®

 **The Institute of Legal Executives (Victoria)**

 *~ Incorporated in 1966 ~*

PO Box 177, Burwood, 3125; Tel: 03 9808 7159

*or* DX 32502 BURWOOD CEO email: austilex@tpg.com.au

 23 May 2016

Consumer Property Acts Review

Policy and Legislation Branch

Consumer Affairs Victoria

consumerpropertylawreview@justice.vic.gov.au

Dear Sirs,

**Re: Consumer Property Acts Review Issues Paper No. 3**

**Sale of land and business**

The Institute welcomes this opportunity to make the following submission in respect to the above Issues Paper, and we thank you for the extension granted. We address only those aspects of the Issues Paper where we feel we are able to contribute.

We note that any opinion of a ‘legal’ nature included in this submission is to be attributed to the contributing Legal Practitioners who have drawn on their own experience in providing commentary.

**Part A: Sale of land process**

***Before signing a contract of sale***

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

We believe current requirements might be improved, without imposing an undue burden on the seller but at the same time giving relevant information to the buyer (particularly the unsophisticated buyer), by including:

* 1. Costs relating to the parent title;
	2. A ‘warning’ immediately below, that the costs relate to the parent title, new rates (Council, Water, as applicable) will issue once the Plan has been registered, land tax may apply to the buyer, and an Owners Corporation requiring the future payment of fees will be established once the Plan is registered; and that the buyer should make enquiries as to local rates and outgoings, and consider costs which may be incurred by the Owners Corporation members in the future in regard to maintenance and management.
	3. Consideration could be given to requiring a seller to give an estimate of future costs; but, if so, this should be a total ‘estimate only’, given there may be matters outside the seller’s control which could increase these costs.

Please also see our responses to questions 5 and 45.

1. *How could uncertainties about the location of water infrastructure under land for sale be resolved?*

We note this is a difficult question - on the one hand a requirement to provide a Property Service Plan could be imposed (prior to settlement with off-the-plan sales, as the infrastructure may not be present/completed at the time of preparation of the Vendor’s Statement); however, any such requirement needs to be carefully considered as Property Service Plans are not always available.

With other infrastructure, such as Telco cables, ideally this would be provided with every Vendor’s Statement, but significantly increases the cost to the seller.

1. *What is your view on the approach or approaches required to deter misleading and deceptive conduct during the sale of land?*

We believe that it is unfair for misleading and deceptive conduct effected by the Selling Agent to be ‘arbitrarily’ attributed to a seller. Sellers (other than commercial sellers) rely heavily upon the Selling Agent’s expertise and knowledge of legislative requirements.

1. *In light of the Australian Consumer Law offences, is there still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act?*

We believe it is of benefit to retain the ‘information’; but, rather than specific offences, reference could be made to Australian Consumer Law in lieu.

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

We believe the Due Diligence Checklist is of great benefit, and it has become the practice for many seller representatives to also include a copy in the Vendor’s Statement. Consideration could be given to adding a warning vis-à-vis our answer to question 1 in the Checklist, rather than in the Vendor’s Statement; or alternatively as noted in our response to question 45.

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

We suggest that a great deal of consideration needs to be given to the cost to the seller - as is, many sellers are appalled at the cost of what might be termed ‘basic disclosure’ Searches and Certificates. [This is not aided by Selling Agents on occasion telling the seller that only a ‘short form’ Vendor’s Statement is required.]

On the other hand, there is some merit in mandating inclusion:

* 1. The person acting for the seller will have no option but to prepare the Vendor’s Statement including this information – at present we have anecdotal information to suggest that there are a number of seller’s representatives who compete on the basis that their total costs are lower than others, but the reason their total costs are lower can include the situation where less has been disbursed on Searches and Certificates, potentially putting the transaction at risk.
	2. Another scenario, experienced by contributors to this submission, is where the Selling Agent seeks to ‘re-direct’ the client to a representative of the Agent’s choice, on the basis that they can act far more swiftly in preparing the Vendor’s Statement than the client’s original choice of representative; and then represent to the client that the client’s representative is not acting in the client’s interest by taking the (reasonable) time needed to properly prepare the Vendor’s Statement. We suggest that in some cases the ‘re-directed’ representative may be able to act far more swiftly because not all due diligence enquiries are being considered.

