as part of their due diligence.

Provisions relating to the small business statement would be moved from the Estate Agents Act to the Sale of Land Act. This reflects that the obligation to provide a small business statement does not apply solely to estate agents, but also to the seller of the business.

Questions

15 If this option is adopted, how might the small business statement be improved to make it relevant and useful to buyers, while being reasonable for a seller to prepare?

16 Should requirements to provide a small business statement continue to apply only for businesses valued at up to $350,000? If not, what threshold would be more appropriate?

17 Are there any risks of unintended consequences associated with relocating provisions for the small business statement into the Sale of Land Act?

10 Statements concerning finance

Issues

Stakeholders considered that, while it is not common for estate agents, auctioneers, builders and developers to make representations about finance, this still happens. Therefore, requirements to provide buyers with certain financial information should continue in some form, to enable buyers to make well-informed decisions.

Stand-alone option

- **Option 11 –** Generalise requirements to provide financial statements so they apply to any person selling land who makes a promise about finance, and relocate these provisions to the Sale of Land Act

Background

The Estate Agents Act places an additional obligation on estate agents and auctioneers who make promises to prospective buyers about the availability of a loan to cover the purchase price. A statement must be provided to the buyer, setting out the particulars of the promise made regarding the loan.

This Act also sets out requirements to be followed by builders and subdividers of land who make representations about finance to prospective buyers. The provisions require that before any deposit is paid or contract entered into, the builder must give the buyer a statement setting out the conditions of the finance that has been promised to the buyer.

These requirements apply to conduct and activities that would not otherwise be captured under the *National Consumer Credit Protection Act 2009*.

Given these provisions have been in place for several decades, the Issues Paper invited feedback on the need to continue to regulate these matters. Stakeholders were asked whether:

- estate agents and auctioneers commonly assist buyers in obtaining finance, or has this practice declined as bank finance has become more readily available
- it is common practice for builders and developers of land to recommend financial products or finance providers to prospective buyers and, if so, have there been problems with this approach.

Stakeholder feedback

Although stakeholders did not provide detailed responses to the questions in the Issues Paper, there was a general view that this is an area that should continue to be regulated. The main points made by stakeholders were:

- the practice of estate agents making promises to buyers around finance has declined
- estate agents tend to refer buyers to particular mortgage brokers or finance companies owned by the estate agency, which may mean buyers feel pressure to use these specific services
- some builders and developers of land recommend financial products or providers, and may get a commission for doing so. They should continue to be required to provide buyers with certain financial information.

One stakeholder also noted that problems can arise in relation to terms contracts and rent-to-buy arrangements, where intermediaries 'broker' deals and make promises about loans that do not come through. This issue is covered more broadly in Part C of this paper.

Option 11 – Generalise requirements to provide financial statements so they apply to any person selling land who makes a promise about finance, and relocate these provisions to the Sale of Land Act

This option would retain requirements for prospective buyers to be provided with certain information if promises about finance have been made. This reflects stakeholder views that there should continue to be protections in this area, and acknowledges that these activities may not be captured by the National Consumer Credit Protection Act. However, the requirements would be broadened to apply to any person selling land who makes promises that relate to giving or obtaining finance, including (but not limited to) estate agents, auctioneers, builders and developers.

To reflect the more general application of these requirements, sections 51 and 57 of the Estate Agents Act would be repealed and new provisions would be located in the Sale of Land Act. The new provisions would be simplified and modernised, and the more detailed contents of the financial statements would be set out in regulation.

Questions

18 Are there any alternative ways of ensuring buyers are well-informed about representations about finance made by estate agents, builders, or other people involved in the sale of land?

19 Are there any risks associated with relocating these provisions into the Sale of Land Act, and broadening their application to any person selling land who makes promises with respect to finance? If so, how might these risks be addressed?

Part E: Modernisation of the Sale of Land Act

This chapter sets out stakeholder feedback and presents options for modernising the Sale of Land Act, addressing the following issues:

- the purpose of the Act
- outdated definitions
- redundant provisions
- readability of the Act.

Issues

The Sale of Land Act has existed for several decades, and has been amended several times. There are opportunities for modernisation and improvement.

Stand-alone option

- **Option 12 –** Modernise the Sale of Land Act and improve its readability and operation

Background

The Sale of Land Act has been on the Victorian statute book for over 50 years. It has been amended a number of times since its enactment and contains some outdated definitions and redundant provisions. Unlike modern Acts, the Sale of Land Act does not have a section that clearly states its purpose.

