

Consumer Property Acts Review Issues Paper No. 3

Sale of land and business



About the Consumer Property Law Review

On 21 August 2015, the Minister for Consumer Affairs, Gaming and Liquor Regulation, the Hon. Jane Garrett MP, announced the Consumer Property Law Review (the review). The review is examining 4 key pieces of consumer property legislation: the *Sale of Land Act 1962* (Sale of Land Act), *Estate Agents Act 1980* (Estate Agents Act), *Conveyancers Act 2006* (Conveyancers Act) and *Owners Corporations Act 2006* (Owners Corporations Act).

The review will:

- assess the 4 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, and
- recommend necessary amendments to improve the operation of the legislative arrangements set in place by these Acts.

This review covers 2 Acts that have been in place for many years (the Sale of Land Act and the Estate Agents Act). Therefore, opportunities to modernise and improve the legislation will also be considered.

This is the last of 3 issues papers released by Consumer Affairs Victoria (CAV) between December 2015 and April 2016.

This paper covers issues relating to the sale of land, specifically issues identified with the Sale of Land Act and the small business statement contained in the Estate Agents Act.

The first issues paper was released in December 2015 and covered issues relating to the licensing and conduct of estate agents, conveyancers and owners corporation managers and the institutional and regulatory arrangements that govern those licensing schemes. Submissions on the first issues paper closed on 11 March 2016.

The second issues paper was released on 4 March 2016 and covers issues relating to owners corporations, specifically issues identified with the Owners Corporations Act, with the exception of the conduct of owners corporations managers which formed part of the first paper. Submissions on the second issues paper will close on 29 April 2016.

About this issues paper

This issues paper is divided into 6 parts covering:

- the sale of land process
- buying property off-the-plan
- terms contracts and other specialised sale of land contracts
- sale of land and business protections within the Estate Agents Act
- modernisation of the Sale of Land Act, and
- dispute resolution, offences and remedies.

In each part, issues have been raised for consideration and comment. Many of these issues have been raised by stakeholders during preliminary consultation on the review.

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

Feedback from this issues paper will inform the development of an options paper on potential legislative changes which will be released in mid-2016. Submissions on the options paper will inform the government in determining the final suite of reforms.

How to get involved?

We invite your views and comments, as well as your responses to the series of questions posed throughout this issues paper as a guide to writing your submission.

We understand that you may not wish to make a formal submission but may instead like to provide specific information about a particular issue. We welcome this feedback which can be made in the form of a comment directly to our email address. Any comments we receive will not be made publicly available but will be considered as part of the review.

We also welcome your suggestions for other questions or issues that should be considered leading up to the release of the options paper.

Until **13 May 2016** 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.

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Part A: Sale of land process

This section examines the general sale of land process under the Sale of Land Act, with issues grouped around different stages of the sale process, including pre-contractual issues, buying and selling at auction, the contract of sale and the payment of deposit moneys.

1 Before signing a contract of sale

During preliminary consultation it was suggested post-contractual problems are often caused by representations made by a seller or their estate agent in the pre-contractual stage of the sale of land. This section looks at the regulation of the pre-contractual information stage and invites views on whether improvements can be made to minimise post-sale disputes.

1.1 Pre-sale information

Primarily, pre-sale disclosure is mandated by the section 32 statement which the seller is required to provide to the buyer before a contract of sale is signed. The purpose of the section 32 statement is to address an information imbalance that can exist between the seller and the buyer which favours the seller. The seller may hold information that the buyer cannot access or would have trouble accessing and which may affect the buyer's decision to purchase or the amount the buyer is willing to pay for the property.

The Sale of Land Act provides buyers of property with rights to end the contract of sale in circumstances where a seller has misled a buyer or failed to provide all the required information in a section 32 statement. However, these rights are limited to allow for honest and reasonable mistakes by sellers in circumstances where a court determines the buyer is in substantially as good a position as if the proper disclosure had been made.

The information required to be provided in the section 32 statement was the subject of a recent review and preliminary consultation suggests that the reforms are largely working well. However, there have been a couple of issues raised which are set out below for consideration and comment.

1.1.1 Disclosure of certain financial information where a sale is 'off-the-plan'

A section 32 statement must contain information about a number of financial issues relating to the property for sale, including the amount of any rates, taxes, charges or other similar outgoings affecting the land.

An issue has been raised about the relevance of providing this information in relation to an off-the-plan sale as the only current information available to the seller relates to the 'parent' title (that is the piece of land that is proposed to be subdivided). The costs relating to the parent title do not inform the costs that will arise from the lot for sale, which only comes into existence once the relevant plan of subdivision is registered. It has been suggested that currently around half of all off-the-plan sellers simply disclose the information about the costs of the parent title while the other half give an estimate of what the costs are likely to be once the plan of subdivision is registered.

A similar issue has been raised regarding the requirement to disclose owners corporation fees at a time when the owners corporation has not yet been established (as the plan of subdivision has not been registered) and the seller is unsure what the fees will be.

Issues in relation to off-the-plan sales are discussed in more detail in Part B of this paper, including additional mandatory disclosure that applies specifically to off-the-plan sales. This additional disclosure is provided outside of the section 32 statement.

Question

- 1 How could the current requirements for the disclosure of financial information before a contract of sale is signed be improved to take better account of property being sold 'off-the-plan'?

1.1.2 Presence of infrastructure under the land

An issue has been raised regarding water pipes that are located under properties but have not been formally registered on title. It is illegal to build over water infrastructure and it has been suggested that sellers should bear an obligation to disclose information about water pipes located under their land.

A section 32 statement must contain a description of any easement, covenant or other similar restriction affecting the land (whether registered or unregistered) and particulars of any existing failure to comply with the terms of that easement, covenant or restriction. Arguably this requirement may already place an obligation on a seller to disclose information about infrastructure under the property at the point of sale, provided that the seller is aware of the existence of the infrastructure. The *Subdivision Act 1988* also enables the creation of implied easements in certain circumstances which may include infrastructure under the property.

Views are sought on whether the current requirements are sufficient to ensure that appropriate information is disclosed at point of sale about the presence of water infrastructure under the property which may prevent certain uses being made of the property, in particular, re-development or renovation and which may accordingly affect a buyer's decision about whether or not to buy the property.

Question

- 2 How could uncertainties about the location of water infrastructure under land for sale be resolved?

1.2 Misleading and deceptive statements about land for sale

Property advertising must not be misleading or deceptive. It is illegal to misrepresent a property in any way when advertising the property, whether verbally, in writing or in photographs.

The Sale of Land Act establishes a number of offences relating to making or publishing misleading or deceptive statements, representations, promises or forecasts about land for sale. These offences attract a maximum penalty of 50 penalty units (\$7,583.50 at the time of publication) or imprisonment for a term of not more than 12 months.

In any action in respect of the sale of land, if it is proved the representation was false, section 13 of the Sale of Land Act effectively deems the misrepresentation to be fraudulent, meaning that the person who has made the misrepresentation has the burden of proving that he or she had reasonable grounds to believe and did believe that the representation was true or had no reason to suspect that the representation was false and had otherwise acted innocently.

The Sale of Land Act also prevents a seller from relying on conditions in the contract of sale to prevent a buyer from taking action in relation to fraudulent misrepresentations.

The Estate Agents Act establishes offences relating to the making or publishing of false or misleading statements, representations and advertisements by estate agents. These offences attract a maximum penalty of 25 penalty units (\$3,791.75).

The Australian Consumer Law also 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 a body corporate. Given this, views are sought on whether the specific offences in the Sale of Land and Estate Agents Acts relating to misleading and deceptive conduct are still required to meet specific needs.

Questions

- 3 What is your view on the approach or approaches required to deter misleading and deceptive conduct during the sale of land?
- 4 In light of the Australian Consumer Law offences, is there still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act?

1.3 Due diligence

The Sale of Land Act imposes an obligation on sellers of residential land or on their estate agent to ensure that a due diligence checklist is made available to potential buyers of their property.

The due diligence checklist is prepared for prospective buyers to assist them to identify information they may wish to obtain in respect of the land for sale. The information on the due diligence checklist is generic in nature and designed to act as a prompt to buyers about information they may wish to explore further in relation to the properties they are inspecting at open-for-inspection visits or online.

Although the obligation is on the seller and their agent to make the due diligence checklist available, these provisions also highlight the benefits to buyers of property in undertaking their own due diligence. They recognise that there is a limit on the information that a seller should be expected to disclose to all potential buyers and that buyers have a vested interest in making their own enquiries about information of direct relevance to them.

The due diligence checklist was introduced in 2014 and can be accessed electronically at the following link: <https://www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property/checklists/due-diligence>

Views are sought on the operation of the due diligence checklist since its introduction and any areas for improvement.

Question

- 5 What is your view of the effectiveness of the due diligence checklist in increasing the awareness of buyers of the need to make their own enquiries before buying a property?

1.4 Building and pest inspections

Currently, sellers are not required to commission any independent inspections of their property before they sell and provide the resulting reports to buyers. However, many interested buyers will commission inspections and reports themselves, the most common being in relation to potential building defects and the presence of pests such as termites.

It has been suggested that sellers should be required to provide potential buyers with a building and pest inspection report that discloses any hidden defects in the property. Suggested potential benefits of mandatory pest and building inspections include:

- all buyers benefiting from being better informed
- costs being minimised as duplicate reports would not be produced for the same property by different interested buyers, and
- sellers who act on the outcomes of the report and upgrade their property may achieve higher sale prices.

The suggestion of mandatory building and pest inspections has been made particularly about auction sales. As auctions are unconditional, potential buyers wishing to have a property inspected for faults must do so before the auction with no guarantee they will be successful in buying the property. In contrast private sales may be 'subject to' a range of matters including building and pest inspections.

Since 2005, the Australian Capital Territory (ACT) has required sellers to provide a buyer with an information package that includes 4 reports: a building inspection report, a pest inspection report, an asbestos report and an energy efficiency report. It has been suggested that Victoria should follow the ACT's lead and introduce mandatory requirements for pest and building inspections that apply to all sales of residential property.

However, concerns have also been expressed with mandating the disclosure of property reports including:

- how to ensure the integrity and independence of the inspections and reports so buyers can rely on them with confidence without imposing costs that outweigh the benefits
- questions around a buyer's ability to take action against the seller or independent assessor for any errors in a report they relied on to buy a property
- costs of monitoring and enforcement of independent inspectors and added costs for training, certification and professional indemnity insurance, and
- the potential that reports may be produced where there is low value to buyers, such as new houses under warranty and 'knock down' properties facing demolition.

Question

- 6 Would there be advantages to having sellers obtain and provide potential buyers with building and pest inspection reports prior to selling their property? Please give reasons for your view.

2 Auctions

Public auctions are regulated under the Sale of Land Act to ensure fairness and transparency in the way auctions are conducted to provide benefits to prospective buyers and to aid honest sellers and estate agents.

The Act specifically regulates the process of bidding at a public auction to ensure all bids made by the seller are transparently made via the auctioneer and are publicly identified as 'vendor bids'.

Dummy bidding, that is bidding made by the seller or someone acting on behalf of the seller, is prohibited and auctioneers are also prohibited from accepting such bids. However, an auctioneer may make a bid on behalf of the seller in certain circumstances. The auctioneer must announce that the bid is a vendor bid immediately before, or in the process of, making the bid.

The auctioneer must make a copy of the conditions under which the auction is to be conducted available for inspection to those attending the auction. In addition, if the property is not sold at auction (passed in) and the final bid was one made on behalf of the seller, any statement marketing the property needs to include that fact.

The maximum penalties that apply to the public auctions provisions are the most substantial financial penalties applying under the Sale of Land Act. In addition, an estate agent who engages in dishonest auction practices could be subject to disciplinary proceedings at VCAT.