If inclusion was mandated, then such reports would need to be able to be relied upon by the successful buyer (unlike, for example, seller rating certificates which cannot be used by the buyer for adjustment purposes).

***Auctions***

1. *What is your experience of the effectiveness of the rights for buyers to seek compensation at VCAT? Do they act as an incentive to sellers and estate agents to conduct auctions fairly?*

We have no experience of these matters at VCAT; although we would suggest that publicised action by CAV is likely to be a greater disincentive to ‘bad conduct’.

1. *What behaviours by auctioneers and estate agents would you identify as having a negative impact on a buyer’s experience at an auction?*

We note that a ‘negative’ impact may well be subjective – provided all of the relevant information is made available to buyers, and proper procedures followed, it would be difficult to ‘mandate’ behaviour, and probably unnecessary given that the auctioneer/estate agent will be doing his or her best to sell the property for the seller on satisfactory terms and must therefore take into account the potential buyer’s willing participation.

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

We believe yes, at least to the extent that the buyer is made aware that the property is being sold ‘unconditionally’.

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

The contributors to this submission have not been involved in online auctions as noted above. However, we believe:

* 1. The risks do not differ substantially (except as noted in (c)), provided all of the necessary information is made readily available;
	2. A different method may need to be developed for ensuring that bidders have been provided with access to all relevant information, particularly if entering the ‘auction room’ part way through the auction (for example, a bidder may need to acknowledge the information provided before being able to proceed further, as opposed to a physical auction where the auctioneer publicly records that all the relevant information has been made available prior to commencement, no matter at what stage a buyer may choose to arrive/participate);
	3. The risk of insubstantial bidders may be greater, given that such persons may feel they can ‘hide’ behind the anonymity of the internet; however, there have also been reports of persons bidding at physical auctions with no intention of purchasing – the ‘bona fides’ of persons bidding at physical auctions would, we believe, not often be questioned;
	4. The person conducting the auction, where it concerns land in Victoria, should be licensed;
	5. The person/entity merely providing the infrastructure should *not* need to be licensed – in many cases they will merely be providing an IT service, as opposed to a service relating specifically to the sale of land;

Where the auction concerns land in another jurisdiction, the laws of that other jurisdiction should apply; save for a ‘carve out’ that persons conducting auctions from Victoria are required to be licensed.

1. *In what circumstances should the behaviour of people who are not participating directly in an auction be regulated?*

We suggest:

* 1. Perhaps the prohibitions applying to bidders could be extended to others *but* this needs to be widely publicised; and careful consideration given to whether a person is ‘disrupting’ an auction, or merely asserting their rights (see (b)).
	2. Other ‘general’ information could also be publicised in relation to respecting the property of others (although this ought really to be monitored by the auctioneer), particularly for the benefit of those who may be putting themselves in harm’s way by locating themselves on adjoining properties, without permission, to observe or participate in an auction.
1. *Do you think that the holding of public auctions on ANZAC Day should be regulated? Please give reasons for your view.*

We believe many in our community consider it disrespectful to conduct public auctions on ANZAC Day, as they would also consider it highly inappropriate to conduct a public auction on Christmas Day.

We believe public auctions should not be conducted on ANZAC Day, or at the very least only in the afternoon.

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

In respect to the seller and buyer, we believe it does not matter who is responsible from their point of view. However, there appears definite merit in placing the responsibility on the Selling Agent who has had the conduct of the matter and who will receive/share in the commission, rather than the auctioneer.

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

We believe yes, but that it is not practical to disclose this ‘well in advance’ of the auction, as the side deal may have only been made a short time prior. We believe it would be sufficient if these details are disclosed by the auctioneer when opening the auction (and only at auction, as opposed to other negotiations where the seller may be weighing up, for example, a 5% deposit and a 30-day settlement against a 10% deposit and a 60-day settlement).