The Issues Paper identified a number of potential opportunities to modernise the Sale of Land Act. It invited stakeholder views about what the purpose of the Act should be, what key terms should be defined in the Act, ways in which current definitions could be improved, and whether there are any redundant provisions in the Act.

Stakeholder feedback

A relatively small number of stakeholder submissions addressed the issues and questions relating to modernising the Sale of Land Act. The main points are summarised below.

Purpose of the Act

A number of stakeholders made suggestions about what the purposes of the Sale of Land Act should include. The most common suggestion was that the purpose of the Act should be the regulation of contracts for the sale of land. Other suggestions included: the protection of purchasers, the promotion of efficiencies in the sale of land, the conduct of auctions, regulation of pre-sale information to purchasers, and the provision of penalties and civil remedies for breaches of the Act.

Definitions

There was strong stakeholder support for all key definitions being located in one place at the beginning of the Act, with many stakeholders commenting on the outdated nature of some of the terms and definitions (for example, ‘land’, ‘mortgage’ and ‘sale’). Stakeholders also commented that definitions should be consistent with other property legislation where appropriate, such as the *Transfer of Land Act 1958* and the *Property Law Act 1958*.

Redundant provisions and readability

Stakeholders supported the removal of redundant provisions, although no specific examples were provided. Stakeholders also supported improving the readability and operation of the Sale of Land Act, including rewriting that part of the Act dealing with off-the-plan contracts using modern terminology, and clarifying and encouraging the ability of parties to undertake the sale of land through electronic commerce. Other suggestions for improving or updating the Sale of Land Act made by stakeholders have been addressed elsewhere in this paper.

There were mixed stakeholder views on whether there is still a need for the Act to regulate the apportionment of mortgage moneys at subdivision, although a number of stakeholders considered that the need to regulate this issue remains.

Option 12 – Modernise the Sale of Land Act and improve its readability and operation

This option acknowledges broad support for modernising the Act and updating a number of its provisions, including ensuring use of current terminology and consistent definitions.

Under this option, the key purpose of the Act would be introduced, and all key definitions would be updated to reflect modern terminology and centrally located in the front of the Act.

If identified, ‘redundant’ or ‘out of date’ provisions under the Act will be repealed or amended.

Question

20 Are there any potentially redundant or out of date provisions in the Sale of Land Act that should be considered for repeal or amendment?

Part F: Dispute resolution, offences and remedies

This chapter sets out stakeholder feedback and presents options that address the following issues:

- the use and merit of the existing mechanism for arbitration
- mandatory conciliation and mediation of disputes
- remedies under the Sale of Land Act and the *Australian Consumer Law and Fair Trading Act 2012*
- termination rights and the defence of honest and reasonable mistake
- the relevance and appropriateness of offences and penalties.

11 Arbitrators, conciliation and mediation of disputes

Issues

The Sale of Land Act provides dispute resolution by arbitration for a narrow, technical range of disputes. It appears these provisions are rarely, if ever, used and could be removed.

There is some support for extending VCAT's jurisdiction to determine minor disputes under the Sale of Land Act, which together with continued access to the courts, provides greater opportunity for mediation and other alternative dispute resolution mechanisms.

Alternative options

- **Option 13A –** Retain arbitration, but extend VCAT's jurisdiction for some minor disputes
- **Option 13B –** Remove arbitration and extend VCAT's jurisdiction for some minor disputes

Background

The Issues Paper identified that there may be scope to review the mechanism for arbitration under the Sale of Land Act and consider the merits of including mediation and other forms of alternative dispute resolution (for example, conciliation). Whilst the primary means for resolving sale of land disputes is through the Courts, the Act does make some provision for the use of arbitrators in a narrow range of circumstances. Arbitrators have powers to make determinations as to:

- the amount of mortgage moneys to be apportioned to lots when land is subdivided
- non-compliance with or ending of an off-the-plan contract, with the arbitrator able to make orders requiring the seller to pay compensation to the buyer in respect of any loss
- disputes in relation to terms contracts where there has been non-compliance because of a mistake or mis-statement
- the sufficiency of instruments of mortgage submitted in relation to apportionment of mortgage moneys and instruments of transfer, conveyance or mortgage submitted in relation to terms contracts.

Arbitrators may consent to a person selling land under a terms contract which would in other circumstances be prohibited, and have powers to extend the timeframe for compliance with notices issued under the Sale of Land Act.

