

Consumer Property Acts Review Issues Paper No. 3

Sale of land and business

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

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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 Act), 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 and responded to CAV's Issues Paper 1 on the conduct of and institutional arrangements for estate agents, conveyancers and owners corporation managers in March 2016. The LIV also made a submission to CAV in April 2016 in response to CAV's Issues Paper 2 on owners corporations.

The LIV welcomes the opportunity to continue its contributions to CAV's review. This submission contains the LIV's response to the questions in CAV's Issues Paper 3, which focuses on the sale of land and business.

General Comments

The LIV provided preliminary comments to CAV regarding the review in late 2015, with a particular focus on provisions in the Act. The LIV is pleased that the Issues Paper comprehensively addresses a number of the issues identified by LIV members at the meeting with CAV representatives.

While the questions in the Issues Paper are an excellent prompt to guide consideration of the issues and provide submissions, the LIV wishes to highlight one issue regarding to ss9AA to 9AE of the Act not apparently raised in the Issues Paper. The LIV suggests that there may be merit in excluding the application of ss 9AA – 9AE of Act regarding off-the-plan sales in circumstances where the purchaser is in control of preparing and registering the plan of subdivision. Some developers wish to contract with an owner of land but are hamstrung by the provisions. For an example, that was the situation discussed in *Bisognin v Hera Projects Pty Ltd* [2016] VSC 75.

PART A: Sale of land process

Before signing a contract of sale

Pre-sale information

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'?

As stated in the Issues Paper, vendors of off-the-plan property either disclose information about the parent title (which do not inform costs that will arise from the lot for sale as it is not in existence at the date of contract) or provide an estimate of what the costs are likely to be once the plan of subdivision is registered and the lot is created.

The LIV considers that vendors should be required to provide an estimate of the likely costs following creation of the lot so that purchasers have some indication of what those costs will be. However, the LIV suggests that this obligation be limited to developments where a prescribed owners corporation will be established.

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

LIV members have indicated that they have not experienced any issues regarding water infrastructure not registered on title. The LIV therefore does not consider that vendors should be obliged to disclose information about water pipes located under their land.

For the benefit of potential purchasers, a warning could be included in the due diligence checklist provided by vendors or their estate agents which highlights that there may be water pipes under the land which are not registered on title.

Misleading and deceptive statements about land for sale

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

The LIV generally considers that the existing legislative provisions in relation to misleading and deceptive conduct are adequate, noting that:

- the *Estate Agents Act 1980* (Vic) establishes offences relating to the making or publishing of false or misleading statements, representations and advertisements by estate agents; and
- the Australian Consumer Law prohibits false or misleading representations about the sale of land in trade or commerce.

The LIV suggests that CAV should consider any case law in relation to misleading and deceptive conduct during the sale of land and implications for existing legislative provisions.

The LIV also notes that there is a broader review of the Australian Consumer Law being conducted by Consumer Affairs Australia and New Zealand, and that the review will likely consider the provisions regarding false and misleading representations.

4 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?

The LIV considers that any duplication between the *Estate Agents Act 1980* (Vic) and the Australian Consumer Law regarding misleading and deceptive conduct offences should be addressed.

Due diligence

5 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?

Feedback from LIV members indicates that the due diligence checklist has been effective in increasing the awareness of purchasers of the need to make their own enquiries before buying a property.

However, the LIV notes that often, the checklist is included in the section 32 vendor statement even though there is no requirement to do so. This can mean that the purchaser is less inclined to read the checklist if it is included in the section 32 statement.

The LIV suggests that the views of the Real Estate Institute of Victoria and estate agents be sought about the due diligence checklist, noting that the obligation is on vendors or vendors' estate agents to provide the checklist to prospective purchasers.

Building and pest inspections

6 **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.**

The LIV submits that the frequency with which building and pest inspection reports reveal substantial problems with the property does not justify making it mandatory for vendors to be required to obtain and provide potential purchasers with these reports.

The LIV is currently drafting special conditions regarding pest and building inspections for use with the standard contract of sale of real estate. These special conditions can be adopted if a purchaser requires a pest or building inspection to be undertaken.

Auctions

7 **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?**

The Issues Paper states that purchasers have the right to make an application to VCAT for compensation for any loss or damage they have suffered as a result of prohibited auction practices. LIV members have not had any experience regarding the effectiveness of the rights of purchasers to seek such compensation at VCAT.

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

The LIV observes that there appears to be an issue with agents 'underquoting' the likely selling price of properties. The LIV welcomes proposed reforms recently announced by the State Government to be made to the *Estate Agents Act 1980* (Vic) regarding underquoting.

Some LIV members have also indicated that the estate agents representing the vendor 'incite' purchasers to bid or increase their bids at auctions, perhaps where the purchaser might not otherwise have bid.

Auction rules

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

The LIV considers that the rules that cover public auctions should be extended to cover all auctions. This is because, as stated in the Issues Paper, the risks to bidders are similar regardless of whether the auction is public or private. Further, the LIV agrees that it can be difficult to determine the point at which an auction becomes a public one, such as when an auction that is open only to bidders by invitation becomes public knowledge.

The LIV suggests that the mechanics of ensuring that private auctions are subject to the same rules will need to be carefully identified. There may also be need for an education campaign to ensure that potential purchasers are aware of the extended application of the auction rules.

Online auctions

10 **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.**

The Issues Paper comprehensively details issues regarding online auctions. The LIV agrees that these issues need to be addressed as they present new risks for vendors and purchasers, particularly:

- effective enforcement options where auctioneers and operators are not located in Victoria;

- the dissemination of information and the conditions of the auction to bidders before the auction starts;
- ensuring the 'bona fides' of bidders engaging in the auction process; and
- preventing dummy bidding.

