

Consumer Property Acts Review Issues Paper No. 1

Conduct and institutional arrangements: estate agents, conveyancers and owners corporation managers



About the Consumer Property Acts Review

On 21 August 2015, the Minister for Consumer Affairs, Gaming and Liquor Regulation, the Hon. Jane Garrett MP, announced the Consumer Property Acts Review (the review). The review is examining 4 key pieces of consumer property legislation: *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 first of 3 issues papers to be released by Consumer Affairs Victoria (CAV) between December 2015 and March 2016.

This paper covers 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.

The subsequent issues papers will cover:

- owners corporations, specifically issues identified with the Owners Corporations Act, with the exception of the conduct of owners corporation managers which forms part of this paper (see Part B), and
- sale of land and business, specifically issues identified with the Sale of Land Act, including pre-contractual issues and contracts of sale.

The subsequent issues papers are scheduled for release in February 2016 and March 2016 respectively.

About this issues paper

This issues paper is divided into 2 parts. Part A is about estate agents and conveyancers and Part B is about the conduct of owners corporation managers.

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

Until **11 March 2016** you can make a submission:

By mail:

Consumer Property Acts 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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Key acronyms

AIC	Australian Institute of Conveyancers (Vic)
BLA	Business Licensing Authority
CAV	Consumer Affairs Victoria
CPD	Continuing professional development
EAC	Estate Agents Council
REIV	Real Estate Institute of Victoria
SCAV	Strata Community Australia (Vic)
VPF	Victorian Property Fund

Part A – Estate agents and conveyancers

Part A of the paper sets out issues that have been raised in relation to estate agents and conveyancers. In Victoria a licence is required before a person can work as an estate agent or a conveyancer and, as such, there are a number of areas of overlap in the regulatory approaches, although the work of estate agents and conveyancers is quite different in nature. This part of the paper seeks to examine issues that are relevant to both conveyancers and estate agents together, although there are also some issues raised that are unique to each of these occupations which are also canvassed in this part of the paper.

While many of the issues consider the implications for both conveyancers and estate agents, CAV notes that some stakeholders will have areas of special interest or may prefer to focus their comments on the implications for one of these groups only. All feedback is welcomed and stakeholders are encouraged to make submissions on any of the issues raised.

1 Licensing of estate agents and conveyancers

The Estate Agents Act and Conveyancers Act establish licensing schemes for estate agents and conveyancers. This section of the paper explores these licensing schemes to determine whether there are options for reform of the framework. The review will also ensure that any proposals for reform look towards modernising the legislation in line with technology improvements to facilitate electronic communication.

1.1 Definitions

1.1.1 What is an estate agent?

The current definition of ‘estate agent’ captures people who exercise, carry on or advertise they are willing to:

- sell, buy, exchange, let or take on the lease of any real estate or business on behalf of any other person
- negotiate the sale, purchase, exchange, letting or taking on of a lease of any real estate or business on behalf of any other person, or
- collect rents for any real estate or business on behalf of any person.

This definition has undergone minor amendments but is essentially the same as when the Act was introduced. Though amendments to the scope of the licence are not being examined in this review, it is timely to revise the definition and any related sections to ensure that:

- it is easily understood and applied
- it conforms to modern drafting standards, and
- it does not inadvertently capture or exclude any person from the need to be licensed.

For example, it has been queried whether the definition captures people who offer marketing or similar services to sellers who wish to sell their property without the services of an estate agent and people who offer introduction or vetting services for sellers seeking to employ an estate agent.

While the scope of work of an estate agent is broad and captures the sale or purchase of any type of real estate, specialist types of land sales are emerging. For example, schemes are emerging where individuals market land banking or similar arrangements where parcels of undeveloped land are aggregated for future sale or development. As the timelines for these developments can be 20 or more years unique risks arise for buyers, which may suggest that the definition of the work of an estate agent should specifically apply to such schemes.

Questions

- 1 Is the definition of an estate agent easy to understand and apply? How could it be improved?
- 2 What problems have you experienced with unlicensed people who offer marketing or similar services to sellers or who run introduction or vetting services?
- 3 Are there any persons or organisations that are inadvertently captured by or excluded from the need to be licensed as an estate agent?
- 4 Are there any types of sales and leasing schemes that should specifically be referred to in the definition of an estate agent and why would they be included?

1.1.2 What is conveyancing work?

The Conveyancers Act requires that conveyancing businesses be licensed to carry out conveyancing work for 'fee or reward', whether it is the sole or dominant purpose of the business.

A recurring issue that arises with this requirement is the potential for unlicensed trading. This is because it is difficult to prove that certain work has been undertaken for 'fee or reward', for example where a mortgage broker carries out conveyancing work purportedly for no fee, despite a commission being received in the course of the transaction. One option may be to require that any person completing conveyancing work as a business for another entity or person should be licensed.

Question

- 5 Is the definition of conveyancing work sufficiently broad to capture all those who should be licensed? If not, how could it be amended?

1.2 Training and experience

This section examines issues that have been raised about entry level training, ongoing training and work experience requirements for conveyancers and estate agents.

1.2.1 Training requirements

Estate agents and conveyancers are required to satisfy certain training requirements before being eligible to be granted a licence.

The training requirements are intended to ensure that licence applicants meet a minimum standard of skills and knowledge required to become a licensee. The requirements acknowledge the significant risks to consumers that can arise as a result of bad estate agency or conveyancing practice. The requirements are supplemented by work experience requirements, discussed in section 1.2.2 below.

To meet the training requirements to gain an estate agent's licence, an individual must complete either the Certificate IV in Property Services (Real Estate) or have previously completed one of a number of prescribed courses. The course must have been delivered by a registered training organisation. If a course was completed more than 5 years ago, the individual applying for a licence must meet additional requirements under the Estate Agents (Education) Regulations 2008.

For conveyancers, in order to be licensed, an individual must have successfully completed 8 units of competency set out in the relevant national training package or a previously completed equivalent course, such as a law degree (and have demonstrated competency in establishing, managing and administering trust accounts) which was commenced before 1 July 2008.

Concerns have been raised about estate agents and conveyancers who, despite having met the competency qualifications, may not have the necessary skills required to run their businesses. Concerns have also been specifically raised about the quality of delivery of some of the training programs available for conveyancers and estate agents.

Questions

- 6 What is your view as to the present training for estate agents and/or conveyancers? Are there any additional training requirements that should be mandated? Are any of the current requirements unnecessary?
- 7 What are the potential costs of mandating higher entry standards for estate agents and/or conveyancers?

1.2.2 Work experience requirements

There are work experience requirements that apply to estate agents and conveyancers before they can obtain a licence.

For estate agents, the applicant must have gained the equivalent of 12 months full-time experience as an agent's representative in the 3 years immediately before applying for a licence.

For conveyancers, an applicant must have either:

- completed the equivalent of 12 months full-time experience within the last 5 years carrying out conveyancing work under the supervision of either an Australian legal practitioner authorised to be a principal of a law practice or a fully licensed conveyancer, or
- successfully completed a recognised law degree and the approved practical legal training requirements or corresponding practical legal requirements.

Work experience requirements are intended to ensure that applicants have sufficient practical experience of estate agency or conveyancing work before being eligible for a licence. However, there is little prescription on the type of work experience that applicants must have completed, and the nature and type of experience of different applicants can vary widely.

It has been suggested that the work experience requirements for conveyancers should be strengthened to more closely align with those required of legal practitioners. Legal practitioners are required to undertake 2 years supervised practice after completion of an approved practical training course, before they can operate a legal practice independently.

A related issue that has been raised by some stakeholders is that some individuals may be obtaining licences in other jurisdictions with a lower standard of work experience requirements than Victoria and then relying on mutual recognition provisions to access a Victorian licence. For example, it has been suggested by stakeholders that the mutual recognition system has been exploited by individuals who have gained estate agent qualifications in other jurisdictions without work experience requirements and who, as a result, do not have equivalent levels of experience as Victorian qualified estate agents.

Question

- 8 What are your views on the value and efficiency of the work experience requirements for conveyancers and estate agents?

1.2.3 Continuing professional development (CPD)

A number of stakeholders have raised the issue of continuing professional development (CPD) in relation to conveyancers and estate agents. Conveyancers and estate agents who are members of their respective professional bodies (the Australian Institute of Conveyancers and REIV) undertake CPD as part of their membership.

CPD is a feature of some occupational licensing schemes. CPD is intended to ensure that licensees maintain an appropriate level of skills and knowledge, by requiring them to undertake a prescribed amount of further education during a particular period of time. CPD requirements are in addition to any educational pre-requisites for the granting of a licence.

Mandating CPD for conveyancers and estate agents has been suggested as a way to ensure all conveyancers and estate agents keep up to date with changes to legislation and procedures.

Stakeholders have pointed to requirements on legal practitioners to complete 10 hours of CPD per year and have argued that conveyancers should also be required to undertake some level of CPD to continue to operate alongside legal practitioners in the conveyancing space. CPD for estate agents has also been suggested as a way to potentially raise conduct standards, particularly for estate agents who engage in property management.

CAV uses a number of methods to deliver information about the law and practice issues to the industry, including by providing information on its website and by working with industry associations to provide guidance and tools for estate agents and their staff.

Questions

- 9 What is your view about the need for CPD for estate agents and/or conveyancers? If CPD was required, what type of training should be mandated?
- 10 What are the costs of mandating CPD for all conveyancers and estate agents?

1.3 Ineligibility and disqualification criteria

Under the Estate Agents Act, certain people are ineligible to hold an estate agent's licence or be employed as an agent's representative. The Conveyancers Act also specifies that certain people are disqualified from being licensed as conveyancers. In both Acts, a person is ineligible to hold a licence if he or she:

- has had a claim allowed against the Victorian Property Fund (VPF) [*see section 8 of this paper for more information about the VPF*]
- is an insolvent under administration. or
- has within the last 10 years been convicted or had found proven against him or her any offence involving fraud, dishonesty, drug trafficking or violence which was punishable by imprisonment for 3 months or more.

Each of the Acts also have other criteria that prevent a person from holding a licence.

One question is whether the exclusion criteria sufficiently capture the range of criminal offences that should prevent someone from holding an estate agent's or conveyancer's licence. For example, only people convicted of sexual offences involving violence are ineligible to hold a licence. Convictions for other offences, such as possessing child pornography, do not preclude a person from holding a licence. In addition, a person convicted of an unlicensed trading offence under the Estate Agents Act may not necessarily be ineligible.