The Victorian Civil and Administrative Tribunal's jurisdiction in the Sale of Land Act currently only extends to considering compensation claims arising from public auctions.

Stakeholder feedback

Stakeholders considered that the current arbitration system under the Sale of Land Act was rarely, if ever, used. No stakeholder cited experience with this process. There was some concern that arbitration can be a costly and time consuming means to resolve disputes.

Stakeholders were supportive of mediation and alternative dispute resolution being available as a quick and relatively inexpensive means to resolve disputes, including in relation to off-the-plan disputes. A number of stakeholders noted that both the Courts and VCAT already provide ready access to mediation for disputes being managed through these jurisdictions.

In relation to whether conciliation should be mandatory prior to a dispute being considered by VCAT or a Court, stakeholders had mixed views. The majority of stakeholders did not support the broad-based introduction of mandatory conciliation. Some stakeholders considered that mandatory conciliation could be beneficial for some types of dispute, such as off-the-plan settlement disputes. However, others considered that it may cause unacceptable delay in certain disputes. A buyer seeking to recover a deposit after a contract of sale is terminated or a seller seeking to remove a caveat in order to re-offer a property for sale were cited as examples where mandatory conciliation may not be appropriate. Other stakeholders were supportive of ombudsman schemes as a means to improve access to justice for buyers, taking the view that mediation and conciliation can work against the interests of the buyer where there is a power imbalance.

There was some stakeholder support for expanding VCAT's jurisdiction so that it could consider a greater number of disputes under the Sale of Land Act, including potentially assuming the power to determine those disputes currently capable of determination by an arbitrator under the Sale of Land Act.

Option 13A – Retain arbitration, but extend VCAT's jurisdiction for some minor disputes

This option retains recourse to arbitration for certain disputes under the Sale of Land Act, on the basis that, whilst arbitration appears to be little used in practice, it provides an option for parties for judicial consideration and resolution of a dispute for a narrow, but technical, class of disputes as an alternative to full civil court proceedings.

In addition, this option would extend VCAT's jurisdiction to consider a range of minor disputes, as an alternative to court action. This option also acknowledges the desirability of alternative dispute resolution/mediation opportunities that VCAT requires as part of its processes.

What constitutes a 'minor dispute' under the Sale of Land Act would need to be defined, and stakeholder feedback is sought on this point.

Option 13B – Remove arbitration and extend VCAT's jurisdiction for some minor disputes

As with option 13A, this option extends VCAT's jurisdiction to consider a range of minor disputes. However, provisions relating to the resolution of disputes through arbitration would be repealed. This would leave sale of land disputes, where not captured by an expanded VCAT jurisdiction, to be resolved through the Courts.

Questions

21 What would be the advantages and disadvantages of expanding VCAT's jurisdiction to consider a range of minor disputes under the Sale of Land Act?

22 What might constitute a 'minor dispute' under the Sale of Land Act capable of being resolved by VCAT?

12 Offences and remedies

12.1 Remedies under the Sale of Land Act and the Australian Consumer Law and Fair Trading Act

Issues

While current remedies are generally appropriate, there are inconsistencies in language and terminology relating to remedies in the Sale of the Land Act and the Australian Consumer Law and Fair Trading Act.

Most stakeholders were supportive of sellers being provided the opportunity to argue 'honest and reasonable mistake'. Providing for this in the Sale of Land Act could provide better alignment with the Australian Consumer Law and Fair Trading Act.

Stand-alone option

- **Option 14 –** Address inconsistencies in terminology relating to remedies under the Sale of Land Act and consider expanding the circumstances under which a seller may argue 'honest and reasonable mistake' as a defence

Background

The Sale of Land Act provides for various ways to end a contract of sale. Some remedies give the buyer the right to *avoid* the contract (meaning the parties to the contract are discharged from further performance of the contract), while others provide a right to *rescind* the contract. There is a definition of rescission in the Act, the effect of which is that the parties are discharged from all obligations under the contract, both before and after the time of termination. However, this definition is limited to Part 2 of the Act, even though the term 'rescind' is also used elsewhere in the Act.

Other expressions used in relation to remedies under the Sale of Land Act include:

- 'terminate' in relation to cooling-off rights
- 'entitled to all civil remedies' and 'voidable by the purchaser' in relation to terms contracts.

In addition, some of the rescission rights are absolute, while others are limited: preventing a buyer from rescinding the contract if the seller acted honestly and reasonably, and the buyer is in as good a position as if the relevant provision that triggered the rescission right has been complied with.

