**Consumer Property Law Review: Sale of land and business: options for reform**

**Submission by Jim’s Conveyancing**

**(National Office on behalf of Victorian franchisees)**

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**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?

Jim’s Conveyancing: The main obstacles relate to unforeseeable changes in legislation such as an unexpected increase to land tax or considerably higher owners corporation fees (most small developers lack experience or have not sought owners corporation manager’s opinions on this before they make estimations). Due to the risk of providing incorrect information almost all developers will overestimate the outgoings on the vendors statement.

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

Jim’s Conveyancing: This is a difficult point. If there is a small discrepancy perhaps the purchaser could be compensated by the amount of 5 times the difference in the amount (i.e. 5 years worth). Typically within the 5 years CPI increases would have eaten in to any difference. However, if the amount is material then the purchaser should be able to rescind the contract. This is because the decision to purchase for many is made based on the expected outgoings of the property. It also severely impacts their ability to resell.

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

Jim’s Conveyancing: The current regime is sufficient. As is our opinion of most sections of the relevant Acts, the legislation themselves is sufficient, however the enforcement of the legislation is inadequate and there is a general attitude within the industry that there is no consequence to a breach.

Auctions

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

1. 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?

Jim’s Conveyancing: This will inevitably become a more significant issue in the years to come and in our opinion the same regulations should apply to online auctions as in publicly advertised auctions that are common today. For example, it is almost unheard of for an estate agent to ask a potential bidder at an auction for verification of who they are. And yet, the risk with an online auction is total anonymity which will mean illegal vendor bidding will become more common and there will be no way of a vendor pursuing a purchaser if they don’t execute the contract or they don’t pay the deposit or meet their obligations under the contract.

In addition, the issue of un- advertised auctions which are fairly common in suburban Melbourne seems to be ignored in this paper. It is our strong opinion that the potential purchasers at these types of auctions should be offered the same protections as those at publicly advertised auctions.

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

Jim’s Conveyancing: It is our opinion that auctions should not be held 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

1. 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?

Jim’s Conveyancing: It is our opinion that the current system and use of the general conditions as well as estate agents filling up a contract is working well enough not to be needed to be changed. With one exception that estate agents commonly write special conditions that are ambiguous and difficult to enforce by the benefiting party such as finance clauses and building/ pest inspection clauses.

1. 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)?

Jim’s Conveyancing: The vast majority of general conditions are useful and have become so commonly relied upon in our industry that to take them out or significantly reduce or change them would cause significant teething problems. Obviously where a vendor wants additional protection they employ a conveyancer or a lawyer to prepare special conditions for them. To omit the general conditions will cause additional expense to many vendors and all purchasers who are wise enough to obtain legal advice before purchasing, as conveyancers and lawyers would now have the onerous task of reading the conditions in detail and providing personal advice.

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

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

Jim’s Conveyancing: 6 months would be sufficient so that the information contained in any Section 27s already in place would be non- current by that time and new documents would need to be prepared anyway.

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?

Jim’s Conveyancing: We would like to see changes implemented that stop the release of deposits where caveats are over the title. This is because the amount of claim under a caveat is often disputed, the caveator or their lawyer is often difficult to track down to execute the withdrawal or unwilling to do so. It is our opinion that release of deposit is a privilege not an entitlement (for example what occurs in other states) and that a cultural change needs to be made so that vendors and their estate agents don’t just expect the release within 28 days.

Additional provisions in the Act could include the additional requirement that a letter from the mortgagee or caveator signed and on their letterhead must be provided to verify the particulars of the mortgage/ caveat.

There is also ambiguity around whether the requirement on many contracts that ‘vacant possession’ be provided at settlement constitutes a ‘condition enuring for the benefit of the purchaser’ (s27 (2) (a)). If it does then very few contracts would be eligible for the early release of the deposit anyway.

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

1. 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?

Jim’s Conveyancing: 28 days would be sufficient, however there should be a requirement that a copy of the proposed change be sent to the purchaser’s representative as many off the plan settlements take many years and purchaser’s contact details change. If it is less than 28 days there will be times such as Christmas where purchasers and/ or their representatives do not receive the correspondence in time. It is also reasonable to expect that purchasers have a week or two to make decisions or further investigations on how the changes will impact them.