Currently criminal convictions going back 10 years are relevant. Views are sought on whether this is a suitable period of time or whether a shorter period (such as 5 years) would be appropriate acknowledging rehabilitation. In New South Wales, convictions for dishonesty are relevant for 10 years while convictions for other disqualifying offences are limited to 5 years. There is also the capacity for the Director-General to ignore the offence on the grounds of triviality or due to the passage of time.

Another issue for consideration is that of ‘phoenixing’, in which assets are intentionally transferred from an indebted company to a new company to avoid paying liabilities such as outstanding tax, employee entitlements and creditors and how the eligibility criteria could be adjusted for both conveyancers and estate agents to address this issue.

Under the previous national licensing reform proposal a person would have been ineligible to hold a licence if they had breached the Commonwealth Corporations Act 2001 by, for example, failing to exercise powers with care and diligence or in good faith or for a proper purpose, misusing their position or information to gain advantage or cause detriment to a company, breaching procedures including not trading while insolvent and failing to comply with financial reporting requirements.

Under the national licensing reform proposal, failing to pay a fine imposed under the relevant laws, such as the Estate Agents Act or Conveyancers Act would have resulted in a person being ineligible to hold a licence. Complying with disciplinary action is fundamental to enforcement of the law.

Question

11 What are your views on the current eligibility criteria for estate agents and conveyancers?

1.4 Permission application process

Under the Estate Agents Act, individuals who have had VPF claims allowed against them, are insolvents under administration or who have criminal records that would render them ineligible, can apply to the Business Licensing Authority (BLA) for permission to hold a licence or be employed as an agent’s representative. In all cases, the BLA may give its permission if it is satisfied that it is not contrary to the public interest for it to do so.

The permission application process also extends to corporations which may apply to the BLA for permission to hold an estate agent’s licence if it or one of its directors would otherwise be ineligible. Similar criteria must be satisfied, although where directors are involved, the corporation is also required to make a case that there is a substantive reason why the person should remain a director of the corporation.

The permission system was introduced into the Estate Agents Act in 1995 as part of broad reforms which were aimed at revitalising the licensing system and cutting inefficiencies. The majority of these provisions have not been altered since that time.

Under the Conveyancers Act, a permission application can only be made if the person is ineligible because of a criminal record or because they were the subject of a successful claim against the VPF. A corporation may also apply for permission if one of its directors would otherwise be ineligible.

Views are sought on the merits of continuing to enable individuals (who would otherwise be ineligible) to seek permission to hold a conveyancers or estate agent’s licence.

Currently, frivolous applications (for example from people who are still in prison) can be made. Views are sought whether ‘threshold’ criteria must be satisfied before an application can be brought.

Should an applicant undertake certain actions prior to applying (for example, requiring an applicant to demonstrate a genuine intent to work in the industry) or should people be prohibited from applying (for example, preventing unsuccessful applicants re-applying within a certain period or preventing people from applying for permission if they are still under the supervision of a court)?

Questions

- 12 What are the factors in favour of retaining the capacity for the BLA to grant permission to someone who is otherwise ineligible to hold a licence?
- 13 What barriers, if any, should be established in relation to the permission application process?

1.5 Licensing process

Views are sought from stakeholders about the level and value of information that is required to be provided as part of the licensing process and whether there are opportunities for red tape reduction.

For example, efficiencies may be gained in reducing the number of addresses individuals and corporations are required to provide as part of a licence application.

Question

- 14 What are your views on the information required to be provided as part of the licensing process and what are the opportunities for red tape reduction?

1.6 Professional indemnity insurance

Professional indemnity insurance helps a licensee meet the cost of legal claims arising from the person's alleged negligence or breach of duty in the delivery of services. Requiring licensees to hold this type of insurance can also provide some protection to consumers by ensuring that their claims against licensees can be met.

Conveyancers must be covered by professional indemnity insurance specified under a Ministerial Order published in the Government Gazette. The Order outlines the minimum conditions and requirements of the master insurance policy required to be taken out by every licensee.

Under the Conveyancers Act, a person must have professional indemnity insurance cover to be eligible for a licence. While the requirement to hold insurance is the same in other states, the procedure to apply and become eligible to practise varies. In New South Wales, insurance is not a requirement for licence eligibility. However, the licence only becomes valid for practice once insurance is obtained. Similarly, in South Australia, insurance is a pre-condition to practise rather than an eligibility criteria for registration as a conveyancer.

The Estate Agents Act does not require licensees to be covered by professional indemnity insurance. However, some agents already obtain the insurance voluntarily or as a condition of membership of an industry association. For example, the Real Estate Institute of Victoria (REIV) requires its members to obtain professional indemnity insurance cover. The REIV offers insurance services to its members in conjunction with a commercial provider. REIV members currently hold minimum cover of \$2 million.

It has also been suggested that holders of an estate agents licence should be required to hold professional indemnity insurance cover.

Question

- 15 What would be the impact, if any, of removing the requirement for a conveyancer to obtain professional indemnity insurance as a licensing criterion and instead to prescribe it as a pre-condition for practise?
- 16 What would be the impacts of mandating professional indemnity insurance for all estate agents?

1.7 Office management

Currently, the Estate Agents Act has a clear emphasis on establishing direct and physical regulation of the office environment (the branches of the estate agency business). The Act includes concepts such as 'branch office', 'branch manager' and includes long standing transitional arrangements that preserve approvals for individuals who previously managed branches prior to 1995.

Day to day office operations must be managed by an estate agent and estate agents are prohibited from managing more than one estate agency office. Requirements are also placed on estate agents who manage offices to make formal arrangements when they are absent from the office for any period of time. If the period is greater than 30 days the BLA must be notified and approve the replacement manager.

It has been suggested that these obligations are too prescriptive and onerous for estate agents and are not appropriate in light of advances in electronic communications and the greater ability to manage work and people remotely.

An alternative approach could be to place clear obligations on licensed estate agents and rely on those agents to put in place the necessary policies and procedures to ensure those obligations are being met rather than rely on a physical presence in the office being required. As a result the concepts of branch manager and branch office could also be removed.

The Conveyancers Act requires a licensee who carries on a conveyancing business from more than one place of business to appoint a licensee to manage the day-to-day operations of each place, unless the BLA grants an exemption. In addition, a licensee can only manage the day-to-day operations of one place of business. In case of a greater than 7 day absence of the managing licensee at a place of business, another licensee must be appointed temporarily and the BLA notified in writing.

It has been suggested that modern technology can effectively facilitate remote supervision and therefore these requirements should be revised as they unreasonably limit a licensee's ability to leave the business for any more than a week, and find a replacement within the business given the small size of firms in the sector. An alternative approach could be to place clear obligations on conveyancers which they would need to ensure were being fulfilled by the staff they employ.

Question

- 17 Is it really necessary to prescribe in legislation a management approach that requires an estate agent or conveyancer to physically manage the day to day operations at each place of business? If not, what, if any, office management requirements should be prescribed?

1.8 Officer in effective control (estate agents)

Particular duties are placed on licensed estate agents who manage estate agency businesses and officers in control of estate agency corporations. The majority of the duties are strongly geared towards these officers having a physical presence in the office and directly controlling, supervising and monitoring compliance. Such officers must:

- be regularly and usually in charge at the principal office of the estate agent
- give regular and substantial attendance at that office
- properly control and supervise any estate agency business carried on by the agent and for which the person is responsible
- properly control and supervise the management of any branch office
- take reasonable steps to ensure that any estate agents, agents' representatives or other employees of the business comply with the Estate Agents Act, the Sale of Land Act and any other relevant laws
- establish procedures designed to ensure the business is conducted in accordance with the law and good estate agency practice, and
- monitor the conduct of the business in a manner that will ensure as far as is practicable that those procedures are complied with.

It has been suggested that these obligations should be reviewed to enable the electronic conduct of estate agency work and office procedures. For example, the emphasis on the officer in control maintaining a physical presence in the office could be reduced.

A large percentage of calls to CAV are from estate agents and office employees clarifying the law. This may suggest officers in effective control should be required to ensure their staff understand and comply with the Estate Agents Act.

Views are also sought on the impact on a corporation's licence if the officer in effective control leaves the business. Currently, although a corporation is required to have an officer in effective control at the point of licence application and renewal, the absence of an officer in effective control does not provide grounds for automatic cancellation. Similarly there is no capacity to suspend a licence because there is no officer in effective control.

Question

- 18 How could obligations on officers in effective control be improved to better facilitate the proper conduct of estate agency work and office procedures?
- 19 What are the risks for persons licensed as estate agents in not having or not immediately replacing an 'officer in effective control' and should these be addressed in the Estate Agents Act?

1.9 Licensing issues specific to conveyancers

1.9.1 Voluntary suspension of licence

The Conveyancers Act makes no provision for a licensee to voluntarily suspend a licence for a period of one to 2 years for such purposes as maternity leave or overseas travel. This creates problems for sole traders who surrender their licence and seek to re-enter the work force at a later date as they cannot satisfy the work experience component of the application process (because as sole traders they are not able to provide evidence of having been supervised by another fully licensed conveyancer or a legal practitioner) despite having previously been licensed. This issue may be avoided or minimised if the conveyancer was able to voluntarily suspend their licence for a finite period of time.

Legal practitioners are able to suspend their practising certificates for up to 3 years provided on return they undertake approved training within 6 months. The Estate Agents Act allows for a person to be granted a licence (with a streamlined re-application process) if they held an estate agent's licence in the last 5 years.

It has been suggested that similar options should be available to conveyancers to allow them some flexibility and work/life balance.

Question

- 20 What options should be available to facilitate conveyancers taking a break and then re-joining the workforce?

1.9.2 Cancellation of licence

Concerns have been raised about the complexity of licence cancellation where a conveyancer fails to pay an annual licence fee and lodge an annual statement with the BLA by the due date.

Under the Conveyancers Act, if a licensee fails to provide their annual statement and pay their annual licence fees, their licence may only be initially suspended, and cannot be cancelled until another year of non-compliance passes, at which point the licence is cancelled. In comparison, the annual statement process for estate agents omits the suspension period and moves straight to cancellation of the licence unless the annual statement and fees are paid.

It has been suggested that the process under the Conveyancers Act unnecessarily adds a year of suspension to the process and should be aligned with the renewal process under other occupational licensing Acts, including the Estate Agents and Owners Corporations Acts.

