

Consumer Property Acts Review Issues Paper No. 1

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

To: Consumer Property Acts Review, Policy and Legislation Branch, Consumer Affairs Victoria

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TABLE OF CONTENTS

Introduction	1
General Comments	1
Part A – Estate agents and conveyancers	2
Licensing of estate agents and conveyancers	2
Conduct of estate agents	5
Conduct of conveyancers	8
Compliance measures	8
Trust accounting	9
Administrative issues and record keeping requirements	10
Institutional arrangements	11
Victoria Property Fund	11
Modernisation of the legislation	12
Part B – Conduct of owners corporation managers	12
Registration and unsuitable managers	12
Conflicts of interests and other duties in procuring goods and services	13
Unfair terms and management contracts	13
Ending long-term management contracts	14
Managers’ conduct around voting	15
Financial transparency	15

Introduction

In August 2016, the Minister for Consumer Affairs, Gaming and Liquor Regulation, the Honourable Jane Garrett MP, announced a general review of Victoria's real estate and related legislation. The review examines four key pieces of real estate and property legislation: the *Sale of Land Act 1962 (Vic)*, the *Estate Agents Act 1980 (Vic)*, the *Owners Corporations Act 2006 (Vic)* and the *Conveyancers Act 2006 (Vic)*. The objectives of the review are to:

- assess the four Acts to identify improvements that could be made to the legislation;
- 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 legislative arrangements set in place by these Acts.

The Law Institute of Victoria (LIV) provided preliminary comments to Consumer Affairs Victoria (CAV) regarding the review in late 2015. The LIV welcomes the opportunity to continue its contributions to the review, and notes that CAV will be releasing three issues papers. This submission contains the LIV's response to the range of questions in Issues Paper 1, which focuses on the conduct of and institutional arrangements for estate agents, conveyancers and owners corporation managers.

General Comments

The LIV has endeavoured to respond to all of the questions in Issues Paper 1 including those which relate to estate agents and conveyancers, but acknowledges its members' limited exposure to the regulation of those two groups of professionals. However, the LIV is particularly interested in the CAV review to the extent that it relates to licensed conveyancers as they operate in the same field as many legal practitioners.

A significant number of the LIV's members are involved in transactions involving owners corporations, so the LIV is also keenly interested in this part of the review.

Licensed conveyancers

Section 1 of the *Conveyancers Act 2006 (Vic)* specifies one of the purposes of that Act to be 'to protect the interests of consumers of conveyancing services by regulating the carrying out of conveyancing work by persons other than Australian legal practitioners'. The LIV supports this primary objective of the *Conveyancers Act 2006 (Vic)*, and has advocated over the years to ensure that legal practitioners and licensed conveyancers are generally subject to the same regulatory provisions and prohibitions for the benefit of consumers.

For example, the LIV advocated for amendment to s42(3) of the *Property Law Act 1958 (Vic)* to apply to both legal practitioners and licensed conveyancers to protect purchasers from having to pay costs and expenses except those identified as exemptions in ss42(3)(a) to (c) of the *Property Law Act 1958 (Vic)*. The LIV also sought amendment to s29W of the *Sale of Land Act 1962 (Vic)* so that the prohibition in that section to not act for both the vendor and the purchaser under a terms contract applies equally to legal practitioners and licensed conveyancers, and ensures that a consumer is protected in circumstances where either a legal practitioner or licensed conveyancer acts contrary to s29W. The LIV is pleased that its proposed amendments have been included in the *Consumer Acts and Other Acts Amendment Bill 2015*, which was second read in the Legislative Council on 11 February 2016.

The LIV therefore generally supports an alignment of the regulatory requirements that apply to legal practitioners and conveyancers to the extent that this is possible and appropriate.

Owners corporation managers

Issues Paper 1 refers to a previous CAV review regarding owners corporation managers which was undertaken in 2013 to 2014, and which included the release of an issues paper in November 2013. The LIV made a submission in response to that review, and the submission is attached as Attachment A for ease of reference. The LIV's position in relation to the questions posed in the November 2013 remains unchanged,

and the responses given in the LIV's earlier submission have therefore informed its responses to the owners corporation manager questions in current Issues Paper 1.

The LIV, in its earlier submission, proposed that a full review of the *Owners Corporations Act 2006 (Vic)* be undertaken (rather than the more confined 2013 to 2014 review regarding owners corporation managers), noting the ever-increasing number of owners corporations and mixed used developments in Victoria. The LIV is pleased that there will be a comprehensive review of the *Owners Corporations Act 2006 (Vic)* through the release of Issues Paper 2.

Part A – Estate agents and conveyancers

Licensing of estate agents and conveyancers

1 Is the definition of an estate agent easy to understand and apply? How could it be improved?

The LIV considers that the definition of 'estate agent' is easy to understand and apply, but that the definition is too broad. However, the LIV acknowledges that limiting the definition is a policy consideration for government.

2 What problems have you experienced with unlicensed people who offer marketing or similar services to sellers or who run introduction or vetting services?

While LIV members are aware that there is an increasing number of businesses operating as vendors' agents or buyers' advocates, neither LIV members or their clients have experienced any problems with these 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?

The LIV considers that this is a policy consideration for government, and does wish to express any views on this.

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?

LIV members have not had exposure to any schemes that should be specifically referred to in the definition of an 'estate agent'.

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

'Conveyancing work' is defined in s4 of the *Conveyancers Act 2006 (Vic)*. It provides as follows:

4(1) *In this Act, 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 -*

- (a) *the sale of a freehold interest in land;*
- (b) *the creation, sale or assignment of a leasehold interest in land;*
- (c) *the grant of a mortgage or other charge.*

4(2) *Without limiting subsection (1), conveyancing work includes –*

- (a) *legal work involved in preparing any document (such as an agreement, conveyance transfer, lease or mortgage) that is necessary to give effect to a transaction of a kind referred to in subsection (1); and*

- (b) *legal work (such as the giving of advice or the preparation, perusal, exchange or registration of documents) that is consequential or ancillary to a transaction of a kind referred to in subsection (1); and*
- (c) *any other legal work that is prescribed by the regulations as constituting conveyancing work for the purposes of this Act.*

Section 4(3) specifies the type of legal work that cannot be carried out as conveyancing work.