Buyers also have the right to make an application to VCAT for compensation for any loss or damage they have suffered as a result of prohibited auction practices. VCAT is able to order compensation if satisfied that prohibited behaviour (for example, dummy bidding) has occurred and that the buyer has suffered loss or damage as a result of those practices. An application for compensation must be made within 2 years of the auction. VCAT also has powers to make orders against buyers who bring frivolous or vexatious applications.

Views are sought on the general effectiveness of these provisions in preventing unfair outcomes at auctions. In addition, specific issues have been identified in preliminary consultation and these are explored in the following sections.

Questions

- 7 What is your experience of the effectiveness of the rights for buyers to seek compensation at VCAT? Do they act as an incentive to sellers and estate agents to conduct auctions fairly?
- 8 What behaviours by auctioneers and estate agents would you identify as having a negative impact on a buyer's experience at an auction?

2.1 Auction rules

The Act regulates conduct at *public* auctions which are defined as auctions that have been publicly advertised.

During preliminary consultation on this review, views were expressed that the rules that apply to public auctions should be expanded to encompass all auctions, irrespective of whether the auction was publicly advertised.

Comments were made that it can be difficult to determine the point at which an auction becomes a public one (for example, when an auction that is open only to bidders by invitation becomes public knowledge but is not necessarily publicly advertised) and, that the risks to bidders are similar irrespective of whether an auction is conducted publicly or privately.

It was also suggested that there should be more comprehensive regulation of public auctions and private contracts and an approach taken that applies equally to both. In general, the Sale of Land Act does not differentiate between land sold at public auction and land sold privately. The key exception is the public auction provisions, which are designed to ensure that auctions are transparent and fair. Land sold at auction is also sold unconditionally meaning that 'subject to...' clauses, for example, subject to finance or to a building or pest inspection, cannot be included in the contract of sale. However, other key protections under the Sale of Land Act, such as requirements in relation to section 32 statements and the payment of deposits, apply irrespective of whether the property is sold at auction or through a private sale.

Views are sought on whether the mix of regulation is appropriate between public auctions and private sales.

Question

- 9 Should the rules that cover public auctions be extended to cover all auctions? Please give reasons for your view.

2.2 Online auctions

The current legislation was crafted with a focus on a 'physical' auction where people arrive at the property to be auctioned and physically walk around it inspecting the bricks and mortar. Certain information, including important documents such as the section 32 statement and the contract of sale, should be available for potential bidders to scrutinise before bidding commences.

The legislation also envisages that there will be a person who can clearly be identified as the auctioneer who is controlling the auction and is responsible for ensuring that it runs smoothly and that all bidders are aware of the rules and conditions of the auction.

However, online auctions are becoming increasingly popular and are not specifically contemplated under either the Sale of Land Act or the Estate Agents Act, which determines who can conduct an auction of real estate. For example, particular rules for the conducting of auctions, such as requirements to audibly read out certain information and have particular information on display for 30 minutes, may hamper online auctions.

An online auction is an auction that is conducted over the internet and in general has the following characteristics:

- the auction is open to the public and any member of the public can register to bid or observe the auction
- bids are made via the internet
- the amount of a bid is transparent and can be seen by all bidders and observers, and
- the auction may take place over a number of hours or days and may have a set ending time.

Some of the issues that have been identified in relation to online auctions are:

- the extent to which the operator of an online auction or others who engage in the online auction process should be captured by licensing requirements for estate agents
- the location of the online auction as opposed to the land being auctioned, and effective enforcement options 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 (for example, can people join at any time or do you have to be bidding from the start), and
- ensuring the 'bona fides' of bidders engaging in the auction.

An operator or a person who engages in the online auction process by inviting, accepting or rejecting bids or posting vendor bids is conducting an auction and should be a licensed estate agent or agent's representative. However, an operator or person that is only 'hosting' the auction, for example, by providing the infrastructure that is used to conduct the auction, would not need to be a licensed estate agent or agent's representative.

Currently, the Sale of Land Act appears to cover online auctions of Victorian land or businesses irrespective of the physical location of the auctioneer or the operator. However, it may not be clear whether the Act applies where auctions are conducted in Victoria, and/or include Victorian based bidders, but where the land which is the subject of the auction is located outside of Victoria.

In addition, the enforcement powers that are currently available under the Estate Agents Act and Sale of Land Act may not be adequate to properly investigate and deal with offenders who are involved in online auctions. Offences and remedies available to compensate those who have been disadvantaged by wrongful conduct at an online auction may also require adjustment.

Finally, it has been suggested that the 'bona fides' of potential bidders in an online auction may need to be verified because the bidder's ability to abscond before finalising the sale is arguably higher in the online environment and dummy bidding may be more difficult to detect.

Consumer Affairs Victoria welcomes feedback from individuals who have been involved in online auctions whether in the running of such auctions or as bidders.

Questions

- 10 Do the risks to buyers and sellers at an online auction differ from the potential harms experienced by buyers and sellers at a traditional physically based auction? If yes, please give reasons for your view.
- 11 How should online auctions be regulated and what are the limitations of intervention?
- 12 Should there be any barriers to entry for operators of online auctions or other people who host an online auction site such as a requirement to be licensed? Please give reasons for your view.

2.3 Disruption of auctions

The Sale of Land Act prohibits bidders from hindering or harassing rival bidders or dissuading rival bidders from participating in the auction. Bidders are also prohibited from doing anything with the intention of preventing the auction or causing a major disruption, although this offence is not intended to prevent bidders from asking a reasonable number of questions about the land, the contract of sale or the conduct of the auction.

People who engage in public protests at auctions with the intention of preventing the auction from going ahead or significantly disrupting it are not captured by the offences.

Question

- 13 In what circumstances should the behaviour of people who are not participating directly in an auction be regulated?

2.4 Auctions conducted on ANZAC Day

Currently, there is no prohibition on the auctioning of real estate on ANZAC Day, although the Real Estate Institute of Victoria (REIV) actively encourages its members not to conduct public auctions on ANZAC Day as a mark of respect.

However, there are a small percentage of estate agents who disregard this advice and elect to schedule auctions on ANZAC Day. This is a particular problem when ANZAC Day falls on a Saturday, the main day of the week on which public auctions are held. This occurred in 2015, when ANZAC Day fell on a Saturday and a small number of public auctions were conducted, upsetting members of the community including some groups who specifically represent the interests of veterans. At the time, it was suggested that a specific prohibition on the holding of public auctions on ANZAC Day should be considered.

Views are sought from stakeholders on whether auctions should be specifically banned or the holding of public auctions limited to the afternoon of ANZAC Day only.

Question

- 14 Do you think that the holding of public auctions on ANZAC Day should be regulated? Please give reasons for your view.

2.5 Roles and responsibilities of the auctioneer

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. A comment has been made that this responsibility should sit with the estate agent rather than the auctioneer as auctioneers often travel from appointment to appointment and in practice, the person who puts the rules on display and the contract of sale and other documentation out for inspection is an estate agency staff member.

It has been suggested that it is unreasonable to expect the auctioneer to be responsible for ensuring that the rules have been complied with.

Question

- 15 Who should be responsible for ensuring the rules for conducting an auction are complied with? Please give reasons for your view.

2.6 Side deals

There are various items on display at a public auction for potential buyers to scrutinise before bidding gets underway, including the auction rules, the section 32 statement and the contract of sale. A suggestion has been made that any side deals that have been made between potential buyers and the seller of the property should also be disclosed before bidding commences. Side deals may arise when a potential buyer makes a request of the seller before the auction to change one of the conditions of the draft contract in their favour should they be successful at auction. Common examples including an extended settlement date (for example, 120 days rather than 90 days) or accepting a lesser deposit (for example, 5% rather than 10%). It has been suggested that if a seller and one of the potential buyers makes a side deal the terms of this deal should be disclosed to other potential bidders well in advance of the auction to ensure all are bidding on equal terms.

Question

- 16 Should side deals be disclosed to all bidders before an auction commences? Please give reasons for your view.

3 Cooling-off

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 3 clear business days to withdraw from the contract.

The cooling-off period is designed to give the buyer time to change their mind about the decision. It was originally introduced to protect the buyer against impetuous buying or persuasive sales techniques and enable a buyer to obtain further advice about the property.

A short cooling-off period was considered sufficient for buyers to speak to family and friends, and to arrange an independent inspection of the property so they are fully aware of the quality of the property they are buying.

As cooling-off creates uncertainty and inconvenience for sellers, a buyer who cools off is required to pay \$100 or 0.2 per cent of the purchase price, whichever is the greater amount.

Cooling-off rights do not apply to sales at a publicly advertised auction or to sales in the 3 days before or after a publicly advertised auction. The successful bidder at an auction is required to sign a binding contract as soon as the auction is complete as the uncertainty and expense that would flow from bidders having the right to cool-off would undermine confidence in the auction process.

When cooling-off provisions were first introduced in the early 1980s they only applied to contracts for the sale of property under \$125,000, rising to \$250,000 in the late 1980s. In addition, a buyer who had received independent legal advice before signing the contract could not exercise cooling-off rights. These restrictions were subsequently removed by legislation introduced in 2003 and 2010 respectively.

Apart from these changes, the process for cooling-off has remained largely unaltered since its introduction 30 years ago. If a buyer wishes to cool-off, the buyer must give the seller a notice which states that they want to end the contract. The notice must be in writing and delivered to the seller or the seller's agent.

It is important that the presence of cooling-off rights should be seen as a last resort and not be taken as a signal to buyers that they do not need to conduct their own due diligence before buying a property.

Views are sought from stakeholders about the continuing rationale for, and the effectiveness of cooling-off rights in assisting buyers to undo impulsive purchases.

Some issues that have been raised with cooling-off rights over the years include anecdotal reports of:

- cooling-off rights being manipulated by estate agents who wait until the cooling-off period has concluded before posting the signed contract to the buyer's legal practitioner
- cooling-off rights being manipulated by some experienced buyers who sign multiple contracts, knowing they have a cooling-off period in which they can change their mind – giving them time to decide between the options
- a preference by other experienced buyers of ignoring the cooling-off rights and relying on 'subject to...' clauses, in particular 'subject to finance' clauses, to withdraw from a contract without incurring the financial penalty that is attached to cooling-off, and
- a practice by some estate agents of returning the deposit in full and not imposing the penalty on buyers who cool off because it is easier administratively for the deposit to be returned in full, meaning that sellers are not receiving any financial compensation for the uncertainty and inconvenience caused by cooling-off.

Questions

- 17 In what circumstances should buyers be able to cool-off from a contract of sale?
- 18 In your experience, are the current cooling-off provisions effective in 'undoing' an impulsive decision made by a buyer?

4 Contract of sale

Contracts of sale are drafted by legal practitioners and licensed conveyancers. Estate agents may also negotiate contracts of sale but must use a contract of sale prepared by a legal practitioner or conveyancer or the standard form contract of sale and fill in the details of the parties and the purchase price.

The standard form contract of sale is prescribed in the *Estate Agents (Contracts) Regulations 2008*. The objective of the Regulations is to prescribe standard forms of contracts to give effect to agreements negotiated by estate agents and agents' representatives.

The regulatory basis for the standard form contract stems from an exemption for estate agents from the prohibition on unqualified people engaging in legal practice. This exemption is discussed further in section 4.3 below.

In practice, the majority of legal practitioners and conveyancers also rely on and use the standard form contract when putting together contracts of sale for clients, and its terms are commonly adopted.

Views are sought on the effectiveness of using a standard form contract as a basis for imposing general conditions across the industry.

Arguably, contracts prepared by lawyers and conveyancers can be adjusted relatively quickly to deal with emerging problems or changes in the interpretation of different laws that may impact on conditions in the contract of sale, for example, GST or personal property security legislation.