Question

- 21 What issues, if any, would arise if a conveyancer's licence is cancelled if they fail to provide their annual statement and pay their annual licence fees at renewal?

2 Conduct of estate agents

This section examines issues that have been raised in relation to the conduct of estate agents. Issues covered in this section include the conduct of agents in property management, selling property and more specifically in relation to negotiating sales authorities and the obtaining of financial benefits.

2.1 Roles and responsibilities of estate agents

Estate agents play a unique role in the housing and rental markets. Although an estate agent's services are formally engaged by the seller or landlord (depending on the transaction) to act on their behalf and in their interests, many buyers and tenants also perceive that the estate agent should be acting in their interests also, or at the very least acting as an impartial third party.

There is no opening description of the roles and responsibilities of estate agents in the Estate Agents Act or any framing principles that guide their conduct.

The Estate Agents (Professional Conduct) Regulations 2008 prescribe rules of professional conduct for estate agents and agent's representatives. However, these rules of conduct mainly apply to interactions between estate agents and the people who employ their services (for example sellers and landlords), noting that there are some rules that also extend to interactions between estate agents and the consumers of their services (for example buyers and tenants).

Question

- 22 What would be the merits or otherwise in having some established principles about the role of estate agents in the Estate Agents Act and/or setting out the duties for the conduct of an estate agent in relation to sellers, buyers, landlords and tenants (i.e. would it clarify expectations about the role of the agent and their conduct)?

2.1.1 Conduct in property management

Currently 74 per cent of all rental properties are managed by an estate agent. However, the Estate Agents Act does not give much prominence to the role played by estate agents in managing rental properties.

In the rental market, if a property is being managed by an estate agent, that agent is often the primary (or only) point of contact for the tenant. This can be an ongoing relationship stretching over years.

The tenant relies on the estate agent to communicate (and in some instances negotiate) with the landlord about issues the tenant has raised with the rental property. Complaints have been received from tenants citing unprofessional conduct by estate agents including pressuring tenants to make properties available for inspection at unreasonable times and advertising rental properties within a price range and encouraging tenant bidding to secure the property. Other complaints include agents failing to pass on information received from tenants to landlords and failing to act within a timeframe considered adequate by the tenant.

The *Residential Tenancies Act 1997* (Residential Tenancies Act) places a number of obligations on landlords which agents exercise on their behalf. However, many of the complaints that tenants make are not about behaviour that would constitute a breach of the Residential Tenancies Act. Views are sought on the need (if any) to regulate aspects of agent behaviour in relation to tenants.

Questions

- 23 What additional information should be included in the Estate Agents Act about the role estate agents play in property management, including in respect of their duties and obligations to landlords and tenants?
- 24 What sanctions should be in place for estate agents who display poor behaviour in the property management space (for example specific offences, limited licence)?

2.1.2 Conduct in selling property

Unlike tenants, the relationship an estate agent has with a prospective buyer is more limited. However, there may be an argument that there may be duties and obligations an estate agent holds in relation to buyers of property that should be clarified and directly expressed in the Act. For example, although a buyer does not pay an estate agent for services provided in selling the property, buyers expect estate agents to communicate genuine offers to the seller and provide accurate information about a property for sale.

Question

- 25 What are your views on the merits of clarifying and directly expressing in the Estate Agents Act the duties and obligations, if any, that an estate agent may hold towards buyers of property?

2.2 Negotiating the sales authority

Currently there is little regulation of the process by which a seller engages an estate agent to act on their behalf. There are requirements on agents to disclose certain information to a seller before signing an agreement such as (among other things) details of commission, outgoings, fees and rebates. However, the process leading up to signature is not regulated and the Estate Agents Act does not provide any specific remedies to sellers who are unhappy with the level of service provided by the agent once a sales authority is signed.

CAV receives complaints from consumers who have signed sales authority that they subsequently regret. A common complaint is in relation to exclusive sales authorities that bind the seller for the length of the agreement to one agent. In these instances, consumers may have signed up to an exclusive sales authority without properly understanding that this prevents them from engaging another agent to sell their property for the length of the authority, even if they are unhappy with the level of service provided by the estate agent.

The Estate Agents Act provides that exclusive sales authorities must end 60 days after the agreement is signed or in the case of an auction, 30 days after the date of the auction. However, this is only in circumstances where the sales authority does not state specifically the period of the agreement. Therefore, exclusive sales authorities can be for longer periods.

It has been suggested that there may be benefit in placing restrictions on the length of exclusive sales authorities.

Views are sought on whether there is evidence of sellers making decisions in haste, under pressure or without all the information needed to make a good choice.

Question

- 26 What would be the costs and benefits of regulating the conduct of estate agents in negotiating sales authorities and the content of those authorities?

2.3 Financial benefits to estate agents

There are a number of constraints on financial benefits (in particular commission and rebates) that flow to estate agents. Commission is defined under the Estate Agents Act to include fees, charges, reward or other remuneration whether monetary or otherwise. Rebates are defined to include any discount, commission or other benefit.

Below are issues that have been specifically raised by stakeholders. Comments are sought on these issues. However, CAV encourages comments on other issues regarding the regulation of financial benefits received by estate agents.

2.3.1 Disclosure of financial benefits

A key protection under the Estate Agents Act is that an estate agent is not entitled to any payments unless certain information about commission, fees, rebates and other outgoings has been disclosed to the client before a sales authority is signed.

The information required to be disclosed includes details of the agreed commission and outgoings, a statement of fees, a rebate statement and information concerning complaints. The rebate statement must set out details of all rebates the agent will be entitled to and include a statement informing the client that the agent is not entitled to retain any rebate. This disclosure is intended to ensure that the client is aware of all payments that would be expected of them and any rebates that will flow back to the agent and which should be passed through to the client.

An estate agent is not entitled to commission or money for outgoings if they breach their disclosure requirements. This includes circumstances where an agent may have made an omission or technical error but the client has not experienced any detriment as a result of the agent's mistake. It has been suggested that where an agent has acted honestly and reasonably and the client is in as good a position as if the requirements had been complied with, an agent should be entitled to be paid for the service provided.

These disclosure requirements also extend to agreements put in place between estate agents (for example, to share a listing) and it has been suggested that this is unnecessary red tape that could be removed without detriment occurring to clients. This is on the basis that as the listing agent's client is not a party to the agent to agent agreement, they are unaffected by any subsequent agreements that may be made between agents and therefore, the disclosure requirements are unnecessary.

Questions

- 27 What are your views on the current level of information disclosed by an estate agent to a client about commission, fees, rebates and other outgoings?
- 28 What is your view of the appropriate consequence if an estate agent fails to meet the disclosure requirements? For example, should the estate agent be entitled to any commission or other moneys?
- 29 Are there any circumstances where agreements between estate agents should be subject to disclosure requirements? If yes, please provide examples of potential detriment that disclosure could avoid?

2.3.2 Commission sharing

Estate agents are permitted to share commission. However, before obtaining a person's signature to an authority to do any work the estate agent must ensure the person is given a commission sharing statement which sets out the name and other details of any other person who is entitled to share the commission with the estate agent.

It has been raised that the current arrangements assume the real estate transaction is static and the commission sharing is known from the date the original authority is signed by the seller. Therefore, the legislation is not sufficiently flexible enough to deal with circumstances where a property is on the market for months with one estate agent before another estate agent offers to assist in selling it.

The legislation is silent on what should happen if a commission sharing arrangement is entered into after the initial authority is signed. However, it has been asserted that the correct interpretation of the Act is that it requires the original estate agent to present the seller with a new sales authority as well as a commission sharing statement.

It has been suggested that only a commission sharing statement should be required at this point, which would disclose to the seller that another estate agent is now working to sell their property and will be sharing any commission. Reasons for this view include that the level of commission would not change so there is no monetary disadvantage to the seller. It would remove red tape involved in presenting the seller with a fresh authority for signature.

Question

- 30 When should an estate agent disclose details of a person entitled to a commission? If the commission-sharing relationship arrangements change, what requirements of disclosure should apply?

2.3.3 Ban on commission if the agent obtains a beneficial interest

A person who is an estate agent, agents' representative or relative is prohibited from obtaining a beneficial interest in any real estate or business the estate agent has been commissioned to sell unless:

- the estate agent obtains a written acknowledgement from the seller that the seller is aware the person is obtaining a beneficial interest in the real estate or business and gives their consent before the contract of sale is entered into and the person acts honestly and reasonably in relation to the transaction
- no commission or other reward is payable in relation to the transaction, and
- the seller is in substantially as good a position as they would be if the real estate or business were sold at fair market value.

It has been suggested that the withholding of commission in these circumstances is unfair to agents and can provide a 'windfall gain' to sellers who receive a service that they do not need to pay for. The estate agent undertakes all the work of listing, marketing and selling a property but receives no commission if the property is bought by a relative. Effectively the agent is providing a service and is required to comply with the requirements of the Estate Agents Act but receives no compensation for the work they undertake on the seller's behalf.

This is particularly a burden in small towns where there may only be one real estate agency, meaning that there is a more concentrated pool of people with a connection to the estate agency (such as husbands, wives, domestic partners, children, step-children, brothers, sisters and parents) seeking property to buy.

It has been suggested that the ban on the payment of commission or other reward in relation to these sales should be removed. This would enable an agent to receive commission if the property was sold to a relative of the agent or if the agent bought the property provided the seller was made aware of the connection before agreeing to sell, the agent acts honestly and reasonably and the seller is in substantially as good a position if the sale had been to someone else in the market.

Questions

- 31 What safeguards should be in place in circumstances where an estate agent or their representative or relative gains an interest in a property the agent is selling?
- 32 What distinction, if any, should there be between the estate agent personally buying a property, or their representatives or relatives buying a property that is listed with the agency?

2.4 Rebates

The Estate Agents Act prohibits estate agents from retaining any rebates they receive in respect of outgoings, prepayments made by their client regarding intended expenditure by the agent on the client's behalf and payments made by the client to another person in respect of work.

The Estate Agents Act requires an agent to immediately pass on any rebate to their client. The only exception is where the agent in anticipation of receiving the rebate has already given that amount to the client either directly or by reducing the amount they originally charged the client.

Estate agents are also prohibited from seeking an amount for expenses that is more than the amount paid by the agent. The Estate Agents Act regulates the setting of estimates of expenses and how rebates should be taken into account in determining expenses. The value of non-monetary rebates is also specifically regulated.