The LIV is concerned about the breadth of the definition of conveyancing work and the type of legal work it enables licensed conveyancers to undertake under s4(2). For example, the LIV understands that some licensed conveyancers have prepared powers of attorney for clients on the basis that such preparation is ancillary to the conveyancing transaction. Preparation of such documents can be complex and often necessitate an intimate knowledge of the types of legal issues that can arise in order to seek relevant instructions from the client. The LIV therefore submits that these types of documents should only be drafted by legal practitioners, and that s4(3) should be amended to specify this.

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?

The LIV considers that any training requirements for estate agents and/or conveyancers should ensure that estate agents and licensed conveyancers have a comprehensive understanding of all laws which affect real property transactions. For example, this would include laws regarding contract law information, the *Property Law Act 1958 (Vic)*, the *Transfer of Land Act 1958 (Vic)*, the *Sale of Land Act 1962 (Vic)*, off-the-plan developments, farming land, foreign investment and taxation.

Estate agents and conveyancers who will be managing trust money should also be required to complete appropriate training.

The LIV also suggests that any ongoing training requirements should incorporate the key elements of the continuing professional development (CPD) requirements with which legal practitioners must comply. In Victoria, under the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*, legal practitioners must complete 10 CPD requirements in each CPD year (1 April to 31 March), including at least one CPD unit in each of the following fields:

- ethics and professional responsibility;
- practice management and business skills;
- professional skills; and
- substantive law.

It is particularly important that estate agents and conveyancers are aware that ethical issues may arise in transactions, and the steps they can or should take if an ethical dilemma presents itself.

7 What are the potential costs of mandating higher entry standards for estate agents and/or conveyancers?

The potential costs of mandating higher entry standards for estate agents and conveyancers would include the costs of developing and monitoring compliance with those standards as well as the time and resources expended by estate agents and conveyancers subject to those requirements. However, the LIV submits that the benefits of mandating higher entry standards would outweigh the costs. In the LIV's view, consumers would enjoy increased quality of service and advice and there would also likely be a reduction in claims on professional indemnity insurance policies.

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

As stated in the Issues Paper, 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. The LIV submits that the work experience requirements for conveyancers should be more closely aligned with those required of legal practitioners, to ensure that there is scope for exposure to a wide range of conveyancing issues over a 2 year period in a supervised environment.

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?

The LIV refers to its response to question 6.

10 What are the costs of mandating CPD for all conveyancers and estate agents?

The LIV refers to its response to question 7.

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

The Issues Paper summarises the current ineligibility and disqualification criteria for estate agents and conveyancers, and notes that only people convicted of sexual offences involving violence are ineligible to hold a licence. The LIV submits that convictions for other offences referred to in the Issues Paper, such as possession of child pornography or committing an unlicensed trading offence should also preclude a person from holding a licence.

The LIV also considers that any offences which would trigger disciplinary action against legal practitioners should be considered. The Victorian Legal Services Board website (www.lsb.vic.gov.au) includes links to the outcomes of previous disciplinary hearings as published on the AustLII website.

As to the current position where criminal convictions going back 10 years are relevant, the LIV does not support a reduction in this period of time.

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?

The LIV does not consider that the Business Licensing Authority should have capacity to grant permission to someone who is otherwise ineligible to hold a licence. Given the impact upon consumers and the public interest for a licence to be granted if the person is otherwise ineligible, the LIV considers that such applications should be determined by a Court with appropriate jurisdiction.

13 What barriers, if any, should be established in relation to the permission application process?

The LIV refers to its response to question 12.

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?

The LIV is not in a position to respond to this question, as its members are not subject to the conveyancer licensing process.

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 practice?

The LIV suggests that holding professional indemnity insurance should be a pre-condition for practice, as this aligns with the requirements for legal practitioners and ensures that insurance is obtained prior to undertaking conveyancing work. However, if obtaining professional indemnity insurance is a licensing criterion and the licence only becomes valid for practice once insurance is obtained, the net outcome would likely be the same.

16 What would be the impacts of mandating professional indemnity insurance for all estate agents?

The LIV considers that there would be increased consumer protection if professional indemnity insurance is mandated 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?

In its responses to earlier questions, the LIV has indicated support for mandatory CPD requirements and appropriate training for estate agents and conveyancers, and also considers that estate agents and licensed conveyancers should be required to hold professional indemnity insurance. The LIV considers that if estate agents and licensed conveyancers are subject to these requirements, there would be no need for them to physically manage the day-to-day operations at each place of business. The laws

regulating office management by estate agents and conveyancers should be updated to reflect changes in technology.

18 How could obligations on officers in effective control be improved to better facilitate the proper conduct of estate agency work and office procedures?

The LIV refers to its response to question 17.

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?

The LIV does not have any views on this.

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

As specified in the Issues Paper, legal practitioners are able to suspend their practising certificates for up to 3 years provided that on return they undertake approved training within 6 months. The LIV suggests that conveyancers should be given the same opportunity.

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?

The LIV considers that licence cancellation where a conveyancer fails to pay an annual licence fee and lodge an annual statement with the Business Licensing Authority should be simplified by aligning the process with that which applies to estate agents. This means that there would be no suspension of the licence as is currently the case, and the licence would be cancelled unless the annual statement and fees are paid.

As there will likely be issues for the conveyancer's clients and transactions that are in progress, the LIV suggests that a process for external intervention similar to that under Chapter 6 of the *Legal Profession Uniform Law (Victoria)* could be explored.

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)?

The LIV considers that there would be value in the role of estate agents in different contexts being clarified. The LIV proposes that the duties and responsibilities of estate agents in relation to different parties (sellers, buyers, landlords and tenants) be prescribed by regulations. It would also be useful for those different parties to be provided with a summary of the estate agent's duties and responsibilities, so that there is a clear understanding and expectation of the estate agent's role in each context.

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?

The LIV refers to its response to question 22.

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)?

As specified in its response to question 22, the LIV suggests that the duties and responsibilities of estate agents in relation to landlords and tenants should be prescribed by regulations. The LIV suggests that there should be monetary penalties if an estate agent does not comply with any of those duties or responsibilities prescribed by regulations. The LIV also refers to its responses to questions 40 and 43.

The LIV also supports placing limitation or conditions upon licences, depending on the type of offence.

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?

The LIV refers to its response to question 22.

The LIV also suggests that estate agents should have responsibility to quote realistic prices at which they expect the property to be sold to buyers. LIV members are aware of many instances where potential purchasers have been told by an agent the price for which the agent believes the property would be sold, only to attend auction and find the 'reserve' price at which the property is available to be sold is far greater than the price quoted. The LIV understands that the Real Estate Institute of Victoria is currently undertaking work in this area.

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?