In contrast, adjusting the standard form contract requires an amendment to the regulations which generally takes a minimum of 3 months and often takes longer if the issues are complex or the changes required are extensive. Views are sought on the effectiveness of the current approach, and feedback is sought on whether there are merits in alternative approaches such as prescribing general conditions that must be included in all contracts of sale rather than prescribing a standard form contract of sale in total.

Question

- 19 Do you think the standard form contract has merit, or is there a better way to set general conditions to which all sales are subject?

4.1 Special conditions

The standard form contract of sale envisages that special conditions may be added to address particular aspects of the transaction. However, concerns have been raised about a practice of adding an extensive number of special conditions which amend the general conditions and substantially alter the protections offered by the standard form contract.

It has been argued that the use of special conditions in this way undermines the effectiveness of the standard form contract and may be potentially misleading to buyers as many of the changes diminish rights and protections granted to buyers under the contract.

Questions

- 20 What, if any, constraints should be placed around the adding of special conditions to a standard form contract of sale?
- 21 Is there a better way to regulate the conditions under which a sale of land takes place?

4.2 Off-the-plan sales and the standard form contract

The requirements for off-the-plan contracts of sale are set out in the Sale of Land Act and are discussed in further detail in this paper at Part B.

However, issues have been raised during preliminary consultation about the interaction between the standard form contract of sale and the additional protections that apply to off-the-plan sales. For example, it has been suggested that general condition 28.1 may not be appropriate for an off-the-plan sale contract as the deposit may become payable to the seller in certain circumstances before the plan of subdivision is registered. Feedback also indicates that the practice of adding a large number of special conditions (see discussion above) is particularly prevalent in off-the-plan sales.

This feedback raises a broader question as to the suitability of the standard form contract being applied for off-the-plan sales. Views are sought on this point.

Question

22 Is there a need to regulate the conditions that are inserted into contracts for off-the-plan sales?

4.3 Exemption for estate agents from engaging in legal practice

The Legal Profession Uniform Law (Victoria) prohibits unqualified people from engaging in legal practice. However, the Estate Agents Act provides an exemption from the prohibition for estate agents provided they fill out the standard form contract or a contract prepared by a legal practitioner or a licensed conveyancer. This exemption was inserted in the 1990s to protect estate agents who 'fill up' contracts of sale from being prosecuted for engaging in legal practice. The presence of the exemption removed any doubt as to whether the filling up of standard form contracts could be considered to be engaging in legal practice.

The question of what it means to be 'engaging in legal practice' was recently considered as part of the transition towards the Legal Profession Uniform Law. Guidance from the Victorian Legal Services Board is that the Board considers activities such as the giving of legal advice, interpreting and applying legislation or case law for use of a client and drafting legal documents to be engaging in legal practice.

Therefore it is timely to ask whether an exemption for estate agents is still required given that the process of filling up a contract (inserting the names of the parties and the purchase price) is unlikely to be considered to be engaging in legal practice.

Views are also sought on the merits of directly regulating the extent to which estate agents can alter conditions in the standard form contract of sale or include additional special conditions.

Question

23 Can you envisage any issues if the exemption for estate agents is removed? If yes, please give reasons for your view.

5 Deposit moneys

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.

Any deposit money paid to a legal practitioner, conveyancer or estate agent must be held by that person as a 'stakeholder', meaning that they hold the money until it is determined which of the parties is to receive it. This is generally the seller if the sale is completed without incident but could be the buyer if the contract is ended by the buyer due to a failure on the seller's part.

These requirements were introduced into the Act in 1980. Prior to that, it was common practice for an estate agent, on receiving a deposit, to withdraw his or her commissions and outgoings and then pay the remainder of the deposit directly to the seller or to the seller's legal practitioner. This reflected an understanding at common law that, on payment, a deposit immediately became the property of the seller. If an issue arose before settlement and a buyer needed to end the contract, the only option they had was to sue the seller for the return of the deposit.

In 1979, these arrangements were reviewed by a Parliamentary Committee of Inquiry into Conveyancing to address the problem of sellers spending deposits before settlement and being unable to repay the money to the buyer if the sale fell through. This was a particular issue for sales that could not be completed because the balance of purchase money was insufficient to discharge mortgages over the property.

The Committee recommended changes to the Sale of Land Act to require deposits to be held intact until settlement unless the parties agreed otherwise. The Committee also recommended that provided there were adequate safeguards, the buyer should be able to authorise the early release of a deposit to a seller to enable them to apply the money towards the purchase of another property. Appropriate safeguards were considered to be a written request by a seller, followed by written authorisation by the buyer.

Issues that have been raised in relation to the general regulation of deposit moneys are explored below. Issues in relation to the payment of deposit moneys for a property being purchased off-the-plan are separately discussed in Part B of this paper.

5.1 Payment of money

The Sale of Land Act requires deposits to be paid within 7 days of signing a contract to the seller's conveyancer, estate agent or legal practitioner or alternatively into a special purpose account in the joint names of the buyer and the seller.

There is no direct remedy available to the buyer if the seller retains the deposit or fails to pay it over within the 7 day timeframe. While it is an offence for the seller to not comply with the requirements, the maximum penalty is set at only 10 penalty units (\$1,516.70).

Questions

- 24 Is there still a need to ensure that deposit moneys are preserved until settlement? Please give reasons for your answer.
- 25 What remedies should be open to a buyer in circumstances where a seller does not meet his or her obligations to pay over the deposit? For example, should a buyer be able to end the contract?

5.2 Early release of deposit

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, in line with the original recommendations of the 1979 Parliamentary Inquiry, the Sale of Land Act allows for the deposit to be released to a seller before this time provided that certain conditions are met:

- the contract is not subject to any conditions enuring to the benefit of the buyer
- the buyer has accepted title or is deemed to have accepted title to the property
- the seller has given the buyer notice in writing that they require early release and provided the details of any mortgages and caveats over the land
- the buyer is satisfied that the purchase price is sufficient to discharge all mortgages over the property, and
- the buyer has given, or is deemed to have given, the seller notice of their consent.

In this respect the Act seeks to balance the needs of sellers to have early access to a deposit to buy another property or meet other obligations, with the needs of buyers to ensure the purchase price is sufficient to meet any debts over the property at settlement.

A number of issues have been raised with the provisions in the Sale of Land Act that enable the early release of deposit moneys. Many of the issues raised doubt about the effectiveness of the operation of the provisions. Therefore, Consumer Affairs Victoria is particularly interested in obtaining feedback as to how the early release provisions operate in the market place.

5.2.1 Early release of deposit where there is clear title

There is some uncertainty about whether the Act entitles the early release of a deposit where the seller has clear title to the property at the time of entering into the contract of sale.

The Sale of Land Act states that an authorisation by a buyer to an early release of the deposit is not effective unless and until the seller has provided the buyer with a notice setting out particulars of mortgages and caveats over the property.

Different views have been put forward about the effect of the notice requirement where there are no mortgages or caveats over the property.

One view is that the notice requirement effectively prevents a seller obtaining an early release if there is clear title as the Act makes no allowance for a notice where there are no mortgages or caveats. The alternative view is that the seller is only required to provide the notice if there is a mortgage or a caveat and sellers with clear title need only wait for 28 days from the date the contract is signed before claiming the deposit.

5.2.2 Mortgage details

A seller seeking early release of the deposit must provide the buyer with written details of any registered and unregistered mortgages. The information required is quite extensive, including details of the amount, instalments and intervals, the interest rate applying, the repayment date, any advances, any defaults, the amount required to discharge the mortgage, the mortgagee's details and, if the contract is a terms contract, whether the mortgagor has consented to the buyer assuming the mortgage obligations.

This level of information must be disclosed in the section 32 statement if the buyer is agreeing to take over the seller's mortgages at settlement and also in any terms contract for land that is subject to a mortgage.

It has been suggested that this level of information is unnecessary in circumstances where the buyer only needs to be satisfied that the sale price is sufficient to discharge the seller's mortgages at settlement.

It should be noted that general condition 12.1 of the standard form contract of sale of real estate states that the deposit must be released to the seller if:

- the seller provides particulars to the satisfaction of the buyer that either there are no debts secured against the property or if there are debts, the total amount of those debts does not exceed 80 per cent of the sale price, and
- at least 28 days have elapsed since the particulars were given to the buyer.

However, this general condition also requires that all conditions of the Sale of Land Act regarding the early release of deposit must also be satisfied so this only operates to provide guidance to buyers and sellers as to what may be acceptable for an early release to be sanctioned.

Another issue is that the current information required does not necessarily protect a buyer from a fraudulent or dishonest seller who fails to disclose unregistered mortgages. Anecdotal evidence suggests that some lawyers and conveyancers automatically object to the release of the deposit until the seller has clear title. This is because 'redraw facilities' that allow a seller to withdraw money from the mortgage loan account make it very 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.

5.2.3 Conditions for the benefit of the buyer

A requirement for early release of the deposit is that the contract is not subject to any condition 'enuring for the benefit of the purchaser'.

Many contracts for the sale of real estate contain conditions for the benefit of buyers including common conditions such as 'subject to finance' or 'subject to building or pest inspections'. One view is that the contract must be unconditional from the buyer's perspective, and as such early release of the deposit is only prevented when the contract of sale contains conditions that are contingent on some further action that benefits the buyer such as approval of finance.

However, there is an alternative view that the presence of any condition in the contract of sale that benefits the buyer prevents early release of the deposit. The standard form contract of sale includes a number of conditions that benefit a buyer and cannot be met until settlement. For example:

- **general condition 22:** the buyer and/or another person authorised by the buyer may inspect the property at any reasonable time during the 7 days preceding and including the settlement day
- **general condition 24.1:** the seller carries the risk of loss or damage to the property until settlement, and
- **general condition 24.2:** the seller must deliver the property to the buyer at settlement in the same condition it was on the day of sale, except for fair wear and tear.

It has been suggested that the uncertainty about the interpretation of the provision concerning conditions for the benefit of buyers has been used by some buyers to frustrate early release of the deposit in any circumstances.

However, Consumer Affairs Victoria understands that the early release of deposits is a frequent occurrence despite the doubt over the legislation. Therefore, views are sought from stakeholders, in particular legal practitioners and conveyancers who act for buyers and sellers, about their experiences in relation to the early release of deposits.

5.2.4 Consequences of providing false information

A buyer has the right to end the contract of sale and recover the deposit moneys where a seller knowingly or recklessly supplies false information to the buyer regarding any of the particulars required about mortgages and caveats over the land. Unlike some of the other rescission rights under the Sale of Land Act this is an absolute right and the seller has no grounds to mount an honest and reasonable defence to prevent the contract being ended.

Questions

- 26 What is your experience of the effectiveness, or otherwise, of the 'early release' provisions?
- 27 What information is essential to assist a buyer in determining whether or not to release the deposit before settlement?
- 28 Should the buyer's right to end the contract be absolute if the seller misleads them about the details of mortgages and caveats over the land? Can you envisage any circumstances where a seller may make an honest and reasonable mistake?

5.3 Use of bank guarantees and deposit bonds

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. However, recently it has become more common practice for financial institutions to make the beneficiary under the guarantee or bond the seller's legal practitioner rather than the seller when a guarantee or bond is being provided for an off-the-plan sale.

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 following issues have been raised in relation to bank guarantees and deposit bonds:

- a lack of clarity or understanding about these instruments has apparently 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 lesser cash deposit (for example, 5% deposit) over using a bank guarantee or deposit bond, and, as result, diminishing selling opportunities. It has been suggested that the prescribed contract of sale could be a vehicle to address any lack of clarity about the use of such instruments
- the practice of making the beneficiary under the guarantee or bond the seller's legal practitioner may raise issues for the seller's legal practitioner (who is not a party to the contract of sale) if a dispute arises. This is because there is a risk the seller's legal practitioner will be joined in any action brought by the buyer to prevent the bank guarantee or bond being accessed for the seller's benefit, and
- if the beneficiary under the guarantee or bond is the seller's legal practitioner, any change in legal representation before the contract of sale is settled requires a replacement bank guarantee to be provided.