***Cooling-off***

1. *In what circumstances should buyers be able to cool-off from a contract of sale?*

We suggest:

* 1. As it currently stands; *other than* as noted in (b), and our comments below in response to question 18;
	2. Consideration should be given to excluding the ‘corporate body’ exception in section 31(5)(d) – this was no doubt included originally on the basis that a ‘corporate body’ would be an experienced buyer; however, an unsophisticated buyer can often be a ‘Mum and Dad’ company, the directors of whom will not be aware that they are not entitled to a cooling-off period.
1. *In your experience, are the current cooling-off provisions effective in ‘undoing’ an impulsive decision made by a buyer?*

We believe generally yes, although consideration could be given to slightly extending the time period, weighing up the rights of the buyer against the rights of the seller.

 We agree with the matters noted in respect to ‘manipulation’, the most common in the contributors’ experience being delay by the Selling Agent in sending the contract to the buyer’s representative within the cooling-off period, a matter now exacerbated by revised Australia Post delivery times, or at a time which provides the representative with little opportunity to properly consider the matter; or indeed no opportunity, as the representative might be unaware of the matter, and be absent attending to other matters on that particular day.

 Note: We suggest that the Act requires *urgent* review in light of the decision in *Tan v Russell [2016] VSC 93.*

***Contract of sale***

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

We believe the standard form contract has great merit:

* 1. It can keep preparation costs at a reasonable level;
	2. It can keep buyer’s costs at a reasonable level, given that their representative, whilst checking the contract, will already have some part of their advice prepared in advance on the basis of the standard form;
	3. Seller’s representatives are free to include special conditions catering for individual circumstances.

In the contributors’ experience, problems and additional consumer costs most often arise when a standard form contract is *not* used.

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

In the contributors’ experience:

* 1. Some special conditions included by some seller representatives are utterly disgraceful - they include horrendous penalty interest rates for breach as well as unjustifiable breach fees, take away the rights of buyers by difficult to read clauses mentioning that myriad general conditions do not apply (including matters in general condition 2 which would ordinarily be within the seller’s knowledge), place the buyer in breach almost immediately by ‘fine print’ clauses requiring, for example, the provision of a tax file number for deposit investment purposes within a matter of days of the contract being signed, require a new contract to be drawn at a cost in the event of nomination, and the list goes on – unfortunately there does not yet seem to be a buyer adversely affected with sufficient funds and/or incentive to take a seller to task;
	2. However, we believe the majority of seller representatives include special conditions clearly stating the objectives, and clearly stating if general conditions are not to apply;
	3. There are usually very good reasons for including special conditions:

They may ‘spell out’, in greater detail than the general conditions, the rights of each party;

There may be a particular issue with the property, disclosed in the Vendor’s Statement, where the seller wishes to ensure that the buyer acknowledges that issue – for example, a measurement discrepancy noted in the Vendor’s Statement, and a special condition acknowledging that the discrepancy has been brought to the attention of the buyer who purchases on that basis. The buyer is at an advantage because the matter has been mentioned not once, but twice; and the seller is at an advantage because s/he has a specific acknowledgment from the buyer;

A special condition might be included to provide for a deposit bond (as referred to in question 29); or might be included to put a self-represented buyer on notice that Verification of Identity procedures must be completed; or might be included to take account of changed Australia Post delivery times vis-à-vis service.

* 1. If constraints are placed around the adding of special conditions, then unscrupulous persons will simply seek to incorporate them in some other surreptitious manner.
1. Consumers should be free to contract – if special conditions are not able to be added then this is derogating from rights which persons should have in a democratic society; and it also restricts representatives in properly addressing changes in legislation or practices which need to properly be considered (for example, as noted above in respect to VoI, and Australia Post delivery times).
2. Mandating a base, and unchanged, standard form contract (direct from the legislation, or via compliant contracts prepared by membership bodies such as the Law Institute of Victoria) would ensure that buyers and their representatives can look directly at the special conditions for any changes, rather than ‘wading through’ a document to ascertain (apart from special conditions) whether it is in a standard form or not or whether any ‘nasty surprises’ lie in wait.
3. *Is there a need to regulate the conditions that are inserted into contracts for off-the-plan sales?*

We refer to our response to question 21.

We would be in favour of a standard form contract inclusion page to be used if the property is being sold off-the-plan, and which might include matters referred to in our response to question 1.

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

We believe the exemption should be retained to distinguish between ‘filling up’ contracts and unqualified legal work. There is anecdotal evidence to suggest that some Estate Agents are still including special conditions without reference to the seller or buyer’s representative, and it is by no means clear who has prepared those special conditions.