The LIV considers that it would be desirable to regulate the conduct of estate agents in negotiating sale authorities. For example, regulations could be drafted which oblige estate agents to inform sellers that they can enter into either an Exclusive Sale Authority or a General Sale Authority, and the implications of each (including that the estate agent is entitled to his/her commission if the property is sold during the period of an Exclusive Sale Authority, irrespective of whether they introduced the relevant purchaser). The Authorities could also address how and when a seller can terminate an Authority, if they are dissatisfied with the service provided by the estate agent.

In relation to the content of sale authorities, it would be preferable for the Particulars of Appointment page of either an Exclusive Sale Authority or a General Sale Authority to specifically nominate the date upon which the Authority ceases to have effect and the seller is no longer bound by it. The LIV does not support the concept of a 'Continuing Authority Period'.

The LIV also considers that the trigger events for an estate agent to receive sales commission need to be more clearly stated in the 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?

The Exclusive Sale Authority and the General Sale Authority would appear to require full disclosure on the part of the estate agent of their commission, fees, rebates and other outgoings.

The LIV also suggests that the *Estate Agents Act* 1980 (Vic) address the position and disclosure requirements of buyers' advocates. There does not appear to be a prescribed form of authority for a buyer's advocate to disclose their commission fees, rebates or 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?

The Issues Paper states that it has been suggested that the *Estate Agents Act* 1980 (Vic) or regulations should entitle an estate agent to be paid for services provided where they have failed to make proper disclosure, provided that they have acted "honestly and reasonably and the client is in as good a position as if the requirements had been complied with." The LIV supports this approach.

An alternative approach which could be explored is for a discount to be applied to the commission the estate agent would otherwise have been entitled to, had they made proper disclosure. A discount in the order of 10-20% for a failure to meet their disclosure requirements might strike a balance between entitling an agent who has acted honestly and reasonably to be paid for services provided, whilst still acting as a general deterrent to poor practices on the part of the estate agent.

However, the LIV recognises that there may be small errors made by the estate agent in relation to commercial and development sales disclosure where those developments require that the disclosure made with some degree of urgency. These errors might not affect the vendor but the vendor would have the benefit of the sale while estate agents would be disadvantaged in circumstances where they needed to make disclosure with some level of urgency.

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?

The LIV considers that where agreements between estate agents influence how a property is marketed for sale, or any other material consideration bearing on a property's sale (including the cost of marketing items or the sale price), such agreements should be subject to disclosure to the seller of the property in question. For example, with the practice of vendor's advocates becoming involved in sales increasing, LIV members understand that the vendor's advocate negotiates with the vendor's estate agent about a range of commission and also takes a share of that commission. Assuming that the vendor's advocate discloses that practice to the vendor, the vendor's estate agent should also be required to disclose the sharing of that commission to the vendor.

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?

The LIV suggests that an estate agent should disclose in an Authority details of any person entitled to a commission. If circumstances change during the currency of an Authority period, such that the estate agent proposes to utilise the assistance of another agent, where this had not been in contemplation at the time the Authority was signed, they should at that point provide to a seller a commission sharing statement.

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?

The prohibition against estate agents earning a commission where a property is purchased by the estate agent, agents' representative or relative potentially performs an extremely important function. Vulnerable sellers, or other sellers who may be persuaded to sell in circumstances where the estate agent is the subject of an obvious conflict of interests, do require protection.

It is difficult to envisage that even "small towns" would have an unreasonable percentage of their pool of potential buyers falling into the category of relatives of the estate agent.

Vulnerable sellers are protected to some degree if their property is sold after proper marketing at a publicly advertised auction. Where a relative of the estate agent is the highest bidder at such an auction, and the seller is made aware of the relationship between the bidder and the estate agent, and opts to proceed with such a sale, perhaps only in this circumstance could a case be made for the agent being entitled to a commission.

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?

The LIV refers to its response to question 31. Arguably a stronger case could be made for an estate agent receiving a commission where a property is sold to a relative, as opposed to the estate agent or an agents' representative.

33 Are there any circumstances where rebates could be permitted (for example, with appropriate disclosure requirements)?

The LIV submits that it would not be appropriate for estate agents to be entitled to retain rebates from third parties in relation to costs incurred on behalf of sellers. The LIV considers that the *Estate Agents Act 1980 (Vic)* or regulations should also oblige estate agents to disclose, without question, any indirect incentives or arrangements (such as "a paid holiday") which exist between the estate agent and a third party provider. Such an arrangement would create an obvious conflict of interests, which could easily result in sellers paying more for advertising or other services commissioned by the estate agent, than may otherwise be the case.

34 What appropriate remedies or alternative approaches to prohibiting rebates could be considered?

The LIV considers that this is a policy consideration for government, and does wish to express any views on this.

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?

The LIV refers to its response to question 33. The LIV supports the amendment of the *Estate Agents Act* 1980 (Vic) to capture indirect benefits and incentives. The LIV suggests that any indirect benefit or incentive received by an estate agent or which an estate agent has knowledge that he or she may receive directly or from a third party within the next two years should be disclosed by the agent to their client. An estate agent could also be required sign a statement to the effect that he or she has no knowledge that any such incentive has or may be received within the next two years.

LIV members have indicated that a number of estate agents own shares in publishing companies or groups or entities that advertise on the internet. The LIV suggests that they should be required to disclose whether they are a shareholder in that company with which they will place an advertising order unless that company is a public company listed on the stock exchange.

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?

The Issues Paper refers to rules for professional conduct which apply to legal practitioners under the Legal Profession Uniform Law (Victoria). The LIV suggests that similar rules, to the extent relevant and practicable, should apply to conveyancers.

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?

The LIV agrees that the professional conduct rules that apply to conveyancers should align with the relevant rules for legal practitioners wherever practicable. There should not be further rules than those imposed on legal practitioners, as this may lead to over-regulation and increased costs of enforcing compliance.

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?

The LIV suggests that the conveyancer should be required to make disclosure to the client regarding the commission. The LIV considers that similar rules to those contained in the Legal Profession Uniform Law Australian Solicitors' Conduct Rules (rule 12) should apply to conveyancers.

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?

The LIV considers that the costs disclosure requirements required for conveyancers should align with those for legal practitioners where possible. However, legal practitioners are currently exempt from providing costs disclosure where the total legal costs are not likely to exceed \$750. The LIV understands that the Australian Institute of Conveyancers would not support any exemption from the costs disclosure requirements for conveyancers.

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?