Question

29 Should the use of bank guarantees and deposit bonds in the sale of land process be regulated and, if yes, how?

6 Damage to land or buildings before sale completed

Certain protections under 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.

While no issues have been expressly raised with the operation of these provision, they have been in the Sale of Land Act for over 30 years without review. It is, therefore, timely to assess their effectiveness and utility.

6.1 Insurance coverage

The first of these protections deals with insurance of the property in the period between the signing of the contract and settlement.

The Sale of Land 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 a result the buyer may be indemnified for damage and destruction of the land in the period between making the contract and the buyer taking possession or receipt of rents and profits.

Unless the contract of sale specifies otherwise, the risk in the property transfers from the seller to the buyer once the contract of sale is signed. This requirement was introduced to address the situation where land or buildings were damaged or destroyed before settlement, leaving the buyer with no claim under the seller's insurance policy.

The level of protection is largely dependent on the nature and extent of the seller's insurance coverage. Therefore, if the contract of sale does not provide for the land to remain at the risk of the seller until settlement, particulars of any insurance must be disclosed by the seller as part of the section 32 statement (see section 32B(a)).

The standard form contract of sale of real estate prescribed under the Estate Agents Act includes a term stating that the seller carries the risk of loss or damage to the property until settlement. During the recent review of the section 32 statement, stakeholders indicated that it was common for the standard form contract to be used. Therefore, it can be assumed that the protections are not commonly called upon.

It should also be noted that the buyer cannot rely on these protections if the seller restores the damage before the buyer becomes entitled to possession or the receipt of rents and profits.

Questions

- 30 What risks do buyers face in relation to damage or destruction of the property they are buying in the period between the signing of the contract and settlement?
- 31 Are the current protections still relevant or are there other risks that should be mitigated?

6.2 Right to end contract of sale if dwelling house destroyed

A buyer of a property with a 'dwelling house' can end the contract of sale if the dwelling house is destroyed or damaged so as to be unfit for occupation before the contract of sale is completed. A dwelling house is defined by the Act to include a flat or unit and outbuildings, fences and other appurtenances (accessories, trappings and trimmings) to a house, flat or unit.

This right applies irrespective of whether the contract of sale provides for the property to remain at the seller's risk. Where a buyer exercises this right, he or she is entitled to the return of any moneys paid and the seller is entitled to the benefit of any insurance policy relating to the destruction or damage to the property.

The buyer must exercise the right to end the contract within 14 days of becoming aware of the destruction or damage to the dwelling-house. However, the buyer cannot rely on the right to end the contract if the seller restores the damage before the buyer becomes entitled to possession or the receipt of rents and profits.

Views are sought from stakeholders on how the buyer's right to end the contract operates in practice given that the 14 day period in which the buyer can exercise the right does not seem to be a sufficient period of time for the seller to be able to restore the damage.

Question

- 32 What is your experience of buyers relying on the right to end a contract of sale because of damage to a dwelling house? How do these rights work in practice?

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

One way in which a person can buy property in Victoria is to purchase the property ‘off-the-plan’. 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.

Specific provisions to protect purchasers buying off-the-plan have been in place for 30 years, and although there have been some amendments made over those years, the provisions have not been subject to a substantial review. The off-the-plan protections in the Sale of Land Act are complex and lengthy and preliminary consultation with stakeholders raised a number of issues with the current provisions and these issues are explored in this part of the paper. Issues relating specifically to the practice of ‘land banking’ are discussed in section 14 of this paper.

7 How off-the-plan sales are regulated

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 on trust for the buyer until the plan of subdivision is registered, and
- the deposit moneys do not exceed 10% of the purchase price for the lot.

The Sale of Land Act defines a contract that contains these features as a *prescribed contract of sale*. However, for the purposes of this paper, such contracts will be referred to by the colloquial term ‘off-the-plan’ contract.

The provisions of the 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. This arguably gives an impression that such contracts are rare or niche, which is at odds with the increasing demand in Victoria for multi-dwelling construction. Therefore, the review will examine the merits of improving the prominence of off-the-plan sales as a common and frequently-used form of contract for the sale of land.

7.1 Protection of deposit moneys

The defining feature of an off-the-plan contract is the additional level of protection that extends to deposit moneys before the plan of subdivision is registered.

Any deposit money must be held on trust for the buyer by the seller’s legal practitioner, conveyancer or estate agent until the plan of subdivision is registered. Practically, this means that the seller cannot access any money from the sale until the plan of subdivision has been registered and the specific lots for sale created.

This protection recognises that buyers under off-the-plan contracts are more vulnerable than buyers of established property or land. This is because title to a particular lot can only be transferred from a seller to a buyer if the lot exists as part of a registered plan of subdivision. This is straightforward where the property is being sold is an established residence or a vacant lot on a registered plan of subdivision. However, a buyer under off-the-plan contracts is agreeing to buy a property that does not exist at the time they strike the deal with the seller. In essence the buyer is paying money in anticipation that the property will come into existence when the plan of subdivision is registered at a later date.

By requiring the buyer's payments to a seller to be held on trust, the Sale of Land Act seeks to put buyers under off-the-plan contracts in the same position as buyers of established property by ensuring that the payments they make towards the purchase price are only available to the seller once the plan of subdivision is registered and title is available.

The protections under the Sale of Land Act also recognise that there can be a significant amount of time between the initial sale and the buyer gaining title to the property.

The Sale of Land Act provides that deposit moneys payable under a contract for an off-the-plan sale must not exceed 10% of the purchase price of the lot. This protection recognises the often lengthy delay between the signing of a contract and completion of an off-the-plan sale. It protects buyers by ensuring that they are not required to pay an initial deposit payment that exceeds 10% of the purchase price at a time when the seller still has a lot to do to deliver on their commitments under the contract of sale.

This section examines issues that have been raised by stakeholders in relation to these key protections.

7.2 Calculating the purchase price

The deposit moneys are to be calculated as 10% of the lot's purchase price. The Sale of Land Act does not specify what items must be included in the purchase price. Therefore, it is at the discretion of each individual seller to determine the purchase price for the purposes of calculating the amount of the deposit.

The following issues have been raised with the process of calculating the purchase price:

- it has been suggested that sellers may be uncertain as it is unclear whether goods sold with the property (such as furniture, window coverings and appliances) should be included in the purchase price for the purpose of calculating the 10% deposit
- the impact of rebates and other incentives offered by a seller that potentially reduces the sale price if the buyer acts upon them have also been raised as an area that creates uncertainty about the true purchase price for the purposes of calculating the 10% deposit. For example, a seller may offer a discount off the total purchase price as an inducement for early payment (for example, receive \$20,000 off the price of a \$500,000 apartment for early payment), and
- stakeholders have stated that clarification regarding the purchase price is important as the buyer has the power to end the contract of sale if they pay more than a 10% deposit. It should be noted that the Act does not prevent the seller from asking for less than 10% as the deposit meaning that sellers can currently calculate a 10% deposit based on a conservative purchase price that does not include any additional goods that may be sold with the property. In the case of sellers who offer rebates, a conservative purchase price would be the price less the amount of any rebate.

Questions

- 33 What problems exist for sellers in setting a conservative purchase price for the purposes of calculating the deposit?
- 34 How could uncertainties about the true purchase price be addressed?

7.3 Progression payments

The Sale of Land Act does not specifically prevent a seller from requiring a buyer to make additional payments at certain times during the construction of the development. Such payments are commonly known as 'progression payments'. However, under an off-the-plan sale any progression payments received need to be held on trust for the buyer until the plan of subdivision is registered. This prevents sellers from accessing the money to fund the construction of the development or pay down debt to financiers.

The Sale of Land Act is not clear as to whether a seller can ask for progression payments over and above the 10% deposit. On the one hand the Act states that deposit moneys under the contract should not exceed 10% of the purchase price and the conspicuous notice to the buyer also notes that any negotiations between the buyer and seller about the amount of deposit moneys payable under the contract are subject to the 10% limit.

However, this position is confused by the definition of deposit moneys in the provisions relating to off-the-plan sales which contemplates additional moneys being paid as part of the purchase price over and above the 10% deposit. This definition would appear to enable additional progression payments to be made to the seller during the construction phase of the project.

It has been suggested that allowing sellers to access a portion of the money could assist a developer to obtain finance for a development.

Questions

- 35 What are your views of the current arrangements which do not allow a seller to access deposit moneys before the plan of subdivision is registered?
- 36 Do you think the current cap of 10% on deposit moneys is appropriate as a mechanism to protect buyers in an off-the-plan sale? Please give reasons for your view.
- 37 Should progression payments be permitted, and if yes, what constraints should be placed around that permission?

7.4 Transfer and release of deposit moneys

Deposit moneys paid by a buyer before the plan of subdivision is registered must be paid to the seller's legal practitioner, conveyancer or licensed estate agent and held on trust for the buyer until the plan of subdivision is registered.

The Sale of Land Act does not allow the deposit moneys (once paid) to be transferred between two parties who are both acting for the seller in an off-the-plan sale (for example, from the seller's estate agent to their legal practitioner). It has been suggested that allowing this transfer of funds would enable the seller's legal practitioner to invest the funds in an interest-bearing account.

It has also been suggested that the Sale of Land Act is unclear about how the deposit moneys are to be treated once the plan of subdivision is registered. The deposit moneys are to be held on trust for the buyer until registration of the plan. Once the plan is registered, it is logical to assume that the deposit moneys would then be subject to the requirements of section 24 of the Sale of Land Act and be held by the seller's estate agent, conveyancer or legal practitioner as a stakeholder for both parties until it can be determined who is entitled to the funds. However, the Act does not make this specific link or provide guidance as to how the transition from holding the deposit on trust for the buyer to holding the deposit for both parties as a stakeholder occurs once the plan of subdivision is registered.

Questions

- 38 Is there a continuing rationale for treating deposit moneys for off-the-plan sales differently to other deposit moneys and not allowing those moneys to be transferred under any circumstances prior to registration of the plan?
- 39 Does it seem appropriate that deposit moneys be treated differently once the plan of subdivision is registered and the level of protection for buyers lessened or should the deposit moneys be protected for the buyer until settlement? Please give reasons for your view.

8 Mandatory disclosure to buyers of off-the-plan property

A seller of property off-the-plan must disclose information about certain works affecting the land and amendments to the plan of subdivision to a buyer.

This disclosure is in addition to the general requirement on any seller of land to provide a section 32 statement disclosing a range of information about the property for sale prior to a contract of sale being signed. The additional disclosure requirements required for off-the-plan sales attempt to mitigate the unique risks associated with buying off-the-plan. In particular, the disclosure process seeks to inform buyers about works that affect the land while the property is being built (as the property being purchased has not been completed) and amendments to the plan of subdivision (as the final plan registered may be different from the plan at the time the contract is signed).

The seller is also required to ensure that there is a conspicuous notice in the contract of sale which provides the buyer with certain information about off-the-plan sales, in particular, alerting the buyer to the possibility of change in the property's value occurring between the time the contract is signed and the change of ownership secured.

Views are sought on the level of information that is required for purchasers to make an informed decision about an off-the-plan sale. While this paper specifically focuses on the current disclosure requirements, comments are welcomed on any additional information that stakeholders believe should be disclosed for off-the-plan sales.

8.1 Disclosure of works affecting the land

A seller must disclose in an off-the-plan contract details of any work affecting the natural surface level of either the land in the lot, or any land abutting the lot which is in the same subdivision. The disclosure requirements cover works that have been undertaken before the contract was signed and works that the seller is aware of at the time the contract is signed. After the contract is signed, the seller must also disclose any additional works of this nature as soon as practicable after the details to be disclosed come to the seller's knowledge.