It has been raised that the current provisions do not adequately capture situations where an estate agent may be offered an indirect incentive such as a paid holiday by a third party which may then lead the estate agent to look more favourably on that third party and channel work their way. Of particular concern are advertising deals which can be very lucrative and the potential detriment is that clients may be paying over-inflated prices for advertising.

During preliminary consultation it was noted that the current provisions have not been effective in ensuring all forms of rebates or their monetary value are passed on to an agent's clients. It was also suggested that the emphasis at present is upon penalties as the tool for regulation, and that consideration should be given to making other remedies available for contraventions of the Act.

Questions

- 33 Are there any circumstances where rebates could be permitted (for example, with appropriate disclosure requirements)?
- 34 What appropriate remedies or alternative approaches to prohibiting rebates could be considered?
- 35 Do the current arrangements in the Estate Agents Act sufficiently deal with rebates? In particular, should indirect benefits be included, and if so how should these be accounted for?

3 Conduct of conveyancers

This section examines issues that have been specifically raised regarding the conduct of conveyancers. Issues covered in this section include the current professional conduct rules, conflicts of interest and costs disclosure.

3.1 Professional conduct rules

The Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008 made under the Conveyancers Act prescribe rules of professional conduct for conveyancers. These rules must be observed by licensed conveyancers and include (amongst other things):

- acting honestly, fairly and professionally with all parties
- not misinforming, misleading or deceiving any parties in negotiations
- exercising reasonable skill, care and diligence
- complying with fiduciary obligations
- only accepting instructions if competent to perform the work and able to perform the work reasonably promptly
- acting in the best interests of their client and to their client's instructions
- regularly communicating with their client
- confirming oral instructions in writing
- avoiding conflicts of interest
- maintaining confidentiality, and
- keeping written records.

A breach of the rules may result in an inquiry by the Victorian Civil and Administrative Tribunal (VCAT). It has been suggested that these rules should be reviewed in light of the rules for professional conduct that apply to legal practitioners. The *Legal Profession Uniform Law Application Act 2014* came into operation on 1 July 2015 and applies the Legal Profession Uniform Law in Victoria (Legal Profession Uniform Law).

Concern has been expressed at the conflict of interests that may arise for conveyancers who make a payment to a third party who has referred the client to them. It has been suggested that there should be a ban on the payment of referral fees or other commissions as legal and ethical problems arise for the conveyancer and also because the fee must be passed onto the consumer, resulting in higher overall charges.

The Estate Agents Act enables commission sharing but requires the details to be disclosed to the client. This provides another approach to addressing this issue.

Questions

- 36 Do the current professional conduct rules for conveyancers deal sufficiently with matters conveyancers should observe in the conduct of their functions?
- 37 Are there changes or additions to the rules that should be considered? Should the rules align with relevant rules for legal practitioners wherever practicable?
- 38 What regulation, if any, is required to deal with circumstances where a conveyancer is asked to pay, or offers to pay, a commission to a third party who refers a client to the conveyancer?

3.2 Costs disclosure

Under the Conveyancers Act, the fees to be charged for the conveyancing work must be disclosed to the client either before or at the time the conveyancer is appointed, or as soon as practicable after the appointment. The information that must be disclosed includes the amount of the fee or if that is unknown, the basis for the calculation, the manner of invoicing and the dispute resolution avenues open to the client.

Issues have arisen with the requirement where conveyancers disclose their costs (fees and charges) in a manner that may confuse consumers and may result in a larger bill than originally expected. For example, some conveyancers detail their costs in separate emails, using a cost disclosure form in an initial email, and additional costs in a subsequent 'for information only' email.

It has been proposed that consideration be given to aligning the disclosure requirements for conveyancers with those for legal practitioners. Under the Legal Profession Uniform Law if a legal practitioner's costs exceed \$750 he or she is required to give costs disclosure in writing to their client as soon as practicable after instructions are given including an estimate of total legal costs, the basis on which costs are calculated and the client's rights including in the event of a costs dispute. Where total costs are likely to be between \$750 and \$3,000 a 'short form' costs disclosure statement can be used. The Legal Profession Uniform Law also requires further disclosure where there is a significant change in circumstances, including legal costs.

Legal practitioners are expected to provide a genuine estimate of total legal costs to provide their client with sufficient information to allow them to make informed choices about their legal options and their costs exposure.

Question

- 39 Are the current costs disclosure provisions in the Conveyancers Act sufficient? If not, in what respect should they be amended? Should the costs disclosure required for conveyancers align with those for legal practitioners?

4 Compliance measures

Improving enforcement measures to deal with poor conduct by estate agents and conveyancers is a significant theme that has emerged during preliminary consultation for this review.

Enforcement measures can be undertaken by CAV ranging from warnings through to enforceable undertakings. CAV can also apply to VCAT to hold an inquiry, which can result in sanctions including licence cancellation. In addition, both Acts provide for criminal sanctions, for example, in respect of trust account deficiencies.

There have been multiple issues raised by stakeholders about unprofessional conduct by estate agents, particularly in relation to property management. There have also been comments received about unprofessional conduct by conveyancers and issues raised about current enforcement approaches.

This section of the issues paper looks at the current enforcement approaches for addressing poor conduct and breaches of the Acts and presents some potential alternatives for comment.

4.1 VCAT inquiries and alternative approaches to address poor conduct

Under both the Conveyancers Act and the Estate Agents Act, the Director of CAV may apply to VCAT to hold an inquiry to determine whether a licensee has failed to comply with relevant legislation, or is guilty of conduct that renders the licensee unfit to hold a licence. Inquiries into estate agents and agents' representatives may also be held to determine whether the agent is of good character or is otherwise a fit and proper person to hold a licence.

After conducting the inquiry, VCAT has a range of enforcement options ranging from reprimanding the licensee through to cancelling the licence and disqualifying the person involved from holding a licence.

VCAT may also impose a penalty of up to \$5,000 on the licensee in certain circumstances which must be paid into the VPF. Views are sought on this maximum penalty which has not been adjusted since its insertion in 1998.

Comments have been made by some stakeholders that the VCAT process can be cumbersome and that there is a reluctance on the part of some VCAT members to cancel licences because of the impact on livelihoods.

During preliminary consultation, a number of different approaches were suggested to improve the standard of professional conduct and behaviour of estate agents and conveyancers. Many stakeholders suggested specific alternatives to the current approach. In general, there was frustration expressed with the current enforcement options.

An emerging theme is that the emphasis at present is too heavily weighted towards penalties as a tool for regulation and consideration should be given to other remedies, particularly for estate agents. In addition, better tools are needed to deal with estate agents and conveyancers who may have behaved badly but not to a degree that their licences should be cancelled.

Suggestions put forward include:

- introducing a system of ‘demerit points’ for licence holders which could potentially lead to suspension or cancellation of a licence where too many points are accumulated over a defined period of time (this could potentially be via the VCAT inquiry process)
- establishing different tiers of misconduct for which different levels of enforcement would apply, or
- introducing a third party regulatory body such as an ombudsman scheme.

Questions

- 40 What are your views about, and experience of, the current VCAT inquiry system? What are the opportunities to improve the VCAT process?
- 41 Are the range of orders and penalties open to VCAT after conducting an inquiry sufficient and appropriate? If they are not, what changes would you recommend and why?
- 42 What are the merits of the proposed approaches which could operate in conjunction with existing enforcement approaches?
- 43 What additional suggestions do you have to address poor conduct?

4.2 Penalties

The Estate Agents and Conveyancers Acts set criminal penalties that apply to offences created under the Acts. For example, both Acts create (amongst other things) offences for unlicensed trading, failing to comply with conditions or restrictions on a licence and failing to notify the BLA about relevant changes in circumstances or information provided. Views are sought on the adequacy and appropriateness of current penalties that apply under these Acts.

It has been suggested that penalties under the Estate Agents Act, in particular, should be comprehensively reviewed to determine whether they are still appropriate to deter misconduct. While there is annual indexation of penalties, many of the maximum penalties under the Estate Agents Act have not been adjusted in years and are quite low. For example, the maximum penalty for refusing or failing to comply, without reasonable excuse, with a requirement from an inspector in monitoring an estate agency business has not been increased in over a decade and currently sits at 25 penalty units.

Question

- 44 What factors should be considered as part of any review of penalties under the Estate Agents Act?

5 Trust accounting

Estate agents must have trust accounts for holding money they receive from and on behalf of clients including sales deposits, rent and advertising and maintenance fees paid in advance of work done.

Trust money may be received by conveyancers in advance from clients for fees and charges for conveyancing work which must be held in a general trust account. Conveyancers may also handle transit money which is received from a client with instructions that it be paid to a third party and controlled money which is received from a client with written directions to deposit it into an account that is separately controlled by the licensee. This only applies to amounts over \$50,000 or transactions which will not settle within 60 days.

There are strict processes for handling clients' money imposed on estate agents and conveyancers including opening and maintaining bank accounts, setting up and maintaining comprehensive record systems and appointing auditors and conducting audits.

Some suggestions have been made in relation to the keeping of trust accounts by estate agents and conveyancers. Views are sought on the merits of each of these proposals.

Question

- 45 What are your views on the overall effectiveness of the trust accounting requirements for estate agents and conveyancers?

5.1 Trust money

Stakeholders have raised concerns about the investment of trust moneys held by different types of practitioners and, in particular, the accruing of interest received on those moneys.

Estate agents are only able to receive trust money under the Estate Agents Act. Interest generated by trust money held by an estate agent is paid into the VPF. The client therefore is unable to receive interest on money held by an estate agent on the client's behalf.

This is in contrast to legal practitioners who may receive both trust money and controlled money. While trust money held by a legal practitioner is similarly paid into the Public Purpose Fund under the *Legal Profession Uniform Law Application Act 2014*, controlled money will accrue interest payable to the client.

Under the Conveyancers Act, conveyancers are able to receive trust money and controlled money. Under section 91 of the Conveyancers Act all interest received from trust accounts kept by conveyancers (including from controlled money accounts) is paid into the VPF. Controlled money is only generally received by conveyancers in rare circumstances (for example, when a conveyancer is engaged in conveyancing work relating to large subdivisions and off-the-plan sales), while legal practitioners receive and manage controlled money on a more regular basis.

Stakeholders have argued that the arrangements where interest is paid into the VPF creates an unequal playing field for estate agents and conveyancers when competing for work with legal practitioners.