The LIV agrees with the observations in the Issues Paper that the current VCAT inquiry system can be cumbersome. The LIV supports the exploration of alternative approaches to address poor conduct including those identified in the Issues Paper as follows:

- 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;
- establishing different tiers of misconduct for which different levels of enforcement would apply;
- introducing a third party regulatory body such as an ombudsman scheme.

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?

Section 34 of the *Conveyancers Act* 2006 (Vic) and s28A of the *Estate Agents Act* 1980 (Vic) confer upon VCAT wide discretion in relation to orders that can be made after conducting an investigation. These range from reprimand to cancellation of a licence and permanent disqualification, but many of the orders tend towards the harsher end of the scale. The LIV therefore considers that the introduction of a demerit point system as discussed in the Issues Paper and in the LIV's response to question 40 would be useful.

42 What are the merits of the proposed approaches which could operate in conjunction with existing enforcement approaches?

In relation to a 'demerit points' system, the LIV refers to its response to question 41.

An ombudsman scheme such as that described in the Issues Paper would allow for resolution of matters outside of VCAT where appropriate.

43 What additional suggestions do you have to address poor conduct?

The LIV suggests that there should be greater education to improve awareness about ethical conduct and practice. This can be achieved through mandatory annual CPD (which includes ethics training) as a licensing requirement.

The LIV considers that estate agents and conveyancers who have displayed poor behaviour should be required to undertake tailored education programs.

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

The LIV suggests that penalties under the *Estate Agents Act* 1980 (Vic) should be aligned with those found in comparable legislation. Also, any penalties that have not been indexed should be indexed.

The LIV also proposes that there should be specific penalties that apply to estate agents who insert special conditions into contracts of sale. Specifically, the penalties should be fines up to the amount of the commission. The LIV suggests that the scope for such special conditions to be voided could be explored, but notes that there may be detriment to the parties to the contract if they are voided.

Trust accounting

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

The LIV considers that the trust accounting requirements in the *Estate Agents Act* 1980 (Vic) should be brought into line with the structure and wording of the trust accounting requirements in the *Legal Profession Uniform Law (Victoria)*.

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?

The LIV is concerned that the risk of defalcations will arise unless these processes are properly regulated. In the experience of LIV members, estate agents are more likely to release monies (and receive commission) in circumstances where special conditions are yet to be fulfilled in favour of a

purchaser. Legal practitioners and conveyancers are less likely to release deposit monies before strict compliance with s27 of the *Sale of Land Act 1962 (Vic)* has taken place.

The LIV suggests that estate agents could be allowed to hold deposits in a controlled money account if deposit monies are only to be released at settlement. If estate agents are to be permitted to release deposits under s27 of the *Sale of Land Act 1962 (Vic)*, strict guidelines and rules would need to be established and followed.

47 Why is it important that conveyancers continue to have the ability to handle transit money or controlled money accounts?

While the Issues Paper provides that controlled money is only generally received by conveyancers in rare circumstances, the LIV supports the continuation of this right. It creates a level playing field with legal practitioners.

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

The LIV submits that non-compliance with the annual auditing requirements should constitute an automatic grounds for cancellation of a licence.

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)?

The LIV proposes that the offences relating to trust account deficiencies, misappropriations and deficient administration should be aligned with those which apply to legal practitioners in the *Legal Profession Uniform Law (Victoria)*.

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?

The LIV suggests that similar regulatory requirements that apply to law practices and legal practitioners under the *Legal Profession Uniform Law (Victoria)* in relation to administrative issues and record keeping requirements should apply to conveyancers.

51 Do you access public registers and if yes, for what purposes?

The LIV members who contributed to this submission indicated that they rarely access the public registers.

52 What is your view as to the required information for the registers, including whether information about ineligible persons should continue to be required?

The LIV's view is that public registers should be kept for licensed conveyancers similar to the registers which apply to the legal profession. The LIV suggests that there should be scope to look up whether a conveyancer has been subject to disciplinary proceedings, noting that there is public information available about legal practitioners subject to disciplinary proceedings.

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

As many transactions are conducted where the client does not meet the conveyancer or visit the estate agent at their premises, the display materials are less relevant.

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?

In the experience of LIV members, the general public has little knowledge of the Business Licensing Authority and certainly would not identify the Business Licensing Authority as having a regulatory role for conveyancers.

55 Do you believe the role of the Director of CAV is clear and the functions are sufficiently articulated?

Whilst legal practitioners generally understand the role of the Director of Consumer Affairs, the role is not so clear to the public. LIV members often receive feedback which indicates that the perception is that no estate agents and few conveyancers are prosecuted, even though the LIV understands that there are in fact many prosecutions.

56 Are the powers given to the Director and inspectors under the relevant Acts sufficient?

The LIV considers that the powers given to the Director are sufficient, but notes that the perception is that they are rarely exercised.

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

LIV members have little experience regarding the role of the Estate Agents Council.

Victoria Property Fund

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

The LIV proposes that the system for claims for compensation against the Victoria Property Fund as a result of a conveyancer misusing or misappropriating trust money or property in the course of his or her work should be aligned with the system which applies to legal practitioners. The Victorian Legal Services Board maintains the Fidelity Fund which provides compensation to people who have lost money or property to dishonest or fraudulent behaviour of a lawyer, employee of a law practice or an approved clerk.

Regarding a time limit to bring a claim against an estate agent, the LIV considers that the status quo where there is no limitation should remain. This is because it may take time for a defalcation to come to light in the case of long term property management.

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

Education and training for legal practitioners is generally self-funded. The LIV therefore suggests that funds from the Victoria Property Fund should not 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?

The LIV suggests that there should be discretion for a Court with appropriate jurisdiction to refund commission to the vendor if it considers appropriate. This would allow an appropriate outcome in the particular circumstances.

Modernisation of the legislation

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

The LIV suggests that one of the stated purposes of the *Estate Agents Act 1980 (Vic)* could be the regulation of those acting for others in the sale, purchase or leasing of land.

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

The LIV makes no comment in response to this question.

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

There are numerous statutes that will conflict or duplicate requirements of the Australian Consumer Law, particularly once the unfair contract terms protections extend to small businesses. The LIV observes that it may be beyond current resources to attempt to identify this except in respect of the most obvious duplications.

Part B – Conduct of owners corporation managers

Registration and unsuitable managers

64 Are there benefits in aligning the eligibility requirements for an owners corporation manager to the extent practical with those of estate agents?