The disclosure of works affecting the natural surface level of the land is aimed at ensuring buyers know how the natural surface level of the lot they are buying has been or is to be affected by earth works or construction works. A failure by the seller to give notice of works affecting the lot gives the buyer a right to rescind (end) the contract. Issues relating to ending an off-the-plan contract are discussed in section 9.

If the works result from the direction of a council or public authority and the seller has been required to submit plans of the works to the council or public authority, the seller is also required to provide the buyer with a copy of those plans.

A comment has been made that the current requirements 'miss the mark', as information which could have financial implications for buyers (for example, information about construction works that could affect the foundations of the property and information about the soil quality of the land for sale) is not necessarily required to be disclosed.

In addition, the information currently being disclosed is often technical in nature (for example, detailed engineering plans) which is difficult to understand and of little relevance to buyers.

Another problem that has been raised is that the lot for sale may not technically have a natural surface level, for example, an apartment above ground level or an underground car parking space, creating uncertainty about what disclosure (if any) is required.

There is also uncertainty about what constitutes a 'public authority' (for example, should privatised water authorities be included) and what actions by councils or public authorities constitute 'directions' (for example, should a planning permit over the property be classified as a direction).

Questions

- 40 What are your views on the current disclosure requirements in relation to works affecting a lot for sale?
- 41 How can buyers be best made aware of the potential financial implications associated with changes to the environment resulting from earthworks and construction?

8.2 Disclosing amendments to plans

A plan of subdivision may be changed multiple times before it is finally registered. This may include changes after contracts of sale are signed with buyers of the individual lots.

The Sale of Land Act requires the seller to advise the buyer in writing of any proposed amendments to the plan of subdivision. Amendments may be proposed by the seller or required by the Registrar of Titles. In either case, the buyer must be made aware of the proposed changes within 14 days of the seller making the request or receiving receipt of the Registrar's required change.

The buyer then has a further 14 days in which to end an off-the-plan contract of sale after being advised by the seller of an amendment to the plan of subdivision which will materially affect the lot to which the contract relates.

The disclosure requirements are limited to changes to the plan of subdivision only. There are no statutory requirements on sellers to disclose information about changes to the project design or the finishes, fixtures and fittings within the particular lot.

A seller is only required to advise a buyer of the proposed amendment. In practice, a seller may simply provide the buyer with a new plan of subdivision (which could run to a large number of pages). It may be difficult for the buyer to work out exactly what changes have occurred and the impact of those changes on their lot.

Changes may be made to common property and to other lots which may also have an impact on the buyer's lot. However, it can be difficult for buyers to determine whether these changes will have a material impact on their particular lot.

As the disclosure obligations only apply where there are changes to the plan of subdivision, a buyer may only have limited information about changes to the design, specifications and finishes of their particular apartment or the apartment building and no or limited capacity to end the contract if they are dissatisfied with changes that affect the 'look and feel' of the apartment. It is often changes in these specifications that may leave a buyer ultimately dissatisfied. However, many of these changes may not be fully identified until after settlement of the purchase has occurred.

Questions

- 42 Currently, the obligation sits with the buyer to determine what changes have occurred and whether they are detrimental. Do you believe that this is appropriate or should there be some responsibility on the seller to specify the changes to assist the buyer?
- 43 Do buyers have the correct amount of information to make informed decisions about whether changes to the plan have a material effect? Please give reasons or examples to illustrate your position.
- 44 In what circumstances, if any, would it be appropriate for a buyer to end a contract because of changes to design, specifications, fittings and finishes?

8.3 Warning notice

A contract of sale for an off-the-plan sale must contain a warning notice that contains the following information for the buyer:

- that subject to the 10% limit, the seller and buyer may negotiate on the amount of deposit moneys to be paid
- that a substantial amount of time may elapse between the buyer signing the contract and owning the property, and
- that the value of the property may also change during the time between signing of the contract and the buyer taking ownership.

The notice must be conspicuous.

Potential issues include:

- a notice in the contract of sale may not be effective in alerting buyers to the key risks of entering in to an off-the-plan sale as it is information that the buyer only receives once they have already committed to the sale, and
- the notice does not cover all the key risks to the buyer (for example, there is nothing about the risk that there may be changes made to the lot or the apartment building between the buyer signing the contract and owning the property).

Question

- 45 What is your experience with the warning notice for off-the-plan sales? Is it effective in assisting buyers to understand the potential risks of an off-the-plan sale or to negotiate the deposit price?

9 Rights to end an off-the-plan sale

The Sale of Land Act provides buyers in an off-the-plan sale with particular rights to rescind (end) the contract of sale. Each of these rights to rescind is explored in this section.

Most of the rights to end the contract are linked to payment of the deposit moneys. A buyer has rights to end the contract for an off-the-plan sale at any time before the plan of subdivision is registered if:

- the contract does not include a provision that the deposit moneys are to be paid to the seller's legal practitioner, conveyancer or estate agent to be held on trust for the buyer until the plan of subdivision is registered
- the deposit required under the contract exceeds 10% of the purchase price for the lot, and
- the deposit moneys paid before the plan is registered are not paid to the seller's legal practitioner, conveyancer or estate agent.

The buyer also has rights to end the contract if:

- certain disclosures are not made or if the plan of subdivision changes
- the seller fails to disclose details of works affecting the natural surface level of the land, and
- within 14 days of being advised by the seller of an amendment to the plan of subdivision which will materially affect the buyer's lot. This right aims to protect the buyer if significant changes are made which result in the purchase of the property no longer being an attractive proposition for the buyer.

In addition a buyer may end the sale at any time before the plan of subdivision is registered if an amendment is made to the plan of subdivision which restricts or limits the use of the lot. However, this right is limited and does not apply if the amendment results from any recommendation of a public authority or government department. The contract of sale may also provide that this right does not apply in respect of the final location of an easement.

Finally, rights to end the contract also occur if the plan of subdivision is not registered within 18 months of the contract being signed or another period specified in the contract. In this case, the buyer may end the contract at any time following that timeframe expiring but before the plan of subdivision is registered (section 9AE(2)). This requirement aims to provide the buyer with certainty about the timeframe for completion of the project and registration of the plan.

A number of issues have been raised about rights to end off-the-plan contracts which are outlined below.

9.1 Timeframe for exercising right to end the contract

It has been suggested that consideration should be given to shortening the period in which the right to end the contract can be exercised. Currently, many of the termination rights continue until the plan of subdivision is registered. It has been suggested that this provides the seller with little certainty as it may be years between the right to end the contract arising and the plan being registered. It has been suggested that if a buyer has been notified by the seller about an event which gives rise to the right to end the contract and there has been full disclosure, the buyer's right to end the contract should expire after a set period of time (for example 60 days).

In contrast, an issue has also been raised about the timeframe in which a buyer may exercise his or her rights to end the contract following an amendment to the plan of subdivision (which is currently limited to 14 days following disclosure). It has been raised that 14 days does not provide sufficient time for the buyer to decide whether to proceed with the purchase.

Question

- 46 What are your thoughts on the current timeframes available to a buyer to end an off-the-plan sale? Are they appropriate?

9.2 Plan of subdivision not registered by specified date

An issue has been raised that the Act does not enable the seller and buyer to mutually agree to extend the date for registering the plan of subdivision. It has been suggested that there would be benefits to both parties if an off-the-plan contract could be extended by agreement (such as by an exchange of letters between legal practitioners).

Question

- 47 Is it common for plans of subdivision not to be registered by the date specified in the contract of sale? If yes, what are the benefits to both parties of enabling the date to be extended by mutual agreement?

9.3 Preventing abuse of rights to end contracts

During preliminary consultation it was suggested that some sellers may be manipulating buyers by deliberately creating an event to give rise to the buyer's right to end the contract (such as a material alteration to the lot) with the intention of forcing the buyer to end the contract so the seller can re-offer the property at a higher price to others. Views are welcomed from stakeholders as to whether this is a rare or widespread practice.

Questions

- 48 What is your experience of the ending of off-the-plan sales contracts? What are the common areas and issues that trigger rights to end such contracts?
- 49 Are you aware of sellers manipulating buyers into exercising their rights to end the contract to enable properties to be re-sold at higher prices?

10 Owners corporation insurance

When the Owners Corporations Act was developed in 2006, the Sale of Land Act was also amended to require sellers of land within an owners corporation to ensure that the necessary insurance required under the Owners Corporations Act was in place before selling their property.

The Sale of Land Act requires sellers of property within owners corporations to ensure the correct insurance is in place at the point of sale, which is the focus of this paper. Other issues relating to owners corporation insurance are explored in the second issues paper in the Consumer Property Law Review. Individuals who are interested more broadly in other issues relating to owners corporations, including insurance requirements, are encouraged to read and make a submission on the second issues paper.

The Sale of Land Act requires a seller of property in an off-the-plan development to effectively step into the shoes of a newly created owners corporation and take out the required owners corporation insurance for a period of up to 6 months following registration of the plan of subdivision. This provision acknowledges that there may be an initial period following the registration of the plan when properties within the owners corporation may change hands before the owners corporation has had the capacity to organise itself sufficiently to obtain the necessary insurance.

In addition, the Sale of Land Act prohibits the sale of any land within an owners corporation unless the insurance required by the Owners Corporations Act is in place. If a lot is sold without the required insurance, the buyer of the property has rights to end the sale at any time before the contract is completed.

Together these provisions seek to ensure that all the necessary insurance is in place before a property in an owners corporation changes hands, not just following the initial registration of the plan but on an ongoing basis over the life of the owners corporation.

10.1 Insurance within 6 months of plan registration

The obligation on sellers to take out the required owners corporation insurance is limited to the first 6 months following the registration of the plan. This envisages that owners corporations will be actively functioning within 6 months.

However, the recent review of section 32 of the Sale of Land Act demonstrated that there are owners corporations which may be inactive for long periods of time. In addition, there is no specific remedy that applies if sellers (developers) fail to obtain the correct insurance within the first 6 months following the registration of the plan of subdivision. It has been suggested that a buyer should not be obliged to settle the purchase until the developer provides evidence that the necessary insurance is in place.

In addition, views are sought on the merits of this obligation continuing to reside with subsequent sellers of property in an off-the-plan sale as opposed to the developer. Feedback is sought on how this obligation manifests in the market place.

Questions

- 50 How does the obligation to obtain owners corporation insurance within the first 6 months of registration work in practice? Is this an obligation that is fulfilled by the initial developer or dealt with at the first meeting of the owners corporation?
- 51 What remedies should be available to buyers of property if an owners corporation is not meeting its responsibilities under the Owners Corporations Act, such as not having obtained the correct insurance?

10.2 Requirement to hold insurance at point of sale

It has been suggested that the provisions in the Sale of Land Act, in particular the requirement to hold insurance at the point of sale, have the potential to penalise individual sellers for the failure of the owners corporation to obtain the correct insurance, and to force sellers into obtaining insurance in their name over common property specifically for the purpose of selling the property. This issue is potentially compounded where the owners corporation is inactive and the seller is unlikely to be able to garner the necessary support from their neighbours to re-activate the owners corporation and obtain the necessary insurance required before the sale occurs. There is also uncertainty as to whether the offence of selling land within an owners corporation without the required insurance applies to off-the-plan sales that occur before the plan of subdivision is registered.

Views are sought on the necessity for the correct owners corporation insurance to be in place at the point a property within an owners corporation is sold.

Question

- 52 What, if any, requirements under the Owners Corporations Act should an individual seller of property within an owners corporation be responsible for ensuring are complied with at point of sale?

11 Possession and occupation fees

The Act makes a number of references to 'occupation fees' which can be retained by the seller if the buyer ends the contract of sale.

While the Act makes it an offence for a seller to require a buyer to take possession before the plan of subdivision is registered, this offence does not apply where the buyer is paying an occupation fee to occupy the lot.