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?

Jim’s Conveyancing: We strongly agree that developers should be able to accept deposits up to 20%. This will increase the ability for developers to obtain finance and may even reduce prices of off the plan properties to consumers. We don’t however support that it should be collected from investors only. This is because investors will then be targeted by development marketers and give investors a substantial negotiating edge over owner occupier consumers. There will be no obligation for purchasers to pay 20% and will be negotiable as is any other part of the contract but where purchasers can afford it, it will support development in Victoria enormously.

(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?

Jim’s Conveyancing: We feel the current penalty is sufficient.

(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?

Jim’s Conveyancing: This would substantially increase the amount developers can borrow, the terms of the finance (i.e. potentially lower interest rates as lower risk for the mortgagees) and the speed by which development finance can be obtained. In addition, the number of pre- sales required by mortgagees is likely to reduce as their security per lot has increased.

Finally, the amount of interest that can be earned on the trust monies invested in controlled monies accounts will increase making the development even more attractive and likely leading to cheaper prices for consumers.

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?

Jim’s Conveyancing: If rent- to- buy arrangements are prohibited these should only be limited to where a vendor has a mortgage over the property. This is because it is difficult for purchasers to ensure vendors are using their ‘rental’ payments to pay their mortgage or that the amount being paid will be sufficient to pay the entire loan repayment, especially if interest rates increase. We do not have enough statistical information to state whether or not they should be prohibited due to vendor’s misconduct. Perhaps there should be a requirement for the purchaser to obtain independent legal (including from a conveyancer) and financial advice before being able to sign.

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?

Jim’s Conveyancing: Such a question assumes that those buying commercial property are considerably more sophisticated than those buying residential properties and this is certainly not the case, especially with the increase in SMSF purchases of commercial property. So, no, we don’t think commercial property should be exempt from the Sale of Land Act.

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?

Jim’s Conveyancing: This is such an important change and we will applaud the decision for the option fee to be held in trust. Yes, this will offer sufficient protections to buyers. There are other risks such as the lots not being as described, however these are insignificant against that of the option fee being released directly to a marketing company or developer.

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

Jim’s Conveyancing: It is not uncommon to see 6 year option agreement. This is typically due to the fact that the land proposed for development is not zoned ‘residential’ therefore they need to apply for rezoning as well as planning permission before being able to develop the land. The cap on the length of an option agreement is a very difficult question. Perhaps it could be limited to 6 years with the option for the purchaser to renew at their sole discretion (not the developer’s).

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

Jim’s Conveyancing: The consequence is likely to be the end, or near end of these arrangements in the industry as the appeal of them at the moment is the avoidance of the Act in regards to release of deposits.

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?

Jim’s Conveyancing: We have no feedback in regards to this point.

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?

Jim’s Conveyancing: This is a good question and again, difficult to answer. The benefit of the small business statement is that it is not made by the vendor, but rather a professional accountant. This means that it can be relied upon more accurately. Perhaps the statement needs to be provided on businesses up to a large threshold such as $1 million- don’t these purchasers deserve the same protection? As an alternative, vendors could be required to provide a statement to the purchaser of a business letting them know that they have the right to ask for this document even if the business is over $350,000.

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

Jim’s Conveyancing: We have no feedback in regards to this point.

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?

Jim’s Conveyancing: We have no feedback in regards to this point.

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?

Jim’s Conveyancing: We have no feedback in regards to this point.

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?

Jim’s Conveyancing: We have no feedback in regards to this point.

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?

Jim’s Conveyancing: We would strongly support this change. At the moment dispute resolution for minor issues under the Sale of Land Act is expensive and more complicated than most consumers can deal with themselves, therefore the party being threatened with action against them can ignore the claim with confidence that it will not be pursued.

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

Jim’s Conveyancing: Examples, missed adjustments of outgoings at settlement, rubbish or other substantial cleaning being required, losses of a purchaser due to a vendor’s default (very difficult to claim at the moment), vendor’s taking assets that were included in the sale.

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?

Jim’s Conveyancing:

Option 15 – Retain offences and review penalties