

12th May, 2016

The Hon. Jane Garrett. MP.
Minister for Consumer Affairs, Gaming & Liquor Regulation
GPO Box 4356
Melbourne VIC 3001

Dear Minister,

Consumer property law review – Sale of Land and Business

I am writing to make a formal submission to the current review of the Consumer property law – Sale of land and business. The Deposit Guarantee product that Deposit Power provide to consumers has been in existence for more than a quarter of a century. The product is underwritten by a number of insurance companies and banks, who aside from our insurer CBL Insurance include QBE, St George, and Westpac. Deposit Power's clients include CBA, NAB, Aussie Home Loans, Mortgage Choice as well as dozens of mortgage broking groups who facilitate the product for their customers. This demonstrates that the product is widely available to consumers and used by them as a tool to assist in facilitating the sale of property.

BACKGROUND

The Deposit Guarantee product has existed in Australia for over 26 years. During that time more than one million Australians have secured their property purchase through the use of a Deposit Guarantee (or otherwise known as a Deposit Bond).

Deposit Guarantees are a form of surety where an Insurer will guarantee a property deposit on behalf of the purchaser to the vendor. If the purchaser does not complete on the purchase, the vendor will claim the Deposit Guarantee from the Insurer who will pay the cash amount of the deposit to the deposit holder named in the Sale of Land and Business contract. This is usually the real estate agent but can be the vendor or vendor's solicitor.

To qualify for a Deposit Guarantee the purchaser must adhere to strict qualifying criteria and demonstrate to Deposit Power their ability to complete on the purchase contract. Usually this involves proving they have their loan approval in place as well as other funds to needed to complete the sale. This may include the funds from the sale of an existing property, term deposits, gifts from family members and/or shares with the understanding all such funds will be available at settlement date.

Put simply the Deposit Guarantee product is used by those consumers who have the financial capacity to buy a property, but for a specific reason do not have the cash funds to enable them to commit to pay the usual 10% deposit required to secure the property.

Our typical customers include:-

- First home buyers securing their first dream home
- Existing property owners downsizing or upgrading
- Property investors

HOW CONSUMERS ARE CURRENTLY NEGATIVELY IMPACTED

In Victoria there is no specific wording in the contract of sale to provide for the acceptance of the Deposit Guarantee. As a result their acceptance in this state as a deposit alternative to enable the purchase of a property has been on an ad-hoc basis.

In the absence of a specific provision in the contract of sale, the decision to accept Deposit Guarantees in lieu of a cash deposit has defaulted invariably to the real estate agent. The problem

with this situation that we encounter all too often unfortunately is that the interests of the real estate agent are placed ahead of that of the consumer, be they the vendor or purchaser.

An example where we witness estate agents placing their interests ahead of consumers where our product is involved takes place when a purchaser who is making a formal offer to purchase a property, has their offer declined by the agent simply because use of the Deposit Guarantee results in the agent not having their commission released once the contract becomes unconditional.

This negatively impacts consumers as:-

- The purchaser making a formal offer to buy the property is not having their offer genuinely considered on its merits.
- The vendor is not being given the opportunity to consider a genuine offer due to the sole reason that it is not in the estate agents financial interest to put forward the offer.

Deposit Power understands this practice occurs in the market place and indeed there are instances where the property sells for less than the offer made by purchaser using a deposit guarantee simply because the other purchaser was offering a cash deposit that enabled the estate agent to secure their commission once the contract is unconditional. As a result the vendor does not secure the highest offer on their property.

We also see situations where agents will advise our clients to come up with a 5% cash deposit vs the 10% deposit guarantee so they can secure their commission once the contract goes unconditional. This leaves the vendor exposed in the event the purchaser does not complete as now they will only receive a 5% cash deposit net of the agents fees. With a Deposit Guarantee the vendor would receive the full 10% cash deposit in the event the purchaser defaults.

Without specific standard wording to cater for this widely used product, the various legal parties are left to draft and agree on terms themselves. This slows the sale process and can often lead to the buyer missing out on the property. In addition both parties to the contract incur additional legal fees as a result of the drafting and negotiation of terms.

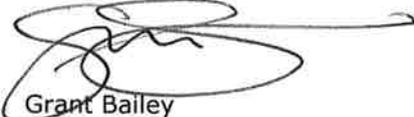
We believe these situations exist largely because the Sale of land and business agreement has no provision to accommodate the Deposit Guarantee product.

RECOMMENDATION

In order to assist in addressing the issues highlighted above and to create a level playfield for consumers, we recommend that specific wording be incorporated into the Sale of land and business contract so as to achieve a standard best practice that all consumers in Victoria who are buying and selling property will benefit from. We have attached a proposed wording as recommended by our lawyers as well as an excerpt from the standard NSW Sale of Land contract.

Please do not hesitate to contact me directly via email or on the number below if you require any additional information.