The LIV considers that there are benefits in aligning the eligibility requirements for an owners corporation manager to the extent practical with those of estate agents provided that the higher standard is always the one adopted.

65 What are your views on whether owners corporation managers should be separately licensed or be part of an estate agent's licence?

The LIV considers that owners corporation managers should be separately licensed. This will avoid conflicts of interest that might arise (for example, if the estate agent appointed to sell a property is also the owners corporation manager for the owners corporation relevant to that property).

Also, separate licensing regimes would likely increase competition, as opposed to if owners corporations managers could be part of an estate agent's licence.

66 Is it appropriate to extend the current regulatory criteria to include serious criminal offences?

The Issues Paper states that there is currently no mechanism in the *Owners Corporations Act 2006 (Vic)* 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 an owners corporation manager. The LIV considers that such persons should be disqualified, as they would be under the *Estate Agents Act 1980 (Vic)*.

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?

The Issues Paper provides that applications to register as an owners corporation manager must be accompanied by evidence of professional indemnity insurance, but that there is no explicit requirement that the manager continue to hold such insurance to practise.

The LIV is of the view that it should be mandatory for owners corporation managers to hold professional indemnity insurance, given the significant portfolios that they manage. This would mean higher accountability for owners corporation managers and would increase consumer protection.

The costs of placing requirements on owners corporation managers to hold professional indemnity insurance as a condition of practice would be passed on to owners corporations.

Conflicts of interests and other duties in procuring goods and services

68 In your experience what is the current practice of owners corporation managers in relation to disclosure of commissions?

In the experience of LIV members, owners corporations managers generally do not disclose commissions.

The LIV also refers to its November 2013 submission (question 19, page 7) in which the LIV stated that express prohibitions on the manager's receipt of commissions or on entering into transactions involving a conflict of interest are not required. However, the LIV submitted that in the interests of transparency, owners corporation managers should be required to provide full and prior written disclosure to owners corporations regarding commissions and transactions involving a conflict of interest.

69 Do commissions and discounts have an adverse impact on premiums for insurance, and if so, how does this manifest?

The LIV considers that this is a question for insurers, and does not have a view on this.

70 What are the non-regulatory approaches that could be considered to ensure commissions and other payments do not distort the market?

The LIV is of the the view that if commissions are being paid to the owners corporation manager, the product might not necessarily be the best product for the owners corporation. There are no obvious non-regulatory approaches that could be adopted, so the LIV submits that a regulatory approach is appropriate whereby the owners corporation manager is required to disclose the commission.

Unfair terms and management contracts

71 What are the main concerns about unfair contract terms in management contracts?

The LIV refers to its November 2013 submission (questions, 8, 9, 10, 11, 12 and 13, pages 5 and 6) in relation to unfair terms in management contracts. In that submission, the LIV stated that:

- it does not consider it necessary to prohibit contract terms that require a step not required by the *Owners Corporations Act 2006 (Vic)*. The LIV submitted that the parties should be able to contract freely rather than having the provisions of their contractual arrangements mandated absolutely by legislation;
- it considers that terms that limit an owners corporation's ability to prevent an unwanted assignment of the management contract should not be prohibited. The LIV suggested that it should be necessary to obtain the consent of the owners corporation to the assignment of the management contract, but that the consent must not be unreasonably withheld;
- terms that require an excessive period of notice for the early termination of a management contract should be prohibited. The LIV suggested that a reasonable period of notice is between two to three months, and that any longer period is excessive;
- it agrees that contracts which fix the amount that the owners corporation must pay the manager on an early termination where the amount is based on a genuine pre-estimate of the loss or damage

should remain valid, even where the actual loss or damage suffered by the owners corporation manager is less than the pre-estimated amount;

- VCAT should have a clear power to deal with unfair terms in management contracts, without the need to show that there is a dispute 'relating to the exercise of a function by a manager'. Subject to there being no (or a nominal) filing fee, the extension of VCAT's powers would facilitate greater access to justice.

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?

The LIV refers to its response to question 71.

In some instances, owners corporation managers might have received a payment or other reward from a lot owner or third party as a result of the awarding of the contract. The LIV does not support this practice, and submits that management contracts should include a warranty that the owners corporation manager has not received any such payment or reward.

Ending long-term management contracts

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?

The LIV refers to its November 2013 submission (questions 1, 2 and 3, pages 3 and 4) in relation to length of management contracts. In that submission, the LIV stated that:

- there should be more specific provisions in the *Owners Corporations Act 2006 (Vic)* regarding the appropriate length of management contracts. The LIV suggested that the initial term of a management contract should be no greater than two years, and that any further term should not exceed three years;
- a management contract should expire at the second annual general meeting;
- subsequent management contracts should not exceed three years. The LIV suggested that this would ensure that owners corporations and their members are not burdened by excessively long management contracts if they are not satisfied with the service provided by that manager.

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?

The LIV refers to its November 2013 submission (question 5, page 4). In that submission, the LIV stated that:

- contract terms that allow an owners corporation manager to renew the contract at its option should be prohibited, as this denies the owners corporation the opportunity to consider the renewal;
- in the event a management contract expires without any agreement for renewal, there should be an amendment to the *Owners Corporations Act 2006 (Vic)* to provide for a short extension of the term of between two and three months.

The LIV suggests that retirement village management contracts should be considered separately in the context of the review of the *Retirement Villages Act 1986 (Vic)*.

75 Are there other issues that require a regulatory response relating to long-term management contracts?

The LIV has not identified any other issues at this time.

Managers' conduct around voting

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

The LIV refers to its November 2013 submission (question 24, page 8). In that submission, the LIV stated that there should not be any express prohibition on a manager from 'attempting to influence' the outcome of a vote or election. This is because the test would be highly subjective in practice, and could interfere with existing practices and processes by which managers endeavor to encourage voting but are not seeking to influence the outcome.

To promote transparency and to lessen the likelihood of influence, the LIV suggests that an owners corporation manager should be required to do either of the following when there is a ballot in progress:

- advise any lot owner to whom the owners corporation manager has spoken that the lot owner should also contact a member of the owners corporation committee or the chairperson; or
- notify a member of the owners corporation committee or the chairperson if the owners corporation manager has spoken with a lot owner.

Financial transparency

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?

The LIV refers to its November 2013 submission (question 28, page 9) which discussed the establishment of a Fidelity Fund to compensate owners corporations for managers' fraud. In that submission, the LIV suggested that there did not appear to be a significant number of recalcitrant owners corporation managers to justify the establishment of a Fidelity Fund at that stage.