Apart from the issue of unqualified legal work, and distinguishing those Estate Agents who have a ‘bank’ of relevant special conditions prepared for them by practitioners, a number of very poor examples have been seen by the contributors, and which do not adequately address the issue (or protection of the parties), for example “subject to satisfactory building report”.

***Deposit moneys***

1. *Is there still a need to ensure that deposit moneys are preserved until settlement? Please give reasons for your answer.*

We believe yes, because there may otherwise be insufficient funds to repay any financial encumbrance.

Although the current practice of providing financial encumbrance details by way of a letter from the outgoing Lender can be cumbersome (and can take a great deal of time, and with some Lenders refusing to provide the information until a contract has been entered into with a set settlement date), it still provides certainty to a buyer that the remainder of the purchase price will be sufficient to satisfy (registered, and therefore known) financial encumbrances at settlement. Alternatively, it should be open to a seller to provide copy bank statements and a warranty as to any re-draw facility.

1. *What remedies should be open to a buyer in circumstances where a seller does not meet his or her obligations to pay over the deposit? For example, should a buyer be able to end the contract?*

We believe that whilst the majority of sales would be conducted with the involvement of an Estate Agent or seller/buyer representative, there should be some protection for the buyer if a seller does not meet his or her obligations. However, given that there will be some instances where the seller is honestly unaware of the requirements, and the sale is otherwise proceeding in the usual manner, it may be going too far to give the buyer the option to end the contract in these circumstances.

There could also be instances where a 7-day period is insufficient.

1. *What is your experience of the effectiveness, or otherwise, of the ‘early release’ provisions?*

We believe that:

* 1. For the most part, the ‘early release’ provisions seem to work well; although, anecdotally, difficulties can be encountered with Estate Agents telling the seller that the deposit can ‘automatically’ be released 28 days after the date of the contract (provided there are no ‘subject to’ conditions); and the representative is thereby often put at odds with their own client in explaining the actual provisions.
	2. The prevalent practice is to include with the Deposit Release Statement a letter from the outgoing Lender addressing all required matters in accordance with section 27(3)(a); as it is prevalent practice for the buyer’s representative to put the seller on notice that this is required.
	3. Some may argue that this is the only certain way to ascertain financial obligations, and that if only a bank statement were required, with the seller’s assurance that either there was no re-draw facility or that the limit was $x, the seller could deliberately withhold information; however, consider a situation where there are two loans secured by the one mortgage – the outgoing Lender will often provide a discrete letter in respect to each loan, and if the seller was intent on giving false information, the seller could choose to provide only one of those letters.
	4. In the contributors’ experience, the ‘conditions enuring’ view is on occasion used to object to deposit release, but not often.
1. *What information is essential to assist a buyer in determining whether or not to release the deposit before settlement?*

The maximum amount which is estimated to be owed at the time of settlement, i.e. if a loan has a re-draw facility, the maximum re-draw amount, and a genuine estimate of interest and fees.

1. *Should the buyer’s right to end the contract be absolute if the seller misleads them about the details of mortgages and caveats over the land? Can you envisage any circumstances where a seller may make an honest and reasonable mistake?*

We believe the buyer should *not* have an absolute right to end the contract in these circumstances, and there must be provision for an honest and reasonable mistake. For example:

* 1. Seller A has two loan facilities deriving from the one registered Mortgage, one being a re-draw facility;
	2. A authorises their representative to request the required information from the Lender;
	3. Two letters are received from the Lender in response, each addressing the separate loan facility;
	4. A’s representative asks A to check the Deposit Release Statement and attachments, and then execute the Statement if correct;
	5. The executed Deposit Release Statement is delivered to the buyer, and release of the deposit is authorised.
	6. *However*, it transpires that whilst the Lender’s letter regarding the re-draw facility correctly states the amount of that re-draw facility, it shows an incorrect amount currently owing. Assuming A relies on the Lender to provide correct information, and only checks the basic information, honestly believing the Lender is in a position to ‘get it right’, it would appear to unduly punish A in allowing the buyer an absolute right to end the contract, when (i) A’s mistake is genuine and honest, and (ii) the maximum (re-draw) loan amount is provided to the buyer in any event so that the buyer can make an informed decision.

