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

BY EMAIL: consumerpropertylawreview@justice.vic.gov.au

Dear Sir / Madam,

Re: Submission to Consumer Property Acts Review Issues Paper No. 3 – Sale of Land and Business

Brand Partners Commercial Lawyers is pleased to make this submission to Consumer Affairs Victoria in respect of the *Consumer Property Acts Review Issues Paper No. 3 – Sale of Land and Business* (**Issues Paper**).

We do not intend to address every subject raised in the Issues Paper. Instead, our submission focuses on issues that Brand Partners has observed through our extensive involvement in property transactions, acting for sellers, buyers and property developers.

For ease of reference, we have maintained the numbering as per the Issues Paper, and provide our comments on the topics set out below as follows:

1.1 Infrastructure on Land

(i) It is not just the uncertainty in relation to water infrastructure which can create difficulties. Electricity infrastructure can also be present on land, where there is no recorded easement or registered lease on title and therefore not discoverable by a prospective buyer unless disclosed in a Section 32 Statement or by physical inspection.

(ii) An example would be an electricity substation which is occupying part of a building, that was installed prior to electricity privatisation and there is no record of its existence

appearing on title or the plan of subdivision. Such a substation would only be discovered by physical inspection of the property.

(iii) Ideally, any public utility service infrastructure should be disclosed on all plans of subdivision. This may require the relevant organisations to audit all their infrastructure and ensure it is either noted on title or on plans of subdivision.

1.3 Due Diligence

(i) Given that the sale of real estate is based on the maxim *caveator emptor*, there is no doubt that there is a need to ensure that buyers are aware of the risks involved in entering into a contract for the sale of land.

(ii) The provision of the Due Diligence Checklist does not have the desired effect. The requirement to "make available" the checklist means that it is often included in the Section 32 Statement, or, worse, the contract itself. In our experience, buyers often gloss over information contained in the Section 32 Statement as they consider it too complex. Buyers often seek advice on the Section 32 Statement *after* entering into the contract, by which time it is often too late to undertake the checks/inspections that the checklist recommends.

(iii) It is understood that you cannot make a person read a document (let alone follow its advice) but in our view by the time that the buyer is provided the Section 32 Statement, they are well into the purchase process, and are often under pressure (by agents or their own desire for a particular property) to enter into a contract.

(iv) We do not consider that the checklist should be dispensed with, rather perhaps the lack of time in which to consider the matters raised in the checklist could be countered by amendments to the cooling off period (discussed below).

1.4 Building and Pest Inspections

(i) Building and Pest Inspections should be made compulsory for properties being sold by Auction. In our experience, often buyers undertake inspections for the first one or two properties they bid on, but if unsuccessful both the cost involved and the disheartenment of losing out on multiple properties means they cease to do so for further properties.

(ii) It is understood that this is an additional cost for a seller. This could be countered in two ways. Either it could be considered in the sale price of the property, or the inspection could be available to prospective buyers for a minimal fee (e.g. $20).

(iii) However, this requirement should only apply to properties which have no builder's warranty or where those warranties are to expire within 3 months of settlement of the property.

(iv) Consider whether there could also be an exclusion with properties that are being sold with a view to be demolished. However, this would need to be specifically advised to buyers in the Section 32 Statement or prior to auction – perhaps the advertising would need to include a statement to this effect to prevent sellers from trying to circumvent this requirement.

3 Cooling Off

(i) In our experience current cooling off provisions are not effective in 'undoing' an impulsive purchase made by a buyer. Often the buyer signs a contract and hands all copies to the estate agent to arrange for execution by the seller. By the time that the buyer's solicitor receives a copy of the contract (and advises the buyer of their rights), the cooling off period has expired. Rarely do we receive contracts within the cooling off period.

(ii) Further, the cooling off period is not necessarily long enough to allow an inspection of the property to occur. If the cooling off period was extended to 5 business days, it would allow both time for inspections to occur and for advice to be sought. This would also overcome some of the lack of efficiency of the Due Diligence checklist as noted above.

(iii) As *Tan v Russell [2016] VSC 93* highlighted, clarification should be provided on who exactly the buyer is entitled to serve notice on – does an estate agent constitute an "agent" for the purposes of withdrawing from the contract? Further, a timeframe for the provision of the notice should be set – does the time period expire at 5pm or midnight? Finally, does "written notice" include an email?

(iv) Buyers should be prevented from relying on the cooling off provision and withdrawing from a contract and them immediately offering to purchase the same property for a lower price. This situation has arisen a number of times and is frustrating to the seller (who has

often rejected other offers). The seller should be entitled to accept the lower offer conditionally – on the basis that if they receive another offer they wish to accept (whether better or not) in the 14 days following the entry into the second contract they may withdraw from that contract without penalty. This could be enshrined in legislation, and would discourage buyers from taking such action as they would run the risk of losing the property.