Consumer Affairs Victoria is interested in the circumstances in which a buyer may be paying an occupation fee and whether such arrangements are common practice.

It is also unclear how the occupation arrangements and occupation fees interact with the provisions of the *Residential Tenancies Act 1997*, and whether such an occupation fee is 'rent' for the purposes of that Act.

Your views are sought on:

- the merits (or otherwise) of a buyer taking possession before the plan of subdivision is registered, and
- the arrangements that are needed to protect the interests of the buyer and the seller if the buyer does take early possession.

Question

- 53 Is it common for a buyer to take possession before a plan of subdivision is registered, and if yes, what arrangements are needed to protect the interests of buyers and sellers in such circumstances?

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

12 Terms contracts

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.

The original terms contract provisions that formed part of the Sale of Land Act in 1962 were developed in response to problems being experienced by buyers during the first half of the 20th century by 'intermediate sellers' who were themselves buying land under terms contracts and then on-selling the land to other buyers. These intermediate sellers would default, leaving the buyers at the end of the line with nothing.

The Sale of Land Act addressed this issue by prohibiting terms contracts unless the seller is the registered proprietor of the land or presently entitled to become the registered proprietor or legally empowered to execute a registrable transfer of the land.

As final settlement of the property under a terms contract could be months or even years away, the Sale of Land Act also includes the following key protections for buyers who enter into such arrangements:

- a buyer who is not in default can require the seller to transfer title to the buyer in exchange for a mortgage back to the seller for the remaining outstanding funds
- land that is subject to a mortgage cannot be sold under a terms contract unless specific requirements are met or the mortgage is discharged within 90 days of the making of the contract, and
- the seller must not mortgage land that is subject to a terms contract and if the seller does so, the contract can be ended by the buyer and the seller is guilty of an offence.

These provisions are designed to protect the buyer who is vulnerable because they are agreeing to pay significant portions of the purchase price before obtaining title to the property. The harms these provisions seek to avoid are the possibility that the buyer might not get title to the property despite paying a large part of the purchase price, or that the seller might mortgage the property while the buyer is in possession, limiting the buyer's title to the property.

In 2008, the terms contracts provisions in the Sale of Land Act were re-drafted with the aim of simplifying and clarifying the legislation as well as modernising it. Further amendments were made in 2015 in response to stakeholder concerns that the legislative changes in 2008 had inadvertently excluded some terms contracts from the protections provided by the Act.

Despite the amendments made to the provisions in 2008 and 2015, the majority of the protections afforded to buyers in terms contracts remain largely unaltered since 1962. While some particular issues are identified below for discussion, views are sought generally on the effectiveness of the legislation and any particular areas that warrant review and reform.

12.1 Continuing rationale for terms contracts

As outlined above, selling property under terms contracts has been a part of the Victorian property market for a significant amount of time. However, it has been suggested that market changes over the last 50 years, in particular, the competitive mortgage market, means that there is no longer a compelling reason to continue to allow terms contracts and as such, their use should be banned or severely restricted.

A contrasting view that has also been expressed is that there still is a place for terms contracts, particularly in rural areas, as it has been a long standing practice for farmers to sell farming land to their neighbour or children through a terms contract. Another example put forward of where terms contracts have worked effectively in the past is where property is sold within families, for example parents selling property to their children on favourable terms.

Question

- 54 What is your experience with buying or selling property under a terms contract? Do you agree that there is a continuing place for such contracts in today's market?

12.2 Effectiveness of existing remedies

The buyer under a terms contract can end the contract at any time before its completion and recover any money paid under the contract if the seller breaches the Sale of Land Act.

However, the buyer cannot end a terms contract if the seller has acted honestly and reasonably and ought fairly to be excused for the contravention and the buyer is substantially in as good a position as if all the relevant provisions had been complied with.

In addition, even if the contract is ended, the buyer must pay an occupation rent for the period during which the buyer was in actual possession of the land or entitled to rent or other profit.

These remedies assume that the buyer is in a position to take action against the seller and that the seller has sufficient funds to repay the buyer for any loss suffered.

However, there has been an increasing trend for terms contracts to be struck between financially stressed sellers and buyers who are unable to obtain mainstream finance. These arrangements are facilitated by intermediaries who introduce the parties to each other and organise the sale. Some of these intermediaries may be licensed estate agents and/or be licensed to provide credit. Another popular form of contract used by intermediaries is the 'rent-to-buy' arrangement which is discussed in the following section of this paper.

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, including:

- a financially stressed seller with significant debts in addition to any existing mortgage over the property, for example credit cards debts, which they may not be able to service even with the instalments paid by the buyer, noting that these debts may be incurred before or after entering into the contract of sale
- a financially stressed seller breaching their obligations under the Act resulting in the buyer not being able to recover any money paid using the traditional remedies
- risks to the seller such as the sale taking longer than anticipated and not being a 'quick fix' to their financial problems, as the buyer may not be able to afford the agreed instalments, and
- 'bad acts' by an intermediary who is not a party to the contract of sale, for example, knowingly facilitating a sale between people who do not have the ability to meet their contractual obligations.

Questions

- 55 Should the current restrictions on sellers under terms contracts be expanded to encompass debt that is not linked to the property but which may impact on the seller's capacity to pass title to the buyer? If yes, what sources of debt should be included?
- 56 Should there be greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries? If yes, what would you favour:
- offences and remedies directed at intermediaries?
 - requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?
 - other approaches? Please provide your ideas.

13 'Rent-to-buy' contracts

A form of contract that is not directly regulated by the Sale of Land Act is the rent-to-buy contract.

While individual contracts may vary, in general there are two main components to a rent-to-buy arrangement:

- the 'rent part' which is a residential tenancy agreement allowing the tenant/buyer to occupy the property for a fee. The tenant must sign a residential tenancy agreement and pay a bond, as well as rent over an agreed period, and
- the 'buy part' which takes the form of a sale option/sale deed: this is not a contract of sale but is an option that gives the tenant the right to purchase the property by an agreed time period. The tenant needs to qualify for a home loan at the conclusion of the rental period and then sign a contract of sale.

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. The initial option fee and ongoing option fees are credited against the purchase price for the property if the tenant/buyer converts the option into a contract of sale. However, if the tenant/buyer does not proceed with the purchase, the option fees are lost.

Similar issues to those being experienced with terms contracts have arisen with intermediaries (see the discussion under section 12.2 above) 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.

It has been suggested that there is a need to address these arrangements as the third party acts as a facilitator or intermediary between the seller and the buyer to bring together two parties who would otherwise not enter into a contractual relationship and who are both potentially vulnerable to exploitation.

There are a number of risks for the tenant/buyer in entering into rent-to-buy arrangements.

During the rental period, if the buyer/tenant defaults on the lease (for example, does not pay their rent for a month), the landlord/seller can potentially exercise their rights under the *Residential Tenancies Act 1997* to terminate the lease and as a result, the rent-to-buy arrangement. In such circumstances, the tenant/buyer is likely to lose both the option to purchase and any fees paid under the sale option.

There are also a number of risks in the 'buy' component of the transaction. The tenant/buyer is vulnerable because they agree to pay significant sums of money (through option fees) before obtaining title to the property. As such, the tenant/buyer is vulnerable to losing this money and to the risk of the landlord/seller mortgaging the property while the tenant/buyer is in possession.

While the definition of 'sale' in the Sale of Land Act includes the giving of an option to purchase, so the general remedies under the Act apply, there are no specific provisions in the Act regulating rent-to-buy arrangements. This can be contrasted to the specific protections that apply to terms contracts.

The issues highlighted in terms contracts regarding the seller's capacity to repay any loss and the buyer's capacity to take legal action also apply in a rent-to-buy scenario. Therefore, it has been suggested that specific regulation of rent-to-buy arrangements is required to address the risks posed to both buyers and sellers.

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 are sought on the option of applying such approaches to rent-to-buy contracts in Victoria.

Question

- 57 What are your experiences of rent-to-buy contracts? Can you provide any examples where a buyer has successfully purchased a property using the rent-to-buy method?

14 Land banking

'Land banking' is a term that covers an approach increasingly employed by some property developers who are subdividing undeveloped land into small blocks which are offered to buyers as an investment opportunity on the basis that the value of the land will increase once it is approved for development by council, enabling the investor to re-sell the property at a profit.

Investors under such schemes 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 local council).

Buyers under such schemes may be vulnerable because:

- the land may be unsuitable for re-zoning and therefore development, for example, it may be protected for conservation reasons, located on a flood plain or protected for other reasons that the buyer is unaware of at the time they are offered the property
- some developers sell the plot of land from 'concept' plans which offer a view of what the land could look like if it is approved for residential zoning and subdivided for development – in such cases there is no guarantee the plot of land the investor has an option to purchase is the plot of land they will ultimately buy
- where the land is subdivided and then sold, the subdivided blocks may be too small to appeal to a developer who would prefer to buy a big tract of land from one seller rather than deal with a large number of small sellers, and
- there is a focus on the potential future value of the land against the current selling price, however, there is no guarantee that this future value will eventuate.

It has been suggested that in addition to the existing protections under the Sale of Land Act, stronger protections should be introduced to assist buyers. For example, the Act could provide options for the buyer to end the contract.

Question

- 58 Should there be additional protections provided to buyers who purchase property under land banking schemes? If yes, where do you think the risks lie and how can they be mitigated?

15 Private sales online

Some websites are offering individuals the opportunity to sell their house privately, without employing an estate agent, stating that there are benefits to the seller, in particular savings in commission and advertising fees. These websites also claim that technology makes it easier to sell a home privately as the majority of people looking for property will access the Internet as part of that search.

The potential issues associated with online auctions are discussed above under section 2.2 of this paper. This section looks more broadly at issues associated with buying and selling property privately online.

Depending on the site, a seller may be offered a range of services including drawing up floor plans, preparing advertising and 'For Sale' boards and arranging professional photographs and social media campaigns. Some sites will field enquiries on behalf of sellers while others clearly state the services offered are promotional only.

Views are sought on this emerging area of property sales and whether any issues have been experienced in the market place in buying and selling property online. Anyone selling property online is still subject to the requirements of the Sale of Land Act and so views are also sought as to whether the Act inhibits online sales.

Question

59 What are your experiences with selling and buying property privately online?

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 that inexperienced buyers of real estate and small businesses are provided with sufficient financial information prior to making a decision. While no specific issues have been raised with these provisions during preliminary consultation on the review, they have been in place for over 50 years in one form or another and, therefore, it is timely to review the policy basis for such provisions as part of this review.

16 Small business statement

A statement is required for the sale of a small business valued at up to \$350,000. It is usually completed by the seller and their agent 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 2 years.

The requirement for a small business statement was first introduced in 1963 as an amendment to the *Estate Agents Act 1958*, with the requirement subsequently retained as part of the 1980 Act.

Originally the provisions were designed to protect inexperienced or gullible buyers. At the time, it was stated that both sellers and estate agents were giving buyers insufficient details about the true figures of the business and the terms of loans and tenancy agreements. As a result buyers were finding themselves in financial difficulties. Compulsory provision of more detailed information was aimed at giving the buyer the necessary protection.

If the statement was not given or if the particulars were not provided or were inaccurate, the buyer could end the contract by giving notice in writing to the seller or their agent within 3 months of signing the contract and recovering all moneys paid under the terms of the contract from the agent and the seller.

Views are sought 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 focussed on the licensing and conduct of estate agents.

Question

60 What is your experience with the small business statement? Is it still required? Please give reasons for your view.

17 Statement concerning finance

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.

The buyer has rights to end the contract if the statement is not provided, or if the loan is not obtained in accordance with the promise made and the buyer has done everything reasonably required on them to obtain the loan. However, the buyer cannot end the contract if they have paid the entire purchase price or taken possession of the property.