More generally, views are sought on the merits or otherwise of allowing conveyancers to continue to handle transit and controlled money accounts or, alternatively, the costs and benefits of tightening trust money requirements.

Questions

- 46 In what circumstances would it be appropriate for estate agents to receive money from, or on behalf of, clients and hold that money on trust? What would be the potential risks of providing estate agents and conveyancers with greater flexibility to deposit trust money in accounts that pay interest to the parties to the transaction?
- 47 Why is it important that conveyancers continue to have the ability to handle transit money or controlled money accounts?

5.2 Annual audit of trust accounts

Within 3 months after 30 June each year, every person who carried on business as an estate agent during the previous financial year must have their trust accounts audited. A similar requirement applies for conveyancers who are also required to have their trust records audited by an approved auditor.

It has been suggested that non-compliance with this requirement should constitute an automatic grounds for ineligibility to continue to hold a licence. This approach could be contrasted with the current sanctions that apply where a failure to comply with these requirements could provide grounds for an inquiry to VCAT and the possibility of licence cancellation as a result of that process.

Question

- 48 What is your view about the appropriate sanction if an estate agent or conveyancer does not comply with the annual auditing requirements?

5.3 Offences relating to trust accounts

The Estate Agents and Conveyancers Acts establish offences that prohibit estate agents and conveyancers from having deficiencies in their trust accounts and misappropriating trust moneys.

These are important offences that underpin the integrity of the enforcement regime for protecting trust moneys and preventing dishonest behaviour by estate agents and conveyancers.

However, in the case of the Estate Agents Act, the offences have not been reviewed in decades and as such require updating to reflect modern drafting terminology and improve their enforceability and operation. The penalties also require review.

For example, the offence of having a deficiency in a trust account under section 78 of the Conveyancers Act reflects the wording of a similar offence under the Legal Profession Uniform Application Act and attracts a maximum penalty of 1,800 penalty units or 15 years imprisonment or both. In contrast, a similar offence under section 90 of the Estate Agents Act has a significantly lower penalty (200 penalty units for a body corporate and 100 penalty units for an individual or 2 years imprisonment) and cannot be commenced without the written consent of the Director of Public Prosecutions (DPP). The more serious offence under section 91 of the Estate Agents Act (which relates to wrong conversion and false accounts) does not require DPP approval and has a maximum penalty (1,000 penalty units for a body corporate and 500 penalty units for an individual or 10 years imprisonment) which is still below the maximum penalties set out in the Conveyancers Act.

It has also been suggested that the requirement to prove an element of fraud in regard to the more serious offence under section 91 is unnecessary. Instead it is proposed that the mere use of trust money for personal use should be sufficient to establish an offence.

There has also been a suggestion that the offence under section 64 of the Estate Agents Act should be simplified. Currently it is an offence for an estate agent to fail to have their trust accounts audited within 3 months of the end of each financial year. It has been suggested that it would be preferable to make it an offence to fail to lodge a completed audit report by a specified date.

Question

- 49 How should offences relating to trust account deficiencies, misappropriation and deficient administration be framed for estate agents and conveyancers (i.e. what type of wrongdoing do we want to prevent)?

6 Administrative issues and record keeping requirements

This section sets out some administrative issues and record keeping requirements that have been raised during preliminary consultation. CAV encourages further comments on improvements that could be made to record keeping and administrative requirements placed on licensees.

6.1 Keeping track of conveyancing records post closure or sale

It has been suggested that the Conveyancers Act requires amendment to ensure there are better methods for tracking down records and documents when a conveyancer closes or sells their practice.

Records relating to the conveyancing work of the business, but not trust records, must be stored for 7 years. Additionally, if in the previous 3 years the licensee has ceased operating, all documents and records of the business must be made available for inspection by an inspector at a place where they can be readily inspected.

It has been suggested that conveyancers who close or sell their practice should be required to notify the BLA and provide information about where their records will be stored. The BLA would be required to keep a record of this information to assist consumers who have lost touch with their conveyancer and are trying to locate documents that were previously held by the conveyancer.

Question

- 50 How long should records be required to be retained once a conveyancing business closes, and with whom should this responsibility lie? What mechanisms should be in place so consumers can access documents of the closed business?

6.2 Public registers

The Registrar of the BLA is required to keep a register of estate agents and agents' representatives open for public inspection. Information that is publicly available on the register about estate agents includes licence holder details, licence conditions, business details (including principal office address and the name of the officer in effective control), employees, tribunal or court orders, claims admitted against the licensee and permission determinations. For agents' representatives details include their employer, tribunal or court orders, claims admitted against the agent's representative and any permission determinations.

The current purposes of the register are to:

- enable members of the public to have access to information about licensed estate agents and agents' representatives and other people involved in estate agency business, and
- record the names of all people who have been declared ineligible to hold a licence or be an agent's representative.

Views are sought on the relevance of continuing to record the names of all people who have been declared ineligible to hold a licence or to be an agent's representative. CAV wishes to explore the option of revising the information recorded on the register to limit it to information about licensed estate agents only.

Feedback is also sought on the usefulness and relevance of the information currently required in relation to licensed estate agents. The current level of information required to be included is quite detailed and prescriptive and it is unclear whether it is of particular use to the general public or to the estate agent industry. CAV would welcome information about the relevance and utility of the information on the register.

Although no issues have been raised to date with the public register for conveyancers, CAV welcomes feedback on the relevance and utility of the information on that register also.

Questions

- 51 Do you access public registers and if yes, for what purposes?
- 52 What is your view as to the required information for the registers, including whether information about ineligible persons should continue to be required?

6.3 Display of licence

Estate agents and conveyancers are required to display a copy of their licence at each place of business that they undertake work. CAV is seeking feedback on the continuing relevance of requiring licensees to physically display their licence, particularly as consumers can increasingly access information about a business on line, including access to public registers.

If this requirement is to be retained, information is also sought as to the level of information required to be displayed to assist consumers.

Question

- 53 How do the current requirements for physically displaying the licence by estate agents and conveyancers assist consumers?

7 Institutional arrangements

This section examines the institutional and administrative arrangements underpinning the Estate Agents Act and Conveyancers Act.

7.1 Business Licensing Authority

The BLA is an independent regulator established by the *Business Licensing Authority Act 1998*. In addition to conveyancers, estate agents and owners corporation managers, the BLA also licenses and registers motor car traders, second-hand dealers and pawnbrokers and sex work service providers.

Section 7 of the Estate Agents Act sets out that the BLA is responsible for administering the licensing provisions of the Act.

In contrast, the Conveyancers Act does not have a stand-alone provision that sets out the responsibilities of the BLA, and this Act is not specifically mentioned in the formal functions provision of the Business Licensing Authority Act. Section 6 of that Act states that the functions of the BLA are to administer the licensing and registration provisions of the Estate Agents Act, the *Motor Car Traders Act 1986*, the Owners Corporations Act, the *Sex Work Act 1994*, and the *Second-Hand Dealers and Pawnbrokers Act 1989*. However, it is clear from the provisions of the Conveyancers Act that the BLA performs similar functions in relation to conveyancers as it does for estate agents by administering the licensing provisions of the Act including determining eligibility to hold and in certain circumstances cancel a licence.

Question

- 54 Do you believe that the functions of the BLA are clear, and if not, how could the legislation be improved to clarify the BLA's role?

7.2 Consumer Affairs Victoria

CAV is a business unit within the Department of Justice and Regulation. In order to fulfil its role as Victoria's consumer affairs regulator, CAV undertakes a number of functions including:

- reviewing and advising government on consumer legislation and industry codes
- advising and educating consumers and businesses on their rights, responsibilities and changes to the law
- conciliating some disputes between consumers and traders, and
- enforcing and ensuring compliance with consumer laws.

Section 109 of the *Australian Consumer Law and Fair Trading Act 2012* sets out detailed functions for the Director of CAV in relation to that Act and other Consumer Acts. The 4 Acts that are being reviewed, the Estate Agents Act, Conveyancers Act, Owners Corporations Act and Sale of Land Act are all listed as Consumer Acts and these functions therefore extend to those Acts. These functions can be summarised as including:

- enforcement functions such as receiving and dealing with complaints, monitoring compliance, investigating and prosecuting breaches and instituting and defending proceedings
- preparing and publishing documents such as guidelines in relation to operation and enforcement and codes of practice to safeguard and promote the interests of purchasers of goods and services
- education and information functions such as advising people of their rights and educating and informing people on fair trading issues, and
- research and reporting functions including collecting and collating information, conducting research and reporting to the Minister.

The Estate Agents Act also has a stand-alone functions section which states that the functions of the Director of CAV are to:

- ensure that estate agents and agent's representatives comply with trust account procedures, professional conduct rules and other requirements of the Act
- initiate inquiries before VCAT
- deal with prosecutions, inquiries and complaints, and
- provide assistance and support to the Estate Agents Council (EAC)

These functions have remained unchanged since 1998.

CAV encourages feedback on its functions and role in relation to all the legislation under review as part of the Consumer Property Acts Review.

It has been suggested that the Estate Agents Act has not kept pace with modern entry and inspection powers and it is proposed to review those powers to ensure that inspectors' capacity to enter premises under search warrant and to monitor compliance are appropriate.

Concern has also been expressed at the ability to enter and search any premises at which unlicensed conveyancing may be undertaken.

Questions

- 55 Do you believe the role of the Director of CAV is clear and the functions are sufficiently articulated?
- 56 Are the powers given to the Director and inspectors under the relevant Acts sufficient?

7.3 Estate Agents Council

The EAC was established as part of wide ranging reforms introduced in 1995. The Second Reading Speech for the *Estate Agents (Amendment) Act 1994* does not cover the creation of the EAC in depth except to state that it would have a 'clearly defined policy and advisory role' and a specific role 'to evaluate the impact of commission deregulation on consumers and the effectiveness of the complaints handling procedure, agency compliance and consumer satisfaction'. The Second Reading Speech also noted that the Minister may seek the recommendation of the EAC before making any determinations under section 76 of the Act in relation to the Estate Agents Guarantee Fund (now the VPF).

The objectives of the EAC are:

- to promote appropriate standards of conduct and competency for persons in the real estate industry
- to protect the interests of persons using real estate services
- to ensure that effective procedures exist for the resolution of disputes between estate agents and those who use their services, and
- to further their objectives as far as practicable in conjunction with relevant real estate industry associations.