4.2 Off-the-plan sale and the standard form of contract

(i) It would be beneficial to have a standard form off-the-plan contract. Currently, an off-the-plan sale cannot be made using the standard form contract without the addition of special conditions. A standard off-the-plan contract would alleviate the need to insert (so many) special conditions into an off-the-plan sale.

(ii) A separate standard off-the-plan contract could be prescribed, or a general condition included in the current standard form contract which would be applicable for an off-the-plan sale.

5.2 Early Release of Deposit

(i) The ability to enable the early release of the deposit under certain circumstances serves a valuable purpose and should be retained. Generally, in any sales industry the seller is not required to hold a deposit on trust for a buyer. Instead, the seller is entitled to use that deposit.

(ii) The primary risk and concern for a buyer is that if the buyer becomes entitled to return of the deposit, the seller does not have the funds available to refund the buyer and there is insufficient equity in the property to ensure that the deposit is fully refunded.

(iii) Whilst there may be plenty of equity in a property at the time a deposit is released, a buyer may be concerned that a seller may grant a security interest (ie. mortgage) over the property after the deposit is released, which a seller does not appear to be prevented from doing, provided that at settlement clear title is provided to the buyer.

(iv) Whilst a buyer may lodge a buyer's caveat over the property, consider if a seller should be prohibited from granting a mortgage or other security interest over a property after a release of the deposit. Alternatively, consider if a seller may only grant a mortgage over a property after a release of a deposit if the existence of the sale contract has been

disclosed to the lender/mortgagee in cases where a buyer's caveat has not been lodged, so that the subsequent lender's interest is subject to the buyer's lien relating to the released deposit.

(v) Early release provisions are ambiguous and require amendment. In particular, the wording "*conditions enuring for the benefit of the buyer*" should be reconsidered.

(vi) We have had experiences where buyer's representatives have advised at the outset of the conveyance – prior to a Section 27 notice being issued – that they will not under any circumstances advise their client to agree to the release of the deposit on the basis that there are conditions enuring for the benefit of the buyer up to settlement (for instance the General Conditions noted in the Issues Paper). Some practitioners have gone further and demanded that if a Section 27 notice is served, the buyer pays the seller's legal costs for presenting the Section 27 notice to their client.

(vii) Consider whether this limitation should only apply to conditions such as loan approval and pest and building inspections, rather than general procedural obligations (such as inspections, the carrying of risk or acceptance of title).

(viii) Alternatively, consider whether the deposit over an encumbered property could be released only for a specific purpose – for instance paying off debts encumbering the property or for the deposit on a new property. Aside from a statement from the seller as to how the deposit is to be used, the stakeholder could ensure release of the deposit funds directly to the third party, minimising the risk of misuse.

(ix) Where the property is unencumbered there should be no prohibition on the deposit being released prior to settlement. A notice to the effect that the property is unencumbered, and that the deposit will be released within 7 days of the notice, should suffice.

(x) The information required under Section 27 need not be so extensive. Lead should be taken from the standard contract – if the sale price is equal to or less than 80% of the debts encumbering the property (which includes by its nature any interest and fees on a mortgage) the deposit should be released.

(xi) The industry practice of requiring a notice from a seller's financier confirming the details required to be provided in the Section 27 notice can be prohibitive for the deposit being

released. In our experience, financial institutions often do not provide section 27 advice until after a contract of sale has been signed, and often take weeks to provide the required information. Combine this time with the 28 day period provided under Section 27, and it takes 5 to 6 weeks to have the deposit released. Often, by this time, settlement is imminent and any benefit that the seller may have gained from the early release has been lost.

(xii) We have noticed that the letters of support provided by mortgagees for the purpose of an early release of deposit are inconsistent and sometimes lacking in clarity and/or information. Consider if the information to be provided by a seller's mortgagee should be in accordance with a prescribed form.

5.3 Use of Bank Guarantees and Deposit Bonds

(i) A bank guarantee provided by way of deposit should be in the name of the seller. We deal with a large number of off-the-plan developments, and have continual confusion over the correct beneficiary to name in the bank guarantee. The seller is the beneficiary of the bank guarantee, therefore it should be in the seller's name, regardless of whether it is being held by a solicitor pending settlement. The solicitor has no legal right to be beneficiary of the bank guarantee.

(ii) By their nature, off-the-plan sales have extended settlement periods. In this time, legal practitioners may change. Cash deposits are easily transferred between practitioners. This is not the case with a bank guarantee in a legal practitioner's name. There are costs associated with cancelling and re-issuing guarantees, and these costs would need to be borne by the seller if due to a change in legal practitioner.

(iii) Some buyers express a preference for the use of bank guarantees so that the buyer can have the benefit of any interest earned on funds used to secure the bank guarantee.