However, the LIV suggested that if a Fidelity Fund were to be established, one option could be the use and application of the interest earned on funds held on trust by owners corporations (similar to the interest earned on trust money in the trust accounts of legal practitioners and estate agents).

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.

The LIV is not able to indicate the proportion of managers that still use pooled accounts. However, as stated in its November 2013 submission (question 27, page 9), the LIV submits that pooled accounts should be prohibited. The LIV considers that owners corporation managers should be required to keep separate accounts for each owners corporation they manage.



Review of the regulation of owners corporation managers

Owners Corporations Act 2006

To: Consumer Affairs Victoria

25 November 2013

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Table of Contents

1. Introduction	3
2. General Comments	3
3. Issues	3
3.1. Appropriate length of management contracts	3
3.2. Unfair terms in management contracts	5
3.3. Managers' fees.....	6
3.4. Managers' conflicts of interest	7
3.5. Managers' conduct.....	8
3.6. Managers' record keeping	9
3.7. Unsuitable managers	10

1. Introduction

In mid 2013, Consumer Affairs Victoria (CAV) commenced a review of the provisions of the *Owners Corporations Act 2006 (Vic)* (the Act) relating to owners corporation managers, in response to stakeholder concern about a number of management-related issues affecting owners corporations and lot owners. The Law Institute of Victoria (LIV) was grateful for the opportunity to meet with CAV in July to explore some of these issues on a preliminary basis.

In October 2013, CAV released an issues paper, *Review of the regulation of owners corporation managers* (Issues Paper). This submission contains the LIV's response to the range of questions included in the Issues Paper.

2. General Comments

The LIV supports CAV's review of the provisions in the Act relating to owners corporation managers. However, the LIV submits that a comprehensive review of the Act in its entirety is warranted rather than confined review or a review in stages.

For example, the LIV notes the introduction of the *Owners Corporations Amendment Bill 2013* which provides for amendment to the Act in relation to the levying of fees, and considers that the matters canvassed in that Bill could appropriately have been considered in the context of a full review. The LIV was grateful to have the opportunity through some of its members to provide preliminary feedback regarding the matters which the Bill seeks to address, but is disappointed that it was not able to comment on the Bill before its introduction.

LIV representatives met with CAV and Strata Community Australia (Victorian Division) representatives in late December 2011 to discuss a range of issues regarding the operation of the Act, and the need for review. The LIV considers that a full review of the Act is justified for many reasons, noting that there is an increasing number of owners corporations in Victoria and that there are now many more mixed use developments than the traditional smaller residential developments for which the Act seeks to cater. There have also been numerous Victorian Civil and Administrative Tribunal (VCAT) decisions affecting owners corporations since the Act's commencement, including decisions regarding the interpretation of various provisions in the Act. This highlights the importance of addressing legislative anomalies in the Act through a review of its provisions.

The LIV would welcome the opportunity to meet with CAV representatives and other stakeholders to progress the useful discussions that commenced in December 2011, with a view to identifying the numerous areas of the Act which would benefit from review.

3. Issues

3.1. Appropriate length of management contracts

1. *Should there be more specific provisions in the Owners Corporations Act regarding the appropriate length of management contracts?*

There are no provisions in the Act which prevent developers from entering into long-term management contracts (often with associated entities). It is noted in paragraph 2.1.1 of the Issues Paper that such contracts might not be in the best interests of owners corporation members.

The LIV considers that there should be more specific provisions in the Act regarding the appropriate length of management contracts. The LIV suggests that the initial term of a management contract should be no greater than two years and that any further term should not exceed three years.

2 *If so, should management contracts entered into by the developer expire at the first annual general meeting?*

LIV member feedback indicates that the first annual general meeting for an owners corporation is usually held within ten days of registration of the plan of subdivision at Land Victoria. In this context, the LIV proposes that a management contract should expire at the second annual general meeting. The LIV also reiterates its point in response to question 1 that the initial term of a management contract should not exceed two years.

3 *Should subsequent management contracts have a maximum length? If so, what should that be?*

The LIV's comments in response to question 1 also apply here. The LIV is of the view that the term of any subsequent management contract should not exceed three years. This would ensure that owners corporations and their members are not burdened by excessively long management contracts if they are not satisfied with the service provided by that manager.

4 *Should the length of subsequent management contracts differ for large and small owners corporations? If so, how should 'large' and 'small' owners corporations be differentiated?*

The LIV does not consider that the length of subsequent management contracts should differ for large and small owners corporations, as this would likely be cumbersome and subjective in practice.

5 *Should contract terms that allow an owners corporation manager to renew the contract at its option be prohibited?*

The LIV is of the view that contract terms that allow an owners corporation manager to renew the contract at its option should be prohibited, as this denies the owners corporation the opportunity to consider the renewal.

Sub-section 71(2) of the Act specifies the matters which must be dealt with at an annual general meeting. The LIV suggests that the renewal of any management contract should be a mandatory item for consideration at any annual general meeting. This will ensure that the owners corporation and its members have the opportunity to properly consider the re-appointment of a manager.

6 *Should automatic renewals for a further term, where the owners corporation does not serve a non-renewal notice, be prohibited? If so, and if the contract expires without any agreement for renewal, should the Owners Corporations Act provide for a short-term rollover (for example, on a monthly basis)?*

In the event that a management contract expires without any agreement for renewal, the LIV supports amendment to the Act to provide for a short extension of the term of between two and three months.

The LIV also reiterates its comments in response to question 5 regarding inclusion of the renewal of any management contract as a mandatory annual general meeting item.

7 *Should the obligation under section 68 of the Owners Corporations Act be extended to developers who maintain control of an owners corporation by holding a majority of the lot entitlements?*

It is specified in paragraph 2.1.2 of the Issues Paper that s68 of the Act requires a developer who owns a majority of lots to act honestly and in good faith and with due care and diligence in the interests of the owners corporation. The LIV supports the extension of this obligation to developers who maintain control of an owners corporation by holding a majority of the lot entitlements (noting that lot entitlement essentially governs voting entitlement).

3.2. Unfair terms in management contracts

8 *Should contract terms that require a step not required by the Owners Corporations Act be prohibited?*

The LIV does not consider it necessary to prohibit contract terms that require a step not required by the Act. The LIV submits that parties should be able to contract freely rather than having the provisions of their contractual arrangements mandated absolutely by legislation. It must therefore be possible for parties to reach contractual agreement regarding matters which are not addressed in the Act.