This requirement was first introduced over 50 years ago and is substantially unchanged except for a key change made in the 1990s, which limited the obligation to provide the statement to estate agents and auctioneers who made specific promises to buyers about finance.

Views are sought from stakeholders on the prevalence of such statements in the market place and the relevance of the information required to be provided. It has been suggested that the practice of estate agents and auctioneers making promises around finance has declined with the rise of competitive lending and the ready availability of bank finance.

Question

- 61 Do estate agents and auctioneers commonly assist buyers in obtaining finance or has this practice declined over the years as bank finance became more readily available?

18 Builders and subdividers of land

The Estate Agents Act also sets out requirements to be followed by builders and subdividers of land, requiring them to provide buyers with certain financial information.

These requirements have been in place since 1963 and followed the recommendations of the Statute Law Revision Committee which specifically considered whether builders and subdividers should be controlled in any manner under the Estate Agents Act.

At the time, the Committee agreed that a builder or subdivider selling their own property could not properly be described as an agent and as such should not require an estate agent's licence. Nevertheless it was considered that some form of control was necessary in situations where builders or subdividers of land were making representations about finance to prospective buyers.

The provisions provide that before any deposit is paid or contract is entered into, the builder must give the buyer a statement which sets out the conditions of the finance that has been promised to the buyer. The information required is the same as for estate agents or auctioneers discussed in the section above.

These provisions apply to contracts for the purchase of established and partially erected buildings. They may also apply to off-the-plan sales as the legislation contemplates application to contracts entered into for the erecting of any building with the ultimate aim of buying the land and building. The provisions also cover any person who subdivides land with the purpose of selling the allotments.

Failure to comply with the requirement to provide a statement is an offence. The remedies that apply for a failure by an estate agent or conveyancer to comply with the requirement to provide a financial statement also extend to this requirement, meaning that a buyer may have rights to end the contract in certain circumstances.

Views are sought from stakeholders on the need to continue to regulate representations made by builders or developers of land to prospective buyers.

Question

- 62 Is it common practice for builders and developers of land to recommend financial products or finance providers to prospective buyers and, if yes, have there been any problems for buyers with this approach?

Part E: Modernisation of the Sale of Land Act

The Sale of Land Act has been on the Victorian statute book for over 50 years and has been amended many times during its life.

This component of the issues paper focuses on opportunities to modernise the legislation and remove outdated or redundant provisions. It is proposed to revise the Sale of Land Act to remove all antiquated language and to improve the readability of the legislation. Stakeholder suggestions on particular areas for improvement are welcomed.

19 Purpose of the Sale of Land Act

Unlike modern Acts, the Sale of Land Act does not have a section clearly stating its purposes. Having clearly stated purposes assists in understanding and interpreting the Act and can provide a reference point for measuring its effectiveness.

Question

63 What should the purposes of the Sale of Land Act include?

20 Definitions

The Sale of Land Act contains many definitions which have been in place without significant amendment for a long time. The definition of 'land' remains unchanged since the original Act was enacted in 1962 and other key definitions of 'mortgage' and 'sale', have not been amended since 1965.

The lack of amendment may signify that these definitions are working well and do not require any significant change. However, these definitions do include outdated terminology and, in particular, the definition of mortgage is lengthy and convoluted.

In addition, the Sale of Land Act contains 4 separate definition sections (see sections 2, 23, 30 and 33) which define certain terms for the purposes of different parts of the Act. Some of the terms defined in multiple parts of the Act are the same or similar. For example, 'estate agent' is defined in sections 23 and 'licensed estate agent' is defined in section 30 in similar terms as having the same meaning as in the Estate Agents Act.

However, in other parts the definitions are different. For example, different definitions of the key terms 'purchaser' and 'vendor' apply depending on whether the definition in section 2 or the definition in section 30 is to be relied on for the purposes of interpretation.

In addition, certain terms may also be further defined in other sections of the Act. For example, the term 'deposit moneys' is defined in sections 23 and 30 as well as being separately defined in sections 9AA(1)(b) and 9AA(6) specifically for off-the-plan sales.

The presence of multiple definitions for the same or similar terms can be confusing for individuals interpreting the law. Therefore, views are sought on what definitions are required, the merits or otherwise of current definitions within the Act and whether there are any precedents in other legislation that could be successfully adopted in Victoria's sale of land legislation.

Questions

- 64 What are the key terms that should be defined in the Sale of Land Act?
- 65 How can the current definitions be improved? Where have you experienced areas of inconsistency or confusion?

21 Improving the operation of the Sale of Land Act and identifying redundant provisions

Since its enactment, the Sale of Land Act has been amended a number of times and has accumulated a number of provisions that are now redundant or have otherwise served their purpose. The review also provides an opportunity to deal with duplication and inconsistencies within the Act resulting from multiple amendments. Some preliminary issues that have been identified include:

- powers to make regulations are spread across discrete parts of the Sale of Land Act and are limited in their scope
- section 8 of the Sale of Land Act sets out how mortgage moneys are to be apportioned when land that is subject to a mortgage is subdivided and enables dissatisfied parties to apply to an arbitrator for a determination. It has been suggested that these provisions are restricted and inflexible. Views are sought on whether specific regulation is still required, given that other forms of securities are not regulated by the Sale of Land Act
- section 8A of the Sale of Land Act sets out the types of land in Victoria that can be lawfully dealt with without being subdivided: it has been suggested that the language of this section could be simplified as the current wording is complex and difficult to interpret.

Questions

- 66 Is there still a need for the Sale of Land Act to regulate the apportionment of mortgage moneys at subdivision?
- 67 What other opportunities can you identify to modernise the Sale of Land Act?

Part F: Dispute resolution, offences and remedies

Preliminary consultation has suggested that there is scope to review the mechanisms for arbitration under the Sale of Land Act and examine the merits of including mediation and other forms of alternative dispute resolution.

Comments have also been made about the scope of existing remedies under the Act and the potential to modernise and improve the opportunities open to aggrieved parties under a contract of sale to find an appropriate solution to their problems. Note that while other parts of this paper have examined the appropriateness of particular offences and remedies currently available under the Act, this section seeks to examine offences and remedies in a broader context.

22 Arbitrators

Although the primary way in which sale of land disputes are resolved is through the courts, the Sale of Land Act does make limited provision for the use of arbitrators in certain circumstances.

Arbitrators must be a judge of the County Court or qualified to be appointed a judge of the County Court and are appointed by the Governor in Council. Arbitrators may appoint assessors from a panel of persons appointed by the Attorney-General to assist them in determining any matter under the Act.

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, and
- 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 time frame for compliance with notices issued under the Sale of Land Act.

A decision of an arbitrator is enforceable as if it were a judgment or order of the Supreme Court. There are no appeal rights from an arbitrator's decision.

The grounds for arbitration are quite narrow and technical, being largely limited to disputes in relation to terms contracts and off-the-plan contracts.

The provisions relating to arbitrators were part of the original enactment of the Sale of Land Act in 1962 and have been largely untouched since that time, meaning that they do not necessarily take into account modern developments such as VCAT, which may be a better avenue for adjudicating minor sale of land disputes.

Views are sought on the merits of continuing to have arbitrators and the types of disputes that would be appropriate for arbitration.

Questions

- 68 Do you have any personal experience of using the arbitration system under the Sale of Land Act? If yes, how did you find the process?
- 69 What types of disputes would benefit from arbitration and what body should undertake this role?

23 Conciliation and mediation of disputes

Conciliation is an informal process to help parties resolve a dispute through communication, identifying the issue in disputes and exploring options for resolution.

With the exception of arbitration in certain circumstances, the Sale of Land Act does not provide for the investigation of or conciliation of disputes between buyers and sellers.

The Estate Agents Act enables the Director of Consumer Affairs Victoria to investigate any dispute that arises between an estate agent and a client of the estate agent or another estate agent or a member of the public.

Currently the only option available to buyers and sellers of property is to resolve disputes about the sale of land through the courts. As discussed above, arbitration is only available in limited circumstances and there are no conciliation or other lower cost options to assist buyers and sellers to mediate and settle disputes.

It has been suggested that mediation and dispute resolution mechanisms should be introduced into both the Sale of Land Act and the Estate Agents Act.

Questions

- 70 Should there be opportunities for mediation and/or conciliation of disputes arising under the Sale of Land and Estate Agents Acts? If yes, what typical areas of dispute would benefit?
- 71 Should there be mandatory conciliation before a dispute can escalate to VCAT or a court? Are there areas where conciliation should not apply – for example, if a person is electing to exercise their rights to end a contract?

24 Offences and remedies

Throughout this paper there has been discussion at different points about the specific offences and remedies that currently exist under the Sale of Land Act. However, the review provides an opportunity to assess the offences and remedies available throughout the sale of land process in a holistic way.

It has been suggested that the remedies and offences that apply in the Sale of Land Act are limited and antiquated.

Some of the issues that have been raised during preliminary consultation include doubt as to how remedies under the Sale of Land Act sit alongside remedies under other consumer laws and a suggestion that there is a need to review the jurisdiction conferred upon VCAT and the courts, and associated powers.

The jurisdiction conferred upon VCAT under the Sale of Land Act is currently limited to compensation claims arising from public auctions.

24.1 Remedies under the Sale of Land Act

The Sale of Land Act provides for various ways to end a contract of sale. Some remedies under the Sale of Land Act give the buyer a right to *avoid* the contract of sale while others provide a right to *rescind* the contract. Avoidance is not defined but is generally understood to mean that the parties to the contract are discharged from further performance of the contract but remain potentially liable for a breach of contract that occurred before the date of termination.

There is a definition of rescission in the Act which is defined to mean avoidance of the contract as from its beginning, meaning 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 only, even though the term 'rescind' is also used in other Parts of the Sale of Land 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' is used in relation to terms contracts and
- 'voidable by the purchaser' also used in relation to terms contracts.

Views are sought from those who have worked with the legislation about the various termination rights that apply under the Sale of Land Act and options to improve and clarify such rights.

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 substantially in as good a position as if the relevant provision that trigger the rescission right had been complied with. It has been suggested that there should be no absolute rights to rescind and that all of the rescission rights available under the Sale of Land Act should be limited to prevent buyers rescinding where a seller has acted honestly and the buyer has not been disadvantaged. Views are sought on this suggestion.

Questions

- 72 Are the current remedies under the Sale of Land Act meaningful for buyers and sellers? Are there opportunities for reform?
- 73 Should sellers have the opportunity to argue honest and reasonable mistake? Are there any circumstances where a seller should not be able to put this case? Please give reasons for your view.

24.2 Consumer law remedies

Remedies under Part 8.2 of the *Australian Consumer Law and Fair Trading Act 2012* extend and apply to the Sale of Land Act, although certain defences including reasonable mistake of fact and due diligence are not available. This has the effect of providing buyers with access to consumer law remedies, including court orders varying or declaring void contracts of sale, or the awarding of damages.

Many of the specific remedies in the Sale of Land Act are limited in application. For example, rights to end off-the-plan sales are only available until the plan of subdivision is registered. Other more general termination rights may only apply until the buyer has taken possession or is entitled to rents and profits. In contrast, the remedies under the Australian Consumer Law and Fair Trading Act are not limited and can still be exercised after a contract of sale has been completed, provided the buyer can show they have suffered loss and damage.

Views are sought on whether buyers are more likely to rely on specific remedies available under the Sale of Land Act to exercise a direct right to end a contract or make an application to a court to have the contract ended using remedies available under the Australian Consumer Law and Fair Trading Act.

Question

- 74 How often are remedies under Part 8.2 of the Australian Consumer Law and Fair Trading Act used in a sale of land matter? Are there any advantages to specific remedies available under the Sale of Land Act?