The EAC has been in place for over 20 years. Its objectives have not been altered in that time and its functions and powers have been subject to only minor amendment. The membership provisions have also had only minor change. There has been no review of its performance, functions and effectiveness.

Question

- 57 What are your views as to the role of and the objectives for the Estate Agents Council?

8 Victorian Property Fund

The Estate Agents Act establishes the VPF. Income for the VPF comes from licence fees paid by estate agents and conveyancers, any fines and penalties payable under the Estate Agents Act and Conveyancers Act, interest on estate agents' and conveyancers' trust accounts and investment income. The Secretary to the Department of Justice and Regulation is responsible for administering the VPF in general and the Minister is charged with the responsibility of deciding on the allocation of grant moneys after consultation with the EAC, the Secretary and any industry associations, government departments or other bodies she thinks appropriate. Below are issues that have been raised in preliminary consultation.

8.1 Basis for compensation claims from the VPF

Claims for compensation can be made by individuals and corporations who suffer a pecuniary or monetary loss as a result of a licensed estate agent or conveyancer misusing or misappropriating trust money or property in the course of their work. This is known as a defalcation. There is a limit of 10 years from the time of the defalcation on actions that can be brought against conveyancers. However, there is no limitation on the bringing of a claim against an estate agent.

The use of the term 'defalcation' has been raised as a term that may be out of date and requiring modernisation. The current definition in both the Estate Agents Act and Conveyancers Act includes any theft, embezzlement, failure to account or fraudulent misappropriation of funds. Failure to account is defined in the Conveyancers Act but is not defined in the Estate Agents Act (the glossary provides the definition as set out in the Conveyancers Act).

More fundamentally, it has also been suggested that there is need to review the scope of potential claims against the VPF given the basis for a compensation claim is defalcation of trust money or property.

Question

58 What do you think of the current basis for compensation claims against the VPF?

8.2 Grants for education and training

Under the Estate Agents Act excess money in the VPF can be applied by the Minister for a number of purposes. One of those purposes is for the training of estate agents and agents' representatives. It has been suggested that the absence of a specific reference to conveyancers is an omission that unfavourably impacts on the capacity to obtain grant moneys from the VPF to assist with the ongoing education of conveyancers. Views are also sought on whether it would also be an appropriate use of the VPF to fund education and training for owners corporation managers.

Question

59 Should funds from the VPF be put towards education and training for estate agents, conveyancers and owners corporation managers?

8.3 Penalties paid for unlicensed trading

If a court finds an offence proven against a person in relation to sections of the Estate Agents Act relating to unlicensed estate agents the court can order, in addition to any other penalty, that the person pay any amount received as commission or other consideration to the VPF.

It has been suggested that consideration be given to amending the capacity for courts to order moneys received as commission by unlicensed estate agents to be forfeited to the VPF. Instead an unlicensed trader would be required to return any commission to the seller. However, this may result in sellers who choose an unlicensed estate agent gaining an unexpected windfall even if they have received no disadvantage from the unlicensed activity.

Question

60 Under what circumstances should commission received by an unlicensed estate agent be returned to the client or the VPF?

9 Modernisation of the legislation

As the Estate Agents Act is over 30 years old there are a number of opportunities for modernisation of the legislation and the removal of outdated or redundant provisions.

It is proposed to revise the language of the Estate Agents Act to remove all antiquated language and to improve the readability of the legislation. Stakeholder suggestions on particular areas of improvement are welcomed.

Although the Conveyancers Act is more modern legislation, the review also provides an opportunity to remove redundant provisions or correct inconsistencies in the legislation.

9.1 Purposes of the Estate Agents Act

The Estate Agents Act was introduced in 1980 and, unlike most modern Acts, does not contain a section 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

61 What should the purposes of the Estate Agents Act include?

9.2 Identifying redundant provisions

Since their enactment each of the Acts considered in this review may have accumulated a number of provisions that are now redundant or that have otherwise served their purpose. It is proposed that these will be repealed. Some preliminary issues that have been identified include:

- removing references to the provisional licences for conveyancers from the Conveyancers Act
- removing references to accredited auctioneer's certificates from the Estate Agents Act
- removing references to agreements with approved industry associations from the Estate Agents Act, and
- removing requirements on corporations to lodge certain information about shares from the Estate Agents Act.

This review also provides an opportunity to examine the Acts to ensure that there is no unnecessary duplication with other regulatory requirements. In particular, estate agents and conveyancers are also required to comply with the Australian Consumer Law, which commenced in 2011.

Questions

62 What are the opportunities for modernising the Estate Agents Act and the Conveyancers Act?

63 What improvements can you identify to remove redundant provisions or duplication?

Part B – Conduct of owners corporation managers

Victoria has been the dominant residential building market in Australia since the late 2000s for multi-unit apartment and townhouse construction. Victoria's share of the value of new multi-unit apartment constructions is approximately 31 per cent, compared to 19 per cent in 2007-08.

According to Strata Community Australia (Vic) (SCAV), there are about 88,000 owners corporations in Victoria, affecting 1.5 million Victorians, and governing property to the total value of \$300 billion.

Owners corporation managers, who may be volunteers or professional managers, play an important role in owners corporations by assisting in the administration and management of the common property. They may, for example, help organise repairs, collect levies for maintenance, arrange owners corporation meetings, and maintain appropriate insurance and financial records for the owners corporation.

Since the Owners Corporations Act commenced on 31 December 2007, stakeholders have raised various concerns about the conduct of owners corporation managers, including allegations of inappropriate or fraudulent conduct. In 2013-14, CAV conducted a public review of the regulation of owners corporation managers, which included the release of an issues paper in November 2013, which is published on the CAV website at www.consumer.vic.gov.au. The review resulted in a range of proposals to amend the Owners Corporations Act that did not proceed at that time.

This Part re-presents issues regarding the conduct of owners corporation managers and seeks feedback on whether those issues have changed since 2013-14. Views are also sought on whether new issues have emerged since that time that require examination. Note that issues relating to owners corporations more broadly, rather than to managers, will be canvassed in the second issues paper.

10 Registration and unsuitable managers

If an owners corporation is to engage a professional manager in Victoria, the Owners Corporations Act requires the manager to be registered with the BLA. The primary purpose of a registration scheme is to provide a public information tool to allow the public to search for, and access details, about registered businesses, and to communicate with them. A secondary purpose of public registers is to provide contact details that can be used by CAV to communicate with the industry.

Compared with a registration scheme, a licensing scheme imposes a range of more prescriptive eligibility requirements. These typically include minimum training requirements, financial and personal probity requirements (such as a criminal record test), requirements in relation to professional indemnity insurance, and ongoing professional development. Because licensing schemes restrict entry into an industry, they can have potential impacts on competition and mobility of labour, and are usually imposed where the risks of market failure cannot be appropriately addressed or minimised through other means.

Currently, a person is ineligible to register as an owners corporation manager if they are under 18 years of age, a represented person, or an insolvent person. Additionally, registration can be cancelled if the manager does not lodge an annual statement and pay the annual fee, becomes a represented person or insolvent, or has obtained registration through false or misleading information.

Like estate agents, managers may manage significant sums of client moneys. Additionally, lot owners may have a long relationship with their manager (as with the estate agent who manages their rental properties). However, unlike the Estate Agents Act, there is no mechanism in the Owners Corporations Act to disqualify applicants or cancel registrants where the relevant person has committed a criminal offence that would make them unsuitable for the financial and administrative responsibilities of a manager.

In addition, applications must be accompanied by evidence of professional indemnity insurance. This means that professional indemnity insurance is essentially a de facto requirement for eligibility. This ensures that managers are correctly insured at the time of initial registration. However, while the Owners Corporations Act requires managers to disclose professional indemnity insurance details in their annual report at each annual general meeting, continuing to hold professional indemnity insurance is not an explicit requirement of practice. Further, there are no requirements on professional managers to disclose professional indemnity insurance details to their owners corporation prior to appointment or re-appointment.

Questions

- 64 Are there benefits in aligning the eligibility requirements for an owners corporation manager to the extent practical with those of estate agents?
- 65 What are your views on whether owners corporation managers should be separately licensed or be part of an estate agent's licence?
- 66 Is it appropriate to extend the current regulatory criteria to include serious criminal offences?
- 67 What would be the benefits and costs of placing requirements on owners corporation managers to hold professional indemnity insurance as a condition of practise?

11 Conflicts of interests and other duties in procuring goods and services

Owners corporations enter into contracts with third parties for a range of services such as insurance, security, gardening, and repairs. For arranging these contracts, managers frequently receive commissions, rebates, benefits, or discounts from the service providers.

Currently under the Owners Corporations Act there is no specific disclosure regime. However, in relation to conflicts of interests, managers are subject to a range of requirements, including:

- requirements in the Owners Corporations Act to act honestly and in good faith, exercise due care and diligence, and not to make improper use of their position to gain an advantage for themselves or others
- offences in the *Crimes Act 1958* regarding the receipt or solicitation of secret commissions by agents of a corporation
- licensing and other requirements for providers of financial advice under Part 7.6 of the Commonwealth Corporations Act 2001,¹ and
- fiduciary duties imposed on agents by the general law, including an obligation not to be in a position of conflict and not to obtain any unauthorised benefit from the relationship.

However, some stakeholders consider that commissions and discounts inflate the price of premiums or services for owners corporations, and may influence managers to select certain service providers over others that may provide better or more desirable policies or services.

¹ SCAV has required proof of a manager's status as an authorised representative of an Australian financial services licensee on application for membership: *SCAV Policy Position, Version 8: 20 July 2015, page 62.*

On the other hand, it has been said that insurance commissions reduce or 'subsidise' management fees by about 20 per cent, such that a prohibition on insurance commissions would either increase management fees, or reduce management services. Given the complexity of the insurance requirements, owners corporations may then need to purchase those services from a broker or other intermediary. In any case, it is argued that a prohibition would have little or no impact on insurance premiums, as commissions are either mostly or entirely funded from insurers' profits (rather than by premiums).²

Questions

- 68 In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?
- 69 Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?
- 70 What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?

12 Unfair terms in management contracts

Stakeholders have been concerned about 2 types of terms found in management contracts: terms requiring extra steps to terminate the contract, beyond those in the Owners Corporations Act; and terms that fetter the owners corporation's ability to refuse an assignment of contract.