9 *Should terms that limit an owners corporation's ability to prevent an unwanted assignment of the management contract be prohibited?*

The LIV considers that terms that limit an owners corporation's ability to prevent an unwanted assignment of the management contract should not be prohibited. An owners corporation must not unreasonably withhold its consent to an assignment of the management contract.

Therefore, the LIV suggests that it must be necessary to obtain the consent of the owners corporation to the assignment of the management contract, but that the consent must not be unreasonably withheld.

In the event that the consent of the owners corporation to the assignment of a management contract is not required, the LIV is of the view that the assignee of the contract should be required to notify all lot owners of the assignment within a certain time period after assignment (for example, 14 days). There could then be scope for the owners corporation to terminate the contract and appoint a new manager if 25% or more of lot owners object to the assignment. However, the LIV acknowledges the practical difficulties that this could present, given that a transfer of books and records of the owners corporation will have already occurred.

10 *If so, should an owners corporation be allowed to refuse consent to an assignment only on reasonable grounds? Should it prima facie be unreasonable to refuse consent to an assignee who is of good standing with an approved body, for instance, Strata Community Australia (Victorian Division)?*

The LIV refers to its response to question 9.

The LIV agrees that it should prima facie be unreasonable to refuse consent to an assignee who is of good standing with an approved body.

11 *Should terms that require an excessive period of notice for the early termination of a management contract be prohibited? If so, what is a reasonable period of notice?*

The LIV submits that terms that require an excessive period of notice for the early termination of a management contract should be prohibited. The LIV considers that a reasonable period of notice is between two to three months, and that any longer period is excessive.

12 *Should terms that require a **pre-determined** amount to be paid to the manager on termination be prohibited?*

It is specified in paragraph 2.2.1 of the Issues Paper that a contract can fix the amount that the owners corporation must pay the manager on an early termination, and that these amounts are valid if they are a genuine pre-estimate of the loss or damage, regardless of the actual loss or damage the manager suffers. The LIV considers that the status quo should be preserved.

However, the LIV suggests that there would be value in CAV preparing a disclosure statement or due diligence checklist which is to be provided to owners corporations and lot owners and which

specifies a range of important issues for them to consider prior to entering into a contract of management of an owners corporation. It would be appropriate for fees payable to a manager on termination of the management contract to be included in the disclosure statement / due diligence checklist.

- 13 *Should the Victorian Civil and Administrative Tribunal have a clear power to deal with unfair terms in management contracts, that is, without the need to show that there is a dispute 'relating to the exercise of a function by a manager'?*

The LIV supports the extension of VCAT's powers to deal with unfair terms in management contracts without the need to show that there is a dispute 'relating to the exercise of a function by a manager'. Subject to there being no (or a nominal) filing fee, the extension of VCAT's powers would facilitate greater access to justice.

3.3 Managers' fees

- 14 *Is the problem of owners corporations entering into management contracts with excessive fees sufficiently addressed by appropriate controls on the length of management contracts?*

In its response to question 1, the LIV proposed that the initial term of a management contract should be no greater than two years and that any further term should not exceed three years. The LIV considers that such controls on the length of management contracts sufficiently addresses the problem of owners corporations entering into management contracts with excessive fees.

- 15 *If no, should an owners corporation be required to obtain at least two quotations before entering into a management contract?*

The LIV does not consider that an owners corporation should be required to obtain at least two quotations before entering into a management contract.

The LIV instead refers to its comments in response to question 12 regarding the provision of a disclosure statement or due diligence checklist to owners corporations and lot owners. The LIV considers it appropriate that the issue of fees in management contracts be included in such a disclosure statement / due diligence checklist.

- 16 *If so, should that only be if the cost of the engagement exceeds a pre-determined spending limit, in default, a limit set by the Act? If so, what should that statutory limit or formula be (for example, multiplying the number of lots by a certain dollar value)?*

As the LIV does not consider that an owners corporation should be required to obtain at least two quotations before entering into a management contract, the LIV makes no comment in response to this question.

- 17 *Should Consumer Affairs Victoria have the power to investigate excessive commissions, as per the Estate Agents Act?*

Paragraph 2.3.1 of the Issues Paper refers to the excessive commission provisions of the *Estate Agents Act* 1980 and states that under s56A of that Act, the Director of CAV can investigate any dispute between an estate agent and a client concerning the amount of commission or outgoings.

The LIV supports CAV having a similar power to investigate fees charged by owners corporation managers.

3.4 Managers' conflicts of interest

18 *Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?*

As noted in paragraph 2.4.2 of the Issues Paper, Part 11 of the Act empowers VCAT to resolve a dispute relating to the exercise of a function by a manager by revoking the manager's appointment or by imposing conditions or restrictions on the manager.

The LIV generally considers that VCAT's powers in the context of addressing managers' conflicts of interests are sufficient. However, the LIV suggests that it should be possible for parties to apply to VCAT for declaratory relief, as there is currently no scope to do so. This will facilitate access to justice for parties, which is a key guiding principle for VCAT.

19 *If no, should there be express prohibitions on the receipt of commissions or on entering into transactions involving a conflict of interest?*

The LIV is of the view that express prohibitions on the manager's receipt of commissions or on entering into transactions involving a conflict of interest are not required. However, in the interests of transparency, the LIV considers that managers should be required to provide full prior and written disclosure to owners corporations regarding commissions and transactions involving a conflict of interest.

20 *Should there be a presumption that where a manager receives a commission or awards a contract to itself or an associate, it has breached the section 122 obligation unless the owners corporation approves the transaction, after full disclosure by the manager?*

As specified in paragraph 2.5.2 of the Issues Paper, s122 of the Act requires managers to act honestly and in good faith, to exercise due care and diligence, and not to make improper use of their position to gain an advantage for themselves or others, and to account separately for the money held for each owners corporation by the manager.

The LIV does not consider that a manager should be required to seek approval from the owners corporation regarding any commission or transaction involving a conflict of interest. The manager should only be required to disclose the commission or transaction involving a conflict of interest and provided that there is such disclosure, there should be no breach of s122 of the Act.

21 *Should there be some further, particular obligations on managers, to supplement section 122, such as:*

- *an obligation to provide prior written disclosure of any benefits to be received from contractors or of any relationship with a contractor; and/or*

The LIV refers to its response to question 19.

- *an obligation to take reasonable steps to ensure goods and services they obtain or supply are at competitive prices?*

The LIV agrees that there should be an obligation on owners corporation managers to take reasonable steps to ensure that goods and services they obtain or supply are at competitive prices. However, the LIV emphasises that price is not the only factor for a manager to consider regarding the supply of goods and services.