24.3 Offences and enforcement

Traditionally, in a sale of land context the wronged party to a dispute has exercised a right to end a contract of sale rather than by Consumer Affairs Victoria prosecuting offenders. It has been argued that the threat of losing the sale provides a greater incentive for sellers to discharge their obligations appropriately than any threat of prosecution.

The main exception to this general rule is poor conduct at public auctions where there are a greater number of potential buyers who could be unfairly impacted by the seller's or auctioneer's behaviour. Ensuring that public auctions are conducted in a transparent and fair manner is a strong enforcement focus for Consumer Affairs Victoria.

This approach is reflected in the penalties applying to offences under the Act. The public auction penalties are the most significant under the Act. Offences that have been subject to recent reform (for example, terms contracts and section 32 statements) also attract significant penalties.

However, there are a number of areas where the offences and penalties have not been scrutinised in some time, largely in areas where there are extensive rights available to buyers to end contracts of sale. Examples include the penalties applying to off-the-plan sales which are set at a maximum of 50 penalty units (\$7,583.50) and offences in relation to the payment of deposits, some of which are set at as low as 10 penalty units (\$1,516.70).

It should be noted that the Sale of Land Act does include a general offence provision which provides that a person who sells any land in contravention of the provisions of the Act is guilty of an offence. However, the maximum penalty available is only 10 penalty units (\$1,516.70).

Certain enforcement powers the Director of Consumer Affairs Victoria has under the Australian Consumer Law and Fair Trading Act are extended and applied to contraventions of the Sale of Land Act. Provisions relating to contraventions by bodies corporate and conduct by officers, employees and agents under the Australian Consumer Law and Fair Trading Act are also extended to the Sale of Land Act.

Questions

- 75 Do rights to end contracts of sale work as an effective deterrent to poor behaviour by sellers or is there a need to prosecute some offenders? Please give reasons for your views.
- 76 What are your views on the current offences and penalties applying under the Sale of Land Act?

Appendix 1: Summary of questions

This appendix provides a summary of the questions for consideration.

Part A: Sale of land process

1 Before signing a contract of sale

- 1 How could the current requirements for the disclosure of financial information before a contract of sale is signed be improved to take better account of property being sold 'off-the-plan'?
- 2 How could uncertainties about the location of water infrastructure under land for sale be resolved?
- 3 What is your view on the approach or approaches required to deter misleading and deceptive conduct during the sale of land?
- 4 In light of the Australian Consumer Law offences, is there still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act?
- 5 What is your view of the effectiveness of the due diligence checklist in increasing the awareness of buyers of the need to make their own enquiries before buying a property?
- 6 Would there be advantages to having sellers obtain and provide potential buyers with building and pest inspection reports prior to selling their property? Please give reasons for your view.

2 Auctions

- 7 What is your experience of the effectiveness of the rights for buyers to seek compensation at VCAT? Do they act as an incentive to sellers and estate agents to conduct auctions fairly?
- 8 What behaviours by auctioneers and estate agents would you identify as having a negative impact on a buyer's experience at an auction?
- 9 Should the rules that cover public auctions be extended to cover all auctions? Please give reasons for your view.
- 10 Do the risks to buyers and sellers at an online auction differ from the potential harms experienced by buyers and sellers at a traditional physically based auction? If yes, please give reasons for your view.
- 11 How should online auctions be regulated and what are the limitations of intervention?
- 12 Should there be any barriers to entry for operators of online auctions or other people who host an online auction site such as a requirement to be licensed? Please give reasons for your view.
- 13 In what circumstances should the behaviour of people who are not participating directly in an auction be regulated?
- 14 Do you think that the holding of public auctions on ANZAC Day should be regulated? Please give reasons for your view.
- 15 Who should be responsible for ensuring the rules for conducting an auction are complied with? Please give reasons for your view.
- 16 Should side deals be disclosed to all bidders before an auction commences? Please give reasons for your view.

3 Cooling-off

- 17 In what circumstances should buyers be able to cool-off from a contract of sale?
- 18 In your experience, are the current cooling-off provisions effective in 'undoing' an impulsive decision made by a buyer?

4 Contract of sale

- 19 Do you think the standard form contract has merit, or is there a better way to set general conditions to which all sales are subject?
- 20 What, if any, constraints should be placed around the adding of special conditions to a standard form contract of sale?
- 21 Is there a better way to regulate the conditions under which a sale of land takes place?
- 22 Is there a need to regulate the conditions that are inserted into contracts for off-the-plan sales?
- 23 Can you envisage any issues if the exemption for estate agents is removed? If yes, please give reasons for your view.

5 Deposit moneys

- 24 Is there still a need to ensure that deposit moneys are preserved until settlement? Please give reasons for your answer.
- 25 What remedies should be open to a buyer in circumstances where a seller does not meet his or her obligations to pay over the deposit? For example, should a buyer be able to end the contract?
- 26 What is your experience of the effectiveness, or otherwise, of the 'early release' provisions?
- 27 What information is essential to assist a buyer in determining whether or not to release the deposit before settlement?
- 28 Should the buyer's right to end the contract be absolute if the seller misleads them about the details of mortgages and caveats over the land? Can you envisage any circumstances where a seller may make an honest and reasonable mistake?
- 29 Should the use of bank guarantees and deposit bonds in the sale of land process be regulated and, if yes, how?

6 Damage to land or buildings before sale completed

- 30 What risks do buyers face in relation to damage or destruction of the property they are buying in the period between the signing of the contract and settlement?
- 31 Are the current protections still relevant or are there other risks that should be mitigated?
- 32 What is your experience of buyers relying on the right to end the contract because of damage to a dwelling house? How do these rights work in practice?

Part B: Buying property 'off-the-plan'

7 How off-the-plan sales are regulated

- 33 What problems exist for sellers in setting a conservative purchase price for the purposes of calculating the deposit?
- 34 How could uncertainties about the true purchase price be addressed?
- 35 What are your views of the current arrangements which do not allow a seller to access deposit moneys before the plan of subdivision is registered?
- 36 Do you think the current cap of 10% on deposit moneys is appropriate as a mechanism to protect buyers in an off-the-plan sale? Please give reasons for your view.
- 37 Should progression payments be permitted, and if yes, what constraints should be placed around that permission?
- 38 Is there a continuing rationale for treating deposit moneys for off-the-plan sales differently to other deposit moneys and not allowing those moneys to be transferred under any circumstances prior to registration of the plan?
- 39 Does it seem appropriate that deposit moneys be treated differently once the plan of subdivision is registered and the level of protection for buyers lessened or should the deposit moneys be protected for the buyer until settlement? Please give reasons for your view.

8 Mandatory disclosure to buyers of off-the-plan property

- 40 What are your views on the current disclosure requirements in relation to works affecting a lot for sale?
- 41 How can buyers be best made aware of the potential financial implications associated with changes to the environment resulting from earthworks and construction?
- 42 Currently, the obligation sits with the buyer to determine what changes have occurred and whether they are detrimental. Do you believe that this is appropriate or should there be some responsibility on the seller to specify the changes to assist the buyer?
- 43 Do buyers have the correct amount of information to make informed decisions about whether changes to the plan have a material effect? Please give reasons or examples to illustrate your position.
- 44 In what circumstances, if any, would it be appropriate for a buyer to end a contract because of changes to design, specifications, fittings and finishes?
- 45 What is your experience with the warning notice for off-the-plan sales? Is it effective in assisting buyers to understand the potential risks of an off-the-plan sale or to negotiate the deposit price?

9 Rights to end an off-the-plan sale

- 46 What are your thoughts on the current timeframes available to a buyer to end an off-the-plan sale? Are they appropriate?
- 47 Is it common for plans of subdivision not to be registered by the date specified in the contract of sale? If yes, what are the benefits to both parties of enabling the date to be extended by mutual agreement?
- 48 What is your experience of the ending of off-the-plan sales contracts? What are the common areas and issues that trigger rights to end such contracts?
- 49 Are you aware of sellers manipulating buyers into exercising their rights to end the contract to enable properties to be re-sold at higher prices?

10 Owners corporation insurance

- 50 How does the obligation to obtain owners corporation insurance within the first 6 months of registration work in practice? Is this an obligation that is fulfilled by the initial developer or dealt with at the first meeting of the owners corporation?
- 51 What remedies should be available to buyers of property if an owners corporation is not meeting its responsibilities under the Owners Corporations Act, such as not having obtained the correct insurance?
- 52 What, if any, requirements under the Owners Corporations Act should an individual seller of property within an owners corporation be responsible for ensuring are complied with at point of sale?

11 Possession and occupation fees

- 53 Is it common for a buyer to take possession before a plan of subdivision is registered, and if yes, what arrangements are needed to protect the interests of buyers and sellers in such circumstances?

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

12 Terms contracts

- 54 What is your experience with buying or selling property under a terms contract? Do you agree that there is a continuing place for such contracts in today's market?
- 55 Should the current restrictions on sellers under terms contracts be expanded to encompass debt that is not linked to the property but which may impact on the seller's capacity to pass title to the buyer? If yes, what sources of debt should be included?
- 56 Should there be greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries? If yes, what would you favour:
 - offences and remedies directed at intermediaries?
 - requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?
 - other approaches? Please provide your ideas.

13 'Rent-to-buy' contracts

- 57 What are your experiences of rent-to-buy contracts? Can you provide any examples where a buyer has successfully purchased a property using the rent-to-buy method?

14 Land banking

- 58 Should there be additional protections provided to buyers who purchase property under land banking schemes? If yes, where do you think the risks lie and how can they be mitigated?

15 Private sales online

- 59 What are your experiences with selling and buying property privately online?

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

16 Small business statement

- 60 What is your experience with the small business statement? Is it still required? Please give reasons for your view.

17 Statement concerning finance

- 61 Do estate agents and auctioneers commonly assist buyers in obtaining finance or has this practice declined over the years as bank finance became more readily available?

18 Builders and sub-dividers of land

- 62 Is it common practice for builders and developers of land to recommend financial products or finance providers to prospective buyers and, if yes, have there been any problems for buyers with this approach?

Part E: Modernisation of the Sale of Land Act

19 Purpose of the Sale of Land Act

- 63 What should the purposes of the Sale of Land Act include?

20 Definitions

- 64 What are the key terms that should be defined in the Sale of Land Act?
- 65 How can the current definitions be improved? Where have you experienced areas of inconsistency or confusion?

21 Improving the operation of the Sale of Land Act and identifying redundant provisions

- 66 Is there still a need for the Sale of Land Act to regulate the apportionment of mortgage moneys at subdivision?
- 67 What other opportunities can you identify to modernise the Sale of Land Act?

Part F: Dispute resolution, offences and remedies

22 Arbitrators

- 68 Do you have any personal experience of using the arbitration system under the Sale of Land Act? If yes, how did you find the process?
- 69 What types of disputes would benefit from arbitration and what body should undertake this role?

23 Conciliation and mediation of disputes

- 70 Should there be opportunities for mediation and/or conciliation of disputes arising under the Sale of Land and Estate Agents Acts? If yes, what typical areas of dispute would benefit?
- 71 Should there be mandatory conciliation before a dispute can escalate to VCAT or a court? Are there areas where conciliation should not apply – for example, if a person is electing to exercise their rights to end a contract?

24 Offences and remedies

- 72 Are the current remedies under the Sale of Land Act meaningful for buyers and sellers? Are there opportunities for reform?
- 73 Should sellers have the opportunity to argue honest and reasonable mistake? Are there any circumstances where a seller should not be able to put this case? Please give reasons for your view.
- 74 How often are remedies under Part 8.2 of the Australian Consumer Law and Fair Trading Act used in a sale of land matter? Are there any advantages to specific remedies available under the Sale of Land Act?
- 75 Do rights to end contracts of sale work as an effective deterrent to poor behaviour by sellers or is there a need to prosecute some offenders? Please give reasons for your views.
- 76 What are your views on the current offences and penalties applying under the Sale of Land Act?