If unfair terms in management contracts are to be dealt with, this must occur through the Owners Corporations Act, as the management contract is not a 'consumer contract' for the purposes of the Australian Consumer Law, which voids unfair terms in consumer contracts. (See Appendix 2 for a definition of a consumer contract).

Under the Owners Corporations Act, owners corporations are permitted to revoke a manager's appointment by an ordinary resolution (i.e. with at least 50 per cent support), which can be made at a meeting or by ballot. However, some management contracts may require, for example:

- a special resolution (i.e. with at least 75 per cent support)
- an unanimous resolution (i.e. with 100 per cent support)
- some other resolution requiring more than a simple majority (i.e. more than 50 per cent support), or
- an ordinary resolution to be passed only at a general meeting, rather than a ballot.

These provisions arguably circumvent the intention of the Owners Corporations Act by imposing steps that are not required or envisaged by the Act. Nevertheless, some stakeholders suggest that it is reasonable to require an important decision, such as terminating the management contract, to be made at a general meeting, rather than by a ballot, so that members can meet and discuss the issues in person.

However, while face-to-face discussion may be helpful for some lot owners, it is not always practicable, particularly for owners corporations with low meeting attendance rates, and which have difficulties scheduling a time when lot owners (including overseas or interstate owners) can attend. As with minutes of meetings, owners corporations must also maintain, and make available for inspection, the records of ballots and ballot results. Accordingly, a ballot is not necessarily a less inclusive or transparent process.

² An article by CHU Insurance Agency in *StrataLife*, Spring 2013, Insurance Commissions: The myths and facts, states, page 41, that 'Commissions are paid on base premiums, and represent <10% of the total insurance cost.'

With regard to the assignment of management contracts, the trigger for assignment is usually the sale of the manager's business, which cannot occur without the assignment or transfer of the management contract/s to the buyer. Where a manager has contracts with multiple owners corporations, the value of the business depends on the transfer of all contracts. For these larger businesses, such as those that manage 100 or more owners corporations, it can be difficult to obtain consent from all owners corporations. It is said that this justifies terms that fetter the owners corporation's ability to refuse an assignment of contract.

On the other hand, given that the manager acts for the owners corporation, and has an ongoing personal relationship with lot owners, it is important for owners corporations to be able to vet the choice of the new manager.

The common law position is that unless the contract states otherwise, the manager must obtain an owners corporation's consent, which cannot be unreasonably withheld.

Various approaches are taken by the industry. For example, the management contract published by SCAV requires an owners corporation to approve the assignment of a management contract to a professional manager of good standing with their association, and requires the new manager to sign a deed to comply with the management contract. Other contracts allow assignment without the owners corporation's consent.

Questions

- 71 What are the main concerns about unfair contract terms in management contracts?
- 72 Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?

13 Ending long-term management contracts

A developer will generally have control of the owners corporation while lots in a development are being sold. It is not uncommon in this period for a developer to enter into a long-term management contract, often with an associated entity.

Developers sometimes justify this on the basis that they need to ensure that they deliver on promises to buyers. Contracts of at least 10 years in length are also said to be necessary to attract managers who will make the necessary investments, including training their staff, to ensure that the developer's vision is realised. It is said that this is particularly the case for developments that will offer services such as catering and concierge. Comparisons have also been drawn with the hospitality industry, in which business leases can vary between 15 and 20 years in length.

Some managers also suggest that the workload in the first few years of managing a new development is substantial, and that a long-term contract gives managers time to establish and consolidate a well-functioning owners corporation. Additionally, because of the initial investment required of the manager, it is said that 3 or 4 years would pass before the value of the contract would peak (should the manager wish to sell the business).

On the other hand, the appointment of an owners corporation manager may not be comparable to a business that needs to take a lease of premises. It is also said that, in contrast to 10 and 20 year contracts, 3-year management contracts are 'industry best practice', and that one year contracts are also common.

Even with good intentions, the interests of the developer and its long-term manager, and those of the owners corporation, may diverge over time. Significant changes can occur over 10 or 20 years, including movements in a management company's personnel, and shifts in the composition and interests of lot owners.

Issues with long-term contracts can also be compounded by contract terms that allow for automatic renewals or renewals that are entirely at the manager's option. It has been said that management contracts typically provide for yearly renewals, with owners corporations having to serve a notice of non-renewal by a certain time to avoid the renewal. Where it is difficult to get a quorum for an owners corporation meeting to consider the renewal, these contract terms are said to be efficient and appropriate in ensuring that the owners corporation continues to function. However, automatic renewals may be problematic where an owners corporation is no longer satisfied with the manager's performance but, for whatever reason, fails to serve a notice of non-renewal or does so but not by the required time.

Even where a manager is underperforming, it may be difficult for the owners corporation to identify a specific breach of the management contract. The Owners Corporation Act allows for termination of a management contract before it expires. However, ending a contract where there has been no breach by the manager will normally give the manager a right to recover any loss or damage suffered by the early termination.

The standard management contract published by SCAV entitles the manager to such loss or damages, which may be set at a percentage of the remaining management fees and insurance commission. Under contract law, these pre-set amounts are valid, provided that they are a genuine pre-estimate of the loss or damage. Additionally, the manager must mitigate their loss or damage by taking reasonable steps to find alternative sources of income.

However, whether or not the termination payments are valid is usually beyond the understanding of most owners corporations. Where a standard form contract is involved, there may, in any case, be limited opportunity and capacity on the owners corporation's part to negotiate the termination fees.

Uncertainty about the consequences of early termination can discourage owners corporations from attempting termination. In this situation, owners corporations may simply 'put up' with unsatisfactory managers. This also means that buyers who bought their lot after the manager was appointed have not only had no choice of manager, but may not have any real choice for years to come.

Questions

- 73 Should any distinction be drawn between the required contractual terms for initial and subsequent management contracts? If so, why? How would such a distinction be drawn?
- 74 What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?
- 75 Are there other issues that require a regulatory response relating to long-term management contracts?

14 Managers' conduct around voting

Given managers' knowledge of, and interest in, the operation of owners corporations and committees, lot owners often seek their advice or opinion on committee elections and voting on resolutions. For example, a common and ongoing issue in many owners corporations is the small number of people volunteering to serve on committees. A New South Wales discussion paper noted that it is often the same group of people offering to serve each year, resulting in little or no competition. Some stakeholders, therefore, have commented that it is an appropriate use of the manager's influence to encourage people to join the committee or to attend a vote.

However, because managers occupy an influential, sometimes powerful, position in owners corporations, there is potential for them to use that position to influence the outcome of elections and votes, particularly where the manager has been appointed as proxy by (often, inactive) members. Even if the manager is simply trying to ensure the best outcome for the owners corporation, partisanship (or perceived partisanship) can create or exacerbate tensions within an owners corporation.

Question

76 How can concerns about managers' influence on voting be addressed?

15 Financial transparency

Rogue managers have sometimes billed members for costs of utilities they did not use, or billed the owners corporation for more than was actually spent (often in collusion with the contractor). With the expanding owners corporation sector in Victoria, the volume of funds that managers deal with is significant and increasing.

Fraud is primarily addressed by the criminal law, particularly where a manager simply misappropriates an owners corporation's money, but there is a role for the Owners Corporations Act in ensuring that managers deal with owners corporation money appropriately.

Currently, the Act only requires managers to account separately, not to maintain separate accounts. It has been reported that while most managers keep moneys from different owners corporations in separate bank accounts, some pool the moneys in a single bank account, and use modern software packages to assist them in accounting separately for those moneys.

One manager is reported to have used a pooled account to purport to lend money to owners corporations in deficit, at low interest rates. In fact, all the manager did was to use money from the pooled account, that is, the 'loan' was funded using moneys from surplus owners corporations funds, to keep the pooled account in balance.

Other stakeholders have suggested that the experience of smaller owners corporations may be different from that of larger owners corporations because the Fidelity Guarantee in common strata insurance policies for small owners corporations protects them from fraudulent conduct by the manager.

It was also reported that modern accounting software is well suited to the use of separate accounts, and allow for streamlined and 'automatic' reconciliations. Separate accounts also:

- help manage privacy issues, since managers are unable or unwilling to provide information about an owners corporation's funds where that may reveal information about other owners corporations, and
- facilitate financial planning by allowing managers to quickly identify accounts that are, or may be, in deficit.

Therefore, even if the incidence of fraud is low or difficult to confirm, the use of separate accounts and provision of financial information aligns with good governance and financial transparency. As the moneys do not belong to the manager, an owners corporation should not be denied access to information about their own funds.

Questions

77 How can concerns about fraudulent financial conduct be addressed? Would it be preferable in the context of financial transparency and accountability to require separate owners corporation funds to be kept in separate accounts?

78 What proportion of managers still use pooled accounts, and what would be the realistic costs and time required to transition to the use of separate accounts? Where possible, include the basis for these estimates.

Appendix 1: Summary of questions

This appendix provides a summary of the questions for consideration.

Part A – Estate Agents and Conveyancers

1 Licensing of estate agents and conveyancers

- 1 Is the definition of an estate agent easy to understand and apply? How could it be improved?
- 2 What problems have you experienced with unlicensed people who offer marketing or similar services to sellers or who run introduction or vetting services?
- 3 Are there any persons or organisations that are inadvertently captured by or excluded from the need to be licensed as an estate agent?
- 4 Are there any types of sales and leasing schemes that should specifically be referred to in the definition of an estate agent and why would they be included?
- 5 Is the definition of conveyancing work sufficiently broad to capture all those who should be licensed? If not, how could it be amended?
- 6 What is your view as to the present training for estate agents and/or conveyancers? Are there any additional training requirements that should be mandated? Are any of the current requirements unnecessary?
- 7 What are the potential costs of mandating higher entry standards for estate agents and/or conveyancers?
- 8 What are your views on the value and efficiency of the work experience requirements for conveyancers and estate agents?
- 9 What is your view about the need for CPD for estate agents and/or conveyancers? If CPD was required, what type of development should be mandated?
- 10 What are the costs of mandating CPD for all conveyancers and estate agents?
- 11 What are your views on the current eligibility criteria for estate agents and conveyancers?
- 12 What are the factors in favour of retaining the capacity for the BLA to grant permission to someone who is otherwise ineligible to hold a licence?
- 13 What barriers, if any, should be established in relation to the permission application process?
- 14 What are your views on the information required to be provided as part of the licensing process and what are the opportunities for red tape reduction?
- 15 What would be the impact, if any, of removing the requirement for a conveyancer to obtain professional indemnity insurance as a licensing criterion and instead to prescribe it as a pre-condition for practise?
- 16 What would be the impacts of mandating professional indemnity insurance for all estate agents?
- 17 Is it really necessary to prescribe in legislation a management approach that requires an estate agent or conveyancer to physically manage the day to day operations at each place of business? If not, what, if any, office management requirements should be prescribed?