OR

* 1. The seller, as is the case with many consumers, does not thoroughly read the Agent’s Authority.
	2. The Agent’s Authority contains a charging clause, and the Agent lodges a Caveat.
	3. The seller is unaware that a Caveat has been lodged as his address standing in the Register is his former address.

Again, (i) the seller’s mistake is genuine and honest, and (ii) the commission etc. pursuant to which the Caveat was lodged would in the normal course be deducted from the deposit held, not affecting the funds available at settlement.

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

Anecdotally, it appears that sellers prefer cash deposits, even at a lesser amount, due to concerns over gaining access to deposit proceeds, and also being able to obtain the release of a cash deposit prior to settlement to assist in any ongoing purchase. There are also concerns that additional legal fees will be incurred due to the representative needing to provide additional advice to the seller.

We agree that a practice of making the seller’s representative the beneficiary would appear to place the parties in a difficult and/or conflict position, and appears to best be avoided.

We believe that it would be of benefit if the use of bank guarantees and deposit bonds, whilst less common than cash deposits, was regulated.

***Damage to land or buildings before sale completed***

1. *What risks do buyers face in relation to damage or destruction of the property they are buying in the period between the signing of the contract and settlement?*

We believe the main risk to be that the seller does not have adequate insurance and therefore the buyer loses his ‘bargain’; however, we also believe the current position to be satisfactory, and much improved from previously.

We query the disclosure of Owners Corporation insurance particulars vis-à-vis the operation of section 32B(a).

1. *Are the current protections still relevant or are there other risks that should be mitigated?*

We believe the current protections are still relevant.

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

The contributors have no experience of this, but it is relevant that a 14-day period would ordinarily be far too short a time in which to rectify.

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

***How off-the-plan sales are regulated***

1. *What problems exist for sellers in setting a conservative purchase price for the purposes of calculating the deposit?*

We cannot see any practical difficulty in setting a conservative purchase price for deposit purposes – this would be 10% of the price less any potential rebate, given that the position with goods may be unclear at this point.

We also do not believe there is a particular issue with calculating the deposit on the basis of a conservative purchase price, given that the seller cannot access the deposit for most of the contract period; although there could be relevant financing issues.

1. *How could uncertainties about the true purchase price be addressed?*

In terms of the deposit, as above.

1. *What are your views of the current arrangements which do not allow a seller to access deposit moneys before the plan of subdivision is registered?*

As stated, we believe the position is different to where the seller has a discrete title which can be transferred to the buyer. We believe the buyer needs to be adequately protected in the event the development does not proceed, and the buyer is left without adequate security.

1. *Do you think the current cap of 10% on deposit moneys is appropriate as a mechanism to protect buyers in an off-the-plan sale? Please give reasons for your view.*

Yes, this reflects the general market with all property sales where a 10% deposit is the rule rather than the exception.

1. *Should progression payments be permitted, and if yes, what constraints should be placed around that permission?*

We can see that permitting progression payments may assist the developer in obtaining finance, which is conversely to the benefit of the buyer in seeing the development completed. However, on the basis that these would essentially be ‘good faith’ payments over and above a ‘market’ deposit, we believe they should be held in trust until settlement.

1. *Is there a continuing rationale for treating deposit moneys for off-the-plan sales differently to other deposit moneys and not allowing those moneys to be transferred under any circumstances prior to registration of the plan?*

We do not believe there is any reason these deposit monies should be treated differently to other deposit monies.

1. *Does it seem appropriate that deposit moneys be treated differently once the plan of subdivision is registered and the level of protection for buyers lessened or should the deposit moneys be protected for the buyer until settlement? Please give reasons for your view.*

We believe that, although in practical terms a deposit release would be unlikely to take place in an off-the-plan sale, given that many contracts will prescribe settlement within 14 days of notification of registration of the plan (and occupancy permit), we cannot see any reason why off-the-plan deposit monies should be treated differently.

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

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

It is very difficult to say what disclosures would be ‘meaningful’ to an average buyer, and the volume of disclosure also needs to be considered. We make no specific suggestion as to the above, but in relation to delivery of information, we would suggest that all post-contract disclosure documents could be loaded to a central website, with buyers being required to provide an email address for timely notification whenever new information has been loaded.