Yours Sincerely



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Director

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Contract of Sale Real Estate – Victoria

Deposit Guarantee Suggested Wording

- (a) In this contract, the word "Guarantee" means the Deposit Guarantee issued to the vendor at the request of the purchaser by CBL Insurance Limited (the 'Guarantor'),
- (b) The delivery of the Guarantee to the vendor's agent prior to the time the deposit is required to be paid under this contract to the person nominated in this contract to hold the deposit as stakeholder shall be deemed to be payment of the Deposit in accordance with this contract to the extent of the amount guaranteed under the Guarantee,
- (c) On completion of this contract, the purchaser shall pay to the vendor, in addition to all other monies payable under this contract, the amount stipulated in the Guarantee, by way of cash or unendorsed bank cheque or same day cleared electronic funds payment as provided for under the contract.
- (d) If the vendor serves a notice of rescission on the purchaser, then to the extent that the amount has not already been paid by the Guarantor under the Guarantee, the purchaser will immediately pay the deposit (or so much thereof as has not been paid) to the stakeholder.
- (e) The vendor acknowledges that payment by the Guarantor under the Guarantee shall, to the extent of the amount paid, satisfy the purchaser's obligation to pay the deposit under the previous paragraph and this contract.
- (f) The vendor acknowledges that the Guarantee ceases to have effect, and the Guarantor ceases to be liable to the vendor under the Guarantee, from and including the expiry of the Guarantee.

The vendor sells and the purchaser buys the *property* for the price under these provisions instead of Schedule 3 Conveyancing Act 1919, subject to any *legislation* that cannot be excluded.

1 Definitions (a term in italics is a defined term)

In this contract, these terms (in any form) mean –

<i>adjustment date</i>	the earlier of the giving of possession to the purchaser or completion;
<i>bank</i>	the Reserve Bank of Australia or an authorised deposit-taking institution which is a bank, a building society or a credit union;
<i>business day</i>	any day except a bank or public holiday throughout NSW or a Saturday or Sunday;
<i>cheque</i>	a cheque that is not postdated or stale;
<i>deposit-bond</i>	a deposit bond or guarantee from an issuer, with an expiry date and for an amount each approved by the vendor;
<i>depositholder</i>	vendor's agent (or if no vendor's agent is named in this contract, the vendor's <i>solicitor</i> , or if no vendor's <i>solicitor</i> is named in this contract, the buyer's agent);
<i>document of title</i>	document relevant to the title or the passing of title;
<i>GST Act</i>	A New Tax System (Goods and Services Tax) Act 1999;
<i>GST rate</i>	the rate mentioned in s4 of A New Tax System (Goods and Services Tax Imposition - General) Act 1999 (10% as at 1 July 2000),
<i>legislation</i>	an Act or a by-law, ordinance, regulation or rule made under an Act;
<i>normally</i>	subject to any other provision of this contract;
<i>party</i>	each of the vendor and the purchaser;
<i>property</i>	the land, the improvements, all fixtures and the inclusions, but not the exclusions;
<i>requisition</i>	an objection, question or requisition (but the term does not include a claim);
<i>rescind</i>	rescind this contract from the beginning;
<i>serve</i>	serve in writing on the other <i>party</i> ;
<i>settlement cheque</i>	an unendorsed <i>cheque</i> made payable to the person to be paid and – <ul style="list-style-type: none"> • issued by a <i>bank</i> and drawn on itself; or • if authorised in writing by the vendor or the vendor's <i>solicitor</i>, some other <i>cheque</i>;
<i>solicitor</i>	in relation to a <i>party</i> , the <i>party's</i> <i>solicitor</i> or licensed conveyancer named in this contract or in a notice <i>served</i> by the <i>party</i> ;
<i>terminate</i>	terminate this contract for breach;
<i>within</i>	in relation to a period, at any time before or during the period; and
<i>work order</i>	a valid direction, notice or order that requires work to be done or money to be spent on or in relation to the <i>property</i> or any adjoining footpath or road.

2 Deposit and other payments before completion

- 2.1 The purchaser must pay the deposit to the *depositholder* as stakeholder.
- 2.2 *Normally*, the purchaser must pay the deposit on the making of this contract, and this time is essential.
- 2.3 If this contract requires the purchaser to pay any of the deposit by a later time, that time is also essential.
- 2.4 The purchaser can pay any of the deposit by giving cash (up to \$2,000) or by unconditionally giving a *cheque* to the *depositholder* or to the vendor, vendor's agent or vendor's *solicitor* for sending to the *depositholder*.
- 2.5 If any of the deposit is not paid on time or a *cheque* for any of the deposit is not honoured on presentation, the vendor can *terminate*. This right to *terminate* is lost as soon as the deposit is paid in full.
- 2.6 If the vendor accepts a bond or guarantee for the deposit, clauses 2.1 to 2.5 do not apply.
- 2.7 If the vendor accepts a bond or guarantee for part of the deposit, clauses 2.1 to 2.5 apply only to the balance.
- 2.8 If any of the deposit or of the balance of the price is paid before completion to the vendor or as the vendor directs, it is a charge on the land in favour of the purchaser until *termination* by the vendor or completion, subject to any existing right.
- 2.9 If each *party* tells the *depositholder* that the deposit is to be invested, the *depositholder* is to invest the deposit (at the risk of the *party* who becomes entitled to it) with a *bank*, in an interest-bearing account in NSW, payable at call, with interest to be reinvested, and pay the interest to the *parties* equally, after deduction of all proper government taxes and financial institution charges and other charges.