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- 22 *Should there be a mandatory tendering process for all contracts above a pre-determined limit; in default, above a limit set by the Owners Corporations Act?*

The LIV does not consider that there should be a mandatory tendering process for contracts above a pre-determined limit, or indeed, for any contracts of any value. This is because any initial tendering process is likely to identify additional issues and matters for inclusion in the contract which will often necessitate a re-tender.

3.5 Managers' conduct

- 23 *Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?*

The LIV refers to its response to question 18.

- 24 *If not, should managers be prohibited from attempting to influence the outcome of a vote or election? If so, should that be an outright prohibition or only a prohibition on unfairly attempting to influence the outcome of a vote or election or on exerting pressure to influence the outcome of a vote or election?*

Paragraph 2.5.2 of the Issues Paper includes a useful summary of the limitations in the Act regarding 'proxy farming'. Section 89 prohibits any person from requiring or demanding that a lot owner give that person, or any other person, a power of attorney or proxy.

The LIV considers that these provisions are sufficient, and does not support any express prohibition on a manager from 'attempting to influence' the outcome of a vote or election. This is because this test would be highly subjective in practice, and could interfere with existing practices and processes by which managers endeavour to encourage voting but are not seeking to influence the outcome.

- 25 *Should there be a specific restriction on proxies held by the manager where the manager has an interest in the outcome of the vote, for example, should a manager be excluded from holding proxies unless the proxy specifies how the manager holding the proxy is to vote?*

The LIV considers that this is adequately addressed in sub-s 87(4) of the Act, which provides:

- (4) *A person who is not a lot owner and who holds a proxy for a lot owner may not vote on matters affecting himself or herself relating to-*
- (a) the delegation of powers and functions under section 11; or*
 - (b) the appointment, payment or removal of a manager under Part 6.*

- 26 *Would any problem better be addressed, at least for larger owners corporations, by requiring them to engage only professional managers?*

The LIV agrees that there is merit in requiring prescribed owners corporations (that is, owners corporations which levy annual fees in excess of \$200,000 in a financial year or which consist of more than 100 lots) to engage only professional managers. This is because of the complexities that often arise in respect of managing owners corporations of that size.

For the same reason, it would also be useful for CAV to recommend that owners corporations which are not prescribed owners corporations but which consist of 10 lots or more to engage professional managers.

27 *Should pooled accounts be prohibited and managers required to keep separate accounts for each owners corporation they manage?*

The LIV submits that pooled accounts should be prohibited and that managers should be required to keep separate accounts for each owners corporation they manage. It is not appropriate that an owners corporation manager attain profits from a pooled investment comprising the funds of multiple owners corporations.

28 *Should the Owners Corporations Act require managers to contribute to a Fidelity Fund to compensate owners corporations for managers' fraud?*

While there are merits in the establishment of a Fidelity Fund to compensate owners corporations for managers' fraud, this also gives rise to cost issues for lot owners if managers are required to contribute to such a fund. The LIV also observes that there do not appear to be a significant number of recalcitrant owners corporation managers to justify the establishment of a Fidelity Fund at this stage.

The LIV suggests that this issue warrants further consideration and stakeholder consultation. One option which could be explored in relation to establishing a Fidelity Fund is the use and application of the interest earned on funds held on trust by owners corporations (similar to the interest earned on trust money in the trust accounts of legal practitioners and estate agents).

29 *Is the current prescribed minimum cover of \$1.5 million for any professional indemnity claim sufficient?*

LIV members observe that the current prescribed minimum cover of \$1.5 million for any professional indemnity claim in respect of the manager's conduct (but excluding claims arising from the manager's fraudulent conduct) appears to be sufficient for most owners corporations.

However, the LIV proposes that a higher amount of minimum cover could be explored for prescribed owners corporations, noting that claims in respect of larger owners corporations are more likely to exceed \$1.5 million.

3.6 Managers' record keeping

30 *Is the power of the Victorian Civil and Administrative Tribunal, together with the existing obligations under the Owners Corporations Act, sufficient to deal with any problem?*

The LIV refers to its response to question 18.

31 *If not, should managers have the same record keeping obligations as the owners corporation?*

The LIV notes that owners corporations and managers have different functions.

32 *Should they simply have an obligation to record all receipts and expenditure of owners corporation money?*

Paragraph 2.6.1 of the Issues Paper refers to the range of existing record-keeping obligations in the Act for managers. The LIV does not consider that managers should simply have an obligation to record all receipts and expenditure of owners corporation money. A manager should be required to keep records as per the existing provisions in the Act and also comply with any obligations set out in the management contract.

Further, the LIV submits that the Act should be extended to require managers to provide financial statements and records as at the date of handover to a new manager, and up-to-date accounts **at least** to the date of termination of the management contract.

-
- 33 *Should owners corporations have the power to require managers to provide inspection of whatever accounts are kept by the manager, including providing copies?*

The LIV does not consider that owners corporations should have the power to require managers to provide inspection of manager's records as distinct from owners corporation records. The owners corporation should only be entitled to access owners corporation records kept by the manager.

- 34 *Should managers be required to keep a record of each exercise of a delegated function and serve a copy on the owners corporation?*

The LIV does not consider that managers should be required to keep a record of each exercise of a delegated function and serve a copy on the owners corporation. This would place an undue burden on managers, but without significant benefit for owners corporations.

3.7 Unsuitable managers

- 35 *Should there be a criminal record check for managers, including officers or employees?*

Given that owners corporation managers, their officers and employees are in influential and responsible positions in owners corporations and are trusted to manage significant sums of money for lot owners, it is appropriate that there be a criminal record check for managers, their officers and employees.

- 36 *If so, should the test reflect that in the Estate Agents Act? If not, what are appropriate disqualification provisions?*

Paragraph 2.7.1 of the Issues Paper contains a useful summary of the test in the *Estate Agents Act* 1980 for people to hold estate agents' licences. Under that Act, an applicant is ineligible if they have, within the previous 10 years, been found guilty of any offence involving fraud, dishonesty, drug trafficking or violence that is punishable by imprisonment for three months or more. Additionally, a licence is automatically cancelled 30 days after a licensee has been found guilty of any such offence.

The LIV supports the adoption of this test to apply to owners corporation managers, their officers and employees.

- 37 *Should the test extend to voluntary as well as professional managers?*

The LIV considers that the test should extend to voluntary as well as professional managers.