1. *Currently, the obligation sits with the buyer to determine what changes have occurred and whether they are detrimental. Do you believe that this is appropriate or should there be some responsibility on the seller to specify the changes to assist the buyer?*

We believe difficulty is frequently experienced with off-the-plan purchases where the buyer’s representative simply receives a copy of an amended plan and then needs to go to some trouble, at the buyer’s expense, to ascertain and then point out any obvious changes to the buyer. ‘Materially affect’ can also be an issue.

It would be extremely useful if the seller, who has a complete understanding of the change, also provided a synopsis of the change to the buyer.

1. *Do buyers have the correct amount of information to make informed decisions about whether changes to the plan have a material effect? Please give reasons or examples to illustrate your position.*

As above.

1. *In what circumstances, if any, would it be appropriate for a buyer to end a contract because of changes to design, specifications, fittings and finishes?*

We believe this is a similar issue to a property not being in exactly the same condition, fair wear and tear excepted, at settlement. The buyer will be unhappy, but the issue may not be of such a fundamental nature as to warrant giving the buyer the right to end the contract. Unfortunately, many contracts the contributors have seen do not give complete or adequate details of design, specifications, fittings and finishes.

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

It could be said that buyers arrive at the office ‘starry-eyed’, and many have paid no attention whatsoever to the warning notice.

We would be in favour of a separate contract disclosure sheet being inserted in respect to off-the-plan sales (see also our response to question 22). A warning in regard to stamp duty might also be of assistance, as many buyers are also initially ‘ecstatic’ in respect to the perceived low rate of stamp duty payable.

***Rights to end an off-the-plan sale***

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

Considering equity between the seller and buyer, we are not averse to the above suggestion of shortening the period in which the buyer can exercise his or her right to end the contract *provided that* very clear information is given to the buyer in regard to the applicable time limits.

We believe that the 14-day period in respect to ending the contract vis-à-vis an amendment to the plan is possibly too short, and 21 days might be preferable.

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

We believe parties should always be free to mutually contract, including negotiating an extended date.

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

Anecdotally we are aware this can occur, although it is ultimately the buyer’s choice whether or not to pursue their right to end the contract.

***Owners corporation insurance***

1. *How does the obligation to obtain owners corporation insurance within the first 6 months of registration work in practice? Is this an obligation that is fulfilled by the initial developer or dealt with at the first meeting of the owners corporation?*

In the contributors’ experience, the well-organised developer will have this in place, and claim a rebate by way of adjustments. In our view, the developer is best placed to fulfil this obligation.

1. *What remedies should be available to buyers of property if an owners corporation is not meeting its responsibilities under the Owners Corporations Act, such as not having obtained the correct insurance?*

Given that owners corporation insurance is to be issued in the name of the owners corporation, it should be a settlement requirement that a certificate of currency be provided.

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

It is an unfortunate fact that an individual seller may need to outlay funds to secure appropriate insurance prior to sale where the owners corporation is inactive, and only recoup part by way of adjustment with the purchaser. However, for the protection of the property owner as a member of the owners corporation there ought to be adequate insurance in place. Better enforcement procedures for recovery of proportionate premiums from recalcitrant lot owners might assist.

***Possession and occupation fees***

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

We believe it is reasonably common for a buyer to occupy the property after an Occupancy Permit has been issued and before the plan is registered. Ordinarily a licence agreement is entered into, the terms of which are negotiated between the seller and buyer’s representatives, and which commonly exclude the operation of the *Residential Tenancies Act*.

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

***Terms contracts***

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

We believe there is a continuing place for such contracts; and, as noted, often in rural areas or between family members. Whilst not necessarily a common occurrence, we do not believe that such contracts should be banned.

1. *Should the current restrictions on sellers under terms contracts be expanded to encompass debt that is not linked to the property but which may impact on the seller’s capacity to pass title to the buyer? If yes, what sources of debt should be included?*

We believe that the above scenarios can equally occur in relation to cash contracts, although they may be exacerbated by the duration of a terms contract. A seller under a cash contract could well have other debts, as well as a mortgage, and use up a released deposit.