Remedies under Part 8.2 of the Australian Consumer Law and Fair Trading Act extend and apply to the Sale of Land Act, although certain defences are not available, including reasonable mistake of fact. There are also specific remedies available under the Sale of Land Act, but many of these are limited in application. For example, rights to end off-the-plan sales are only available until the plan of subdivision is registered.

The Issues Paper sought feedback from stakeholders on:

- whether current remedies under the Sale of Land Act are meaningful for buyers and sellers, and are there opportunities for reform
- whether sellers should have the opportunity to argue 'honest and reasonable mistake', and are there any circumstances where they should not be able to put this case
- how often remedies under Part 8.2 of the Australian Consumer Law and Fair Trading Act are used in a sale of land matter, and whether there are advantages to specific remedies available under the Sale of Land Act.

Stakeholder feedback

Stakeholders were generally supportive of a review of remedies available under the Sale of Land Act and the Australian Consumer Law and Fair Trading Act. A number of submissions indicated that the current remedies are generally appropriate, although inconsistencies in language and terminology should be addressed.

Most stakeholders were supportive of sellers being provided the opportunity to argue 'honest and reasonable mistake' in a broader range of circumstances. According to some stakeholders, minor, technical errors or oversight

by a seller as a result of an honest and reasonable mistake should not give rise to a right to terminate. Some stakeholders made the point that where a buyer suffers a significant loss as a result of the seller's breach, the loss is no less if caused by a seller's honest and reasonable mistake. Stakeholders supporting the introduction of the ability to argue honest and reasonable mistake submitted that this would better align the Sale of Land Act with the Australian Consumer Law and Fair Trading Act.

Stakeholders noted that buyers were more likely to use the remedies under the Sale of Land Act if they wished to terminate the contract because they are not satisfied with the property. There were mixed views on the extent to which the remedies under the Australian Consumer Law and Fair Trading Act were used by buyers.

Option 14 – Address inconsistencies in terminology relating to remedies under the Sale of Land Act and consider expanding the circumstances under which a seller may argue 'honest and reasonable mistake' as a defence

Under this option, the terminology relating to remedies under the Sale of Land Act would be reviewed to ensure consistency and clarity.

Where appropriate, the circumstances under which a seller may argue 'honest and reasonable mistake' could be expanded to operate as a defence to a right of rescission on the part of a buyer, providing:

- the seller has acted honestly and reasonably and ought fairly to be excused for the contravention
- the buyer is substantially in as good a position as if all the relevant provisions had been complied with.

Question

23 Can you provide examples of specific provisions in the Sale of Land Act under which a seller should be able to argue honest and reasonable mistake as a defence to a breach in the circumstances described in option 14?

12.2 Relevance and appropriateness of offences and penalties

Issues

Stakeholders generally saw value in retaining offences in the Sale of Land Act. Offences and penalties have a role in managing and regulating poor behaviour, but need to remain relevant and be set at an appropriate level in order to act to as an effective deterrent.

Stand-alone option

- **Option 15 –** Retain offences and review penalties

Background

The Issues Paper noted that the right to end a contract can operate as a greater incentive for sellers to discharge their obligations appropriately than any threat of prosecution. However, the Sale of Land Act has established offences and imposed penalties in some areas, including to manage poor conduct at public auctions and in relation to aspects of off-the-plan sales. Many of these offences and penalties have not been scrutinised for some time.

Stakeholder feedback

There was limited stakeholder feedback on this issue. Stakeholders generally saw value in retaining offences in the Sale of Land Act, while recognising that the right to end the contract was often the most effective deterrent.

Some stakeholders considered current penalties to be insufficient, or noted that offences are not always prosecuted. There was acknowledgement by some that prosecution is required for repeated bad behaviour by an individual or entity.

The following stand-alone option is presented for feedback.

Option 15 – Retain offences and review penalties

This option acknowledges that offences and penalties have a role in managing and regulating poor behaviour, but that offences and penalties need to remain relevant and operate as a deterrent. Many of the penalties attached to existing offences have not been reviewed for some time, and are set at a low level. For example, penalties applying to off-the-plan sales are set at a maximum of 50 penalty units ($7,583.50), and some penalties in relation to payment of deposits are as low as 10 penalty units ($1,554.60).

Under this option, all penalties will be reviewed, and increased where appropriate, to ensure that offences and penalties continue to operate as a deterrent to poor behaviour.