(iv) The use of bank guarantees should be addressed in the standard contract. This is an increasingly used process and clarity on their use should be provided – for both the benefit of the parties to the contract and the banks providing the guarantees.

7.2 Calculating the Purchase Price

(i) The purchase price for the purpose of calculating a 10% deposit should be simply the price listed in the contract. Rebates/incentives, for instance, are conditional and often the

right to a rebate does not arise until settlement – and may not arise at all. The seller should not be disadvantaged by holding a lower deposit on the basis that the ultimate purchase price may reduce.

(ii) The same applies for whether goods are included to be calculated in the purchase price – if the value of the goods is included in the Purchase Price in the contract then the 10% deposit should encompass this value.

7.3 Progression payments

(i) It is appropriate that sellers are not able to access the deposits for off-the-plan sales. The buyers are taking a risk that the property may not even come into existence, and it is not uncommon for developers to go into liquidation. Given the uncertainty and the length of time between entry into an off-the-plan contract and settlement, the deposit should remain off limits. The developer/seller does not lose entirely from this situation - they will usually be entitled to any interest that has accrued during the settlement period.

(ii) A 10% deposit is a good compromise for both the protection of the buyer who does not have to expend excessive sums for which they will not see the benefit of (i.e. the property) for an extended period, and to provide the developer with comfort that they will have access to funds if the buyer defaults.

(iii) It is common for settlement periods to extend to two years. Financial situations (and property values) may change dramatically over this time, and it is not uncommon to have buyers seeking to withdraw from off-the-plan contracts when settlement approaches. 10% is enough of an incentive to make a buyer re-consider terminating a contract, while also providing a seller with good basis to recoup any losses suffered by re-selling the property.

(iv) Progress payments should not be permitted. The only reason for such a payment would be to allow the developer access to it in order to assist with financing the development. However, the same reasoning applies to holding a progress payments on trust as it does for the initial deposit regarding the vulnerability of the buyer. We do not consider that the developer should have access to any payments from the buyer to assist with financing the development on the basis that the risk of misuse of funds and non-completion of the project is too high. A developer should have sufficient financing arrangements in place prior undertaking a development and offering lots for sale to the public.

8.2 Disclosing Amendments to Plans

(i) It is unclear whether changes to design, specification, fittings and finishes could be considered changes to the plan of subdivision. For example, the internal layout of an apartment could be substantially changed by a seller, but there is no change to the surrounding walls which are part of the plan of subdivision. Is the seller required to disclose this to buyer?

(ii) Some sellers are also now preparing off-the-plan contracts with plans of subdivision that do not include any lot liability or entitlements at all. If these are later advised to the buyer, does this constitute an amendment which should be disclosed to the buyer?

(iii) Any changes which could affect a buyer's decision to enter into the contract should be disclosed to a buyer, with a right to rescind where any changes materially affect the lot to which the contract relates.

8.3 Warning Notice

(i) The warning notice for off-the-plan sales is not effective. It is provided only at the time that contracts are presented, which is usually when the sale is already being entered into. By this time, the buyer has often agreed to the deposit amount.

(ii) It does not provide warning of the developers rights to amend plans (in particular the colours, materials etc amendment to which do not provide a right to terminate under the *Sale of Land Act 1962*), or the fact that the property may not be constructed at all. Such terms are hidden among the special conditions. The warning should be more extensive.

9.1 Timeframe for exercising right to end the contract

(i) The timeframe for a buyer to end the contract of sale based on an amendment to the plan of subdivision should be amended to 30 days (or at least 21). 14 days is not long enough to receive the notice and adequately consider the position (especially if financial implications are involved). The seller will not be substantially disadvantaged by the increase in this time frame and it will prevent any potential misuse of the timeframe by sellers – for instance sending notifications out just prior to the Christmas/New Year period when buyers will have difficulty seeking advice in the 14 day period.

10.1 Insurance within 6 months of Plan of Registration

(i) In our experience, most seller developers would wait until the first meeting of the Owners Corporation to take out the required insurance, rather than the seller taking out its own initial insurance. However, the first meeting would usually take place very near to the date of the registration of the plan of subdivision.

(ii) Where there is no insurance in place by either the seller developer or an Owners Corporation, then a buyer should not be required to settle – however this situation has never arisen in our experience and would be unlikely to arise.

16 Small Business Statement

(i) Many small business sales of cafes, restaurants or food businesses involve a liquor licence and as a result of the exception set out in subsection (8), the requirement to provide a Small Business Statement would not apply.

(ii) It would be expected that most buyers would conduct a due diligence before entering into a contract to purchase a small business and therefore the requirement of a Small Business Statement has not usually been a critical or important document in a buyer's decision.

Please contact Ms Tammie Moorhouse or Mr Adam Cooke if you have any questions about our submission.

Yours faithfully
BRAND PARTNERS

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