- 18 How could obligations on officers in effective control be improved to better facilitate the proper conduct of estate agency work and office procedures?
- 19 What are the risks for persons licensed as estate agents in not having or not immediately replacing an 'officer in effective control' and should these be addressed in the Estate Agents Act?
- 20 What options should be available to facilitate conveyancers taking a break and then re-joining the workforce?
- 21 What issues, if any, would arise if a conveyancer's licence is cancelled and they fail to provide their annual statement and pay their annual licence fees at renewal?

2 Conduct of estate agents

- 22 What would be the merits or otherwise in having some established principles about the role of estate agents in the Estate Agents Act and/or setting out the duties for the conduct of an estate agent in relation to sellers, buyers, landlords and tenants (i.e. would it clarify expectations about the role of the agent and their conduct)?
- 23 What additional information should be included in the Estate Agents Act about the role estate agents play in property management, including in respect of duties and obligations should they be under to landlords and tenants?
- 24 What sanctions should be in place for estate agents who display poor behaviour in the property management space (for example specific offences, limited licence)?
- 25 What are your views on the merits of clarifying and directly expressing in the Estate Agents Act, the duties and obligations, if any, that an estate agent may hold towards buyers of property?
- 26 What would be the costs and benefits of regulating the conduct of estate agents in negotiating sales authorities and the content of those authorities?
- 27 What are your views on the current level of information disclosed by an estate agent to a client about commission, fees, rebates and other outgoings?
- 28 What is your view of the appropriate consequence if an estate agent fails to meet the disclosure requirements? For example, should the estate agent be entitled to any commission or other monies?
- 29 Are there any circumstances where agreements between estate agents should be subject to disclosure requirements? If yes, please provide examples of potential detriment that disclosure could avoid?
- 30 When should an estate agent disclose details of a person entitled to a commission? If the commission-sharing relationship arrangements change, what requirements of disclosure should apply?
- 31 What safeguards should be in place in circumstances where an estate agent or their representative or relative gains an interest in a property the agent is selling?
- 32 What distinction, if any, should there be between the estate agent personally buying a property, or their representatives or relatives buying a property that is listed with the agency?
- 33 Are there any circumstances where rebates could be permitted (for example, with appropriate disclosure requirements)?
- 34 What appropriate remedies or alternative approaches to prohibiting rebates could be considered?
- 35 Do the current arrangements in the Estate Agents Act sufficiently deal with rebates? In particular, should indirect benefits be included, and if so how should these be accounted for?

3 Conduct of conveyancers

- 36 Do the current professional conduct rules for conveyancers deal sufficiently with matters conveyancers should observe in the conduct of their functions?
- 37 Are there changes or additions to the rules that should be considered? Should the rules align with relevant rules for legal practitioners wherever practicable?
- 38 What regulation, if any, is required to deal with circumstances where a conveyancer is asked to pay, or offers to pay, a commission to a third party who refers a client to the conveyancer?
- 39 Are the current costs disclosure provisions in the Conveyancers Act sufficient? If not, in what respect should they be amended? Should the costs disclosure required for conveyancers align with those for legal practitioners?

4 Compliance measures

- 40 What are your views about, and experience of, the current VCAT inquiry system? What are the opportunities to improve the VCAT process?
- 41 Are the range of orders and penalties open to VCAT after conducting an inquiry sufficient and appropriate? If they are not, what changes would you recommend and why?
- 42 What are the merits of the proposed approaches which could operate in conjunction with existing enforcement approaches?
- 43 What additional suggestions do you have to address poor conduct?
- 44 What factors should be considered as part of any review of penalties under the Estate Agents Act?

5 Trust accounting

- 45 What are your views on the overall effectiveness of the trust accounting requirements for estate agents and conveyancers?
- 46 In what circumstances would it be appropriate for estate agents to receive money from, or on behalf of, clients and hold that money on trust? What would be the potential risks of providing estate agents and conveyancers with greater flexibility to deposit trust money in accounts that pay interest to the parties to the transaction?
- 47 Why is it important that conveyancers continue to have the ability to handle transit money or controlled money accounts?
- 48 What is your view about the appropriate sanction if an estate agent or conveyancer does not comply with the annual auditing requirements?
- 49 How should offences relating to trust account deficiencies, misappropriation and deficient administration be framed for estate agents and conveyancers (i.e. what type of wrongdoing do we want to prevent)?

6: Administrative issues and record keeping requirements

- 50 How long should records be required to be retained once a conveyancing business closes, and with whom should this responsibility lie? What mechanisms should be in place so consumers can access documents of the closed business?
- 51 Do you access public registers and if yes, for what purposes?
- 52 What is your view as to the required information for the registers, including whether information about ineligible persons should continue to be required?

- 53 How do the current requirements for physically displaying the licence by estate agents and conveyancers assist consumers?

7 Institutional arrangements

- 54 Do you believe that the functions of the BLA are clear, and if not, how could the legislation be improved to clarify the BLA's role?
- 55 Do you believe the role of the Director of CAV is clear and the functions are sufficiently articulated?
- 56 Are the powers given to the Director and inspectors under the relevant Acts sufficient?
- 57 What are your views as to the role of and the objectives for the Estate Agents Council?

8 Victorian Property Fund

- 58 What do you think of the current basis for compensation claims against the VPF?
- 59 Should funds from the VPF be put towards education and training for estate agents, conveyancers and owners corporation managers?
- 60 Under what circumstances should commission received by an unlicensed estate agent be returned to the client or the VPF?

9 Modernisation of the legislation

- 61 What should the purposes of the Estate Agents Act include?
- 62 What are the opportunities for modernising the Estate Agents Act and the Conveyancers Act?
- 63 What improvements can you identify to remove redundant provisions or duplication?

Part B: Conduct of owners corporation managers

- 64 Are there benefits in aligning the eligibility requirements for an owners corporation manager to the extent practical with those of estate agents?
- 65 What are your views on whether owners corporation managers should be separately licensed or be part of an estate agent's licence?
- 66 Is it appropriate to extend the current regulatory criteria to include serious criminal offences?
- 67 What would be the benefits and costs of placing requirements on owners corporation managers to hold professional indemnity insurance as a condition of practise?
- 68 In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?
- 69 Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?
- 70 What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?
- 71 What are the main concerns about unfair contract terms in management contracts?
- 72 Are there other types of unfair terms that should be considered? If so, what are they and how common are they? Why might they be unfair?

- 73 Should any distinction be drawn between the required contractual terms for initial and subsequent management contracts? If so, why? How would such a distinction be drawn?
- 74 What is your view as to contractual terms for the renewal of management contracts? For example, should there be any rules about terms such as automatic renewals or renewals at the prerogative of the manager only?
- 75 Are there other issues that require a regulatory response relating to long-term management contracts?
- 76 How can concerns about managers' influence on voting be addressed?
- 77 How can concerns about fraudulent financial conduct be addressed? Would it be preferable in the context of financial transparency and accountability to require separate owners corporation funds to be kept in separate accounts?
- 78 What proportion of managers still use pooled accounts, and what would be the realistic costs and time required to transition to the use of separate accounts? Where possible, include the basis for these estimates.

Appendix 2: Glossary of key terms

This appendix contains a glossary of key terms that are referred to throughout this paper.

agent's representative means any person:

- who is not a licensed estate agent but who:
 - is employed by, or who acts for or by arrangement with, a licensed estate agent; or
 - is a director, member or officer of a corporation that is a licensed estate agent; and
- who performs for that estate agent any of the functions of an estate agent (other than work ordinarily performed by clerks, cashiers or accountants):

regardless of whether his or her remuneration is by way of salary, wages, commission or otherwise.

A '**consumer contract**' is a contract under which, among other requirements, goods or services are supplied to an individual, not an unincorporated body such as an owners corporation. The test for an unfair standard form consumer contract in the ACL is whether the term:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract
- is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term, and
- would cause detriment (whether financial or otherwise) to a party if it were to applied or relied on conveyancing business means any business in the course of which conveyancing work is carried out for fee or reward, whether or not the carrying out of conveyancing work is the sole or dominant purpose of the business;

conveyancing work means legal work carried out in connection with any transaction that creates, varies, transfers, conveys or extinguishes a legal or equitable interest in any real or personal property, such as, for example, any of the following transactions:

- the sale of a freehold interest in land
- the creation, sale or assignment of a leasehold interest in land
- the grant of a mortgage or other charge.

defalcation means any theft, embezzlement, failure to account, fraudulent misappropriation or other act punishable by imprisonment of or in relation to money or any other property

failure to account means a failure by a licensee to account for, pay or deliver money or other valuable property:

- that has been received or entrusted to the licensee, or an associate of the licensee, in the course of the licensee's conveyancing business; and
- in the case of money or other valuable property received by or entrusted to an associate of the licensee, that is under the direct or indirect control of the licensee:

whether the failure arises from an act or omission of the licensee or an associate of the licensee

Note: this term is not defined in the Estate Agents Act 1980

Director of CAV means the person who, for the time being, is employed as Director of CAV under the *Public Administration Act 2004*.

estate agent or agent means any person (whether or not he or she carries on any other business) who exercises or carries on or advertises or notifies or states that he or she exercises or carries on or that he or she is willing to exercise or carry on or in any way hold himself or herself out to the public as ready to undertake the business of:

- selling buying exchanging letting or taking on lease of or otherwise dealing with or disposing of;
- negotiating for the sale purchase exchange letting or taking on lease of or any other dealing with or disposition of;
- collecting rents for:

any real estate or business on behalf of any other person.

inspector means an inspector appointed under the *Australian Consumer Law and Fair Trading Act 2012*

legal work means work that, if done by a person who is not a qualified entity within the meaning of the Legal Profession Uniform Law (Victoria) would give rise to an offence against a provision of Part 2.1 of that Law

outgoings means any moneys spent by an estate agent on his or her principal's behalf for which the estate agent is at common law entitled to be reimbursed

Registrar means the Registrar of the Business Licensing Authority