3 Deposit-bond

- 3.1 This clause applies only if this contract says the vendor has agreed to accept a *deposit-bond* for the deposit (or part of it).
- 3.2 The purchaser must provide the original *deposit-bond* to the vendor's *solicitor* (or if no *solicitor* the *depositholder*) at or before the making of this contract and this time is essential.
- 3.3 If the *deposit-bond* has an expiry date and completion does not occur by the date which is 14 days before the expiry date, the purchaser must *serve* a replacement *deposit-bond* at least 7 days before the expiry date. The time for service is essential.

- 3.4 The vendor must approve a replacement *deposit-bond* if –
- 3.4.1 it is from the same issuer and for the same amount as the earlier *deposit-bond*; and
 - 3.4.2 it has an expiry date at least three months after its date of issue.
- 3.5 A breach of clauses 3.2 or 3.3 entitles the vendor to *terminate*. The right to *terminate* is lost as soon as –
- 3.5.1 the purchaser *serves* a replacement *deposit-bond*; or
 - 3.5.2 the deposit is paid in full under clause 2.
- 3.6 Clauses 3.3 and 3.4 can operate more than once.
- 3.7 If the purchaser *serves* a replacement *deposit-bond*, the vendor must *serve* the earlier *deposit-bond*.
- 3.8 The amount of any *deposit-bond* does not form part of the price for the purposes of clause 16.7.
- 3.9 The vendor must give the purchaser the *deposit-bond* –
- 3.9.1 on completion; or
 - 3.9.2 if this contract is *rescinded*.
- 3.10 If this contract is *terminated* by the vendor –
- 3.10.1 *normally*, the vendor can immediately demand payment from the issuer of the *deposit-bond*; or
 - 3.10.2 if the purchaser *serves* prior to *termination* a notice disputing the vendor's right to *terminate*, the vendor must forward the *deposit-bond* (or its proceeds if called up) to the *depositholder* as stakeholder.
- 3.11 If this contract is *terminated* by the purchaser –
- 3.11.1 *normally*, the vendor must give the purchaser the *deposit-bond*; or
 - 3.11.2 if the vendor *serves* prior to *termination* a notice disputing the purchaser's right to *terminate*, the vendor must forward the *deposit-bond* (or its proceeds if called up) to the *depositholder* as stakeholder.

4 Transfer

- 4.1 *Normally*, the purchaser must *serve* at least 14 days before the date for completion –
- 4.1.1 the form of transfer; and
 - 4.1.2 particulars required to register any mortgage or other dealing to be lodged with the transfer by the purchaser or the purchaser's mortgagee.
- 4.2 If any information needed for the form of transfer is not disclosed in this contract, the vendor must *serve* it.
- 4.3 If the purchaser *serves* a form of transfer and the transferee is not the purchaser, the purchaser must give the vendor a direction signed by the purchaser personally for this form of transfer.
- 4.4 The vendor can require the purchaser to include a form of covenant or easement in the transfer only if this contract contains the wording of the proposed covenant or easement, and a description of the land benefited.

5 Requisitions

- 5.1 If a form of *requisitions* is attached to this contract, the purchaser is taken to have made those *requisitions*.
- 5.2 If the purchaser is or becomes entitled to make any other *requisition*, the purchaser can make it only by *servicing* it –
- 5.2.1 if it arises out of this contract or it is a general question about the *property* or *title* - *within* 21 days after the contract date;
 - 5.2.2 if it arises out of anything *served* by the vendor - *within* 21 days after the later of the contract date and that *service*; and
 - 5.2.3 in any other case - *within* a reasonable time.

6 Error or misdescription

- 6.1 The purchaser can (but only before completion) claim compensation for an error or misdescription in this contract (as to the *property*, the *title* or anything else and whether substantial or not).
- 6.2 This clause applies even if the purchaser did not take notice of or rely on anything in this contract containing or giving rise to the error or misdescription.
- 6.3 However, this clause does not apply to the extent the purchaser knows the true position.

7 Claims by purchaser

- The purchaser can make a claim (including a claim under clause 6) before completion only by *servicing* it with a statement of the amount claimed, and if the purchaser makes one or more claims before completion –
- 7.1 the vendor can *rescind* if in the case of claims that are not claims for delay –
- 7.1.1 the total amount claimed exceeds 5% of the price;
 - 7.1.2 the vendor *serves* notice of intention to *rescind*; and
 - 7.1.3 the purchaser does not *serve* notice waiving the claims *within* 14 days after that *service*; and