1. *Should there be greater levels of scrutiny applied to terms contracts ‘brokered’ by intermediaries? If yes, what would you favour:*
	* 1. *offences and remedies directed at intermediaries?*
		2. *requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?*
			1. *other approaches? Please provide your ideas.*

The contributors have no particular experience with intermediaries vis-à-vis terms contracts, save to note that an unscrupulous intermediary could also ‘aid’ financially stressed parties to enter a cash contract.

***‘Rent-to-buy’ contracts***

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

The contributors have no experience of rent-to-buy contracts. However, it does appear appropriate that these types of contracts be regulated in a similar manner to other property-purchase contracts.

***Land banking***

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

We are of the view that whilst stronger protections appear to be justified, the rights of the developer also need to be balanced.

***Private sales online***

1. *What are your experiences with selling and buying property privately online?*

The contributors have no experience with private sales online. The only comment we would make is as we noted in our response to Issues Paper No. 1, that care needs to be taken to ensure that any Australian Legal Practitioner or Licensed Conveyancer acting for a client in directly negotiating and concluding a sale/purchase, without the services of an Estate Agent, is not inadvertently caught by legislation applying to Licensed Estate Agents.

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

***Small business statement***

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

We believe that disclosure is still relevant and necessary to provide buyers with a reasonable estimate of financial matters, in a similar manner as disclosure is required under the *Retail Leases Act.*

***Statement concerning finance***

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

We believe the practice has declined.

***Builders and sub-dividers of land***

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

The contributors have no direct experience of this. However, we believe the same issue arises with all such referrals – the potential for a conflict of interest.

**Part E: Modernisation of the Sale of Land Act**

***Purpose of the Sale of Land Act***

1. *What should the purposes of the Sale of Land Act include?*

Whilst we make no specific observation, we suggest that this should be considered in conjunction with the *Transfer of Land Act* and *Property Law Act*.

***Definitions***

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

We believe that, unless this would result in some inconsistency, the same terms should be contained in one glossary to apply to the whole Act.

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

1. *Is there still a need for the Sale of Land Act to regulate the apportionment of mortgage moneys at subdivision?*

We believe not.

1. *What other opportunities can you identify to modernise the Sale of Land Act?*

Whilst modernisation may be an advantage, care needs to be taken to not thereby create inconsistencies with other Acts, such as the *Property Law Act.*

**Part F: Dispute resolution, offences and remedies**

***Arbitrators***

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

The contributors have no experience in relation to this. However, enabling disputes to be resolved through a less costly process than resort to the Courts, would be of benefit.

***Conciliation and mediation of disputes***

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

We refer to our response to question 69.

***Offences and remedies***

1. *Are the current remedies under the Sale of Land Act meaningful for buyers and sellers? Are there opportunities for reform?*

We would suggest that the current remedies need to be consolidated.

1. *Should sellers have the opportunity to argue honest and reasonable mistake? Are there any circumstances where a seller should not be able to put this case? Please give reasons for your view.*

We believe yes. Notwithstanding that a seller has not complied with his or her obligations, if the buyer is in substantially the same position, and the seller acted honestly and reasonably, we do not believe that a buyer should be able to escape the contract on the basis of a ‘technicality’.

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

The contributors have no direct experience in the exercise of rights under the *Australian Consumer Law and Fair Trading Act*. However, we believe that buyers would initially be more likely to rely on specific remedies under the *Sale of Land Act.*

1. *Do rights to end contracts of sale work as an effective deterrent to poor behaviour by sellers or is there a need to prosecute some offenders? Please give reasons for your views.*

We believe the ‘threat’ of a contract being ended, and thereby removing financial certainty, is by far a greater deterrent to poor behaviour. The need for prosecution, we believe, lies where the bad behaviour is a regular occurrence by a particular person or entity, rather than a ‘once off’ occurrence (which may or may not be deliberate).

Yours faithfully,

(Miss) Roz Curnow

Chief Executive Officer

On behalf of the Council of the Institute

[www.legalexecutives.asn.au](http://www.legalexecutives.asn.au)

Our Philosophy:

*Everyone* employed in the legal profession is *important*;

every task done well, whether it be mundane or carried out at a high level of responsibility,

contributes to a better profession.

*Experientia Docet Sapientiam: Experience Teaches Wisdom.*