However, LIV members have had little or no experience with online auctions. The LIV therefore suggests that the Real Estate Institute of Victoria be consulted in relation to these issues.

11 How should online auctions be regulated and what are the limitations of intervention?

The LIV refers to its response to question 10.

12 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 Issues Paper states that the operator of an online auction only 'hosts' the auction by providing the infrastructure that is used to conduct the auction. In contrast, a person who engages in the online process by inviting, accepting or rejecting bids or posting vendor bids is conducting an auction. The LIV does not think the operator should be required to be licensed if it is only providing the online auction infrastructure, but agrees that a person conducting an auction should be licensed.

The LIV suggests that the Real Estate Institute of Victoria be consulted in relation to this question.

Disruption of auctions

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

While the Issues Paper states that there may be instances of people engaging in public protests at auctions with the intention of preventing the auction from going ahead or significantly disrupting it, the LIV does not consider that this warrants regulation.

Auctions conducted on ANZAC Day

14 Do you think that the holding of public auctions on ANZAC Day should be regulated? Please give reasons for your view.

The LIV does not consider that there should be regulation prohibiting the holding of public auctions on ANZAC Day. Estate agents should be able to adopt a common sense approach regarding appropriate (and inappropriate) days to hold auctions.

Roles and responsibilities of the auctioneer

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

The LIV considers that the vendor's estate agent should be responsible for ensuring that a copy of the conditions under which the auction will be conducted is available for inspection at the place at which the auction is being conducted, as well as the contract of sale. As stated in the Issues Paper, an auctioneer travels from appointment to appointment and it is usually the estate agent who puts the rules and contract of sale on display. Alternatively, there could be joint responsibility shared by the vendor's estate agent and auctioneer.

Side deals

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

The LIV does not consider that side deals should be required to be disclosed to all bidders before an auction commences. In terms of ensuring a 'level playing field' for all bidders, no bidder / potential purchaser is precluded from seeking amendments to the contract of sale prior to auction which will be made if they are successful at auction (excluding 'subject to' conditions).

To promote the right of potential bidders and purchasers to request variations to the contract of sale prior to auction which will be made if they are successful at auction, this could be included in the due diligence checklist.

Cooling-off

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

As stated in the Issues Paper, a cooling-off period applies to private sales of residential and small rural properties. However, cooling-off rights do not apply to sales at a publicly advertised auction or to sales in the 3 days before or after a publicly advertised auction. The LIV considers that the current position is appropriate.

However, the LIV suggests that, following the decision in *Tan v Russell* [2016] VSC 93, the Act requires amendment to allow a purchaser to give a cooling-off notice to the vendor's estate agent. The LIV refers to its response to question 64.

18 In your experience, are the current cooling-off provisions effective in 'undoing' an impulsive decision made by a buyer?

LIV member feedback indicates that the current cooling-off provisions are effective in 'undoing' an impulsive decision made by a buyer. The Issues Paper details various issues that have been raised regarding cooling-off rights such as manipulation by estate agents or experienced purchasers, or use of 'subject to' clauses in the contract of sale. However, the LIV does not consider that these issues are so prevalent or significant to justify legislative amendment. It is also important to provide a vendor with as much certainty as possible that a contract has been entered into.

Contract of sale

19 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?

The LIV considers that current process of prescribing a contract of sale of real estate in the Estate Agents (Contracts) Regulations 2008 is working well. This approach also ensures that estate agents do not engage in legal work in relation to contracts, as they are only able to 'fill up' the prescribed contract. Any amendments to the contract or special conditions should always be referred to a legal practitioner or licensed conveyancer.

Special conditions

20 What, if any, constraints should be placed around the adding of special conditions to a standard form contract of sale?

LIV member feedback indicates that it is relatively common practice for special conditions to be inserted to amend various general conditions in the standard form of contract of sale. The LIV is proposing to feature an article in the Law Institute Journal in late 2016 which provides practical guidance to practitioners when encountering onerous special conditions in contracts and where such conditions

might be regarded by a Court as a breach of the Australian Consumer Law. This will hopefully assist practitioners and conveyancers when reviewing contracts on behalf of purchaser clients.

The LIV considers that there should be an express legislative prohibition on the inclusion of special conditions in the section 32 vendor statement. Otherwise, the LIV is of the view that market forces and a 'common sense' approach should dictate the type of special conditions (including onerous special conditions) in contracts. Prudent purchasers will seek legal advice from a legal practitioner or licensed conveyancer before entering into a contract.

21 Is there a better way to regulate the conditions under which a sale of land takes place?

The LIV refers to its response to question 20.

Off-the-plan sales and the standard form contract

22 Is there a need to regulate the conditions that are inserted into contracts for off-the-plan sales?

The LIV acknowledges that it is common for numerous special conditions to be inserted into contracts for off-the-plan sales where the standard form contract is used as a base. Many special conditions in such contracts operate to prevent or reduce the circumstances in which the purchaser can avoid the contract for minor issues.

While the process of preparing and reviewing such contracts is sometimes cumbersome, the LIV does not think that any legislative amendment or further regulation is justified. The LIV suggests that instead, purchasers should be encouraged to seek legal advice prior to entering into contracts.

Exemption for estate agents from engaging in legal practice

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

The LIV does not support the removal of the exemption, as it makes it clear that an estate may only 'fill up' the standard contract of sale prescribed by the Estate Agents (Contracts) Regulations 2008, and may not do any other legal work in relation to the transaction such as drafting special conditions.

There is anecdotal evidence from LIV members of transactions where estate agents have drafted contracts and special conditions with potentially serious and deleterious results.

There is also a potential for conflict where a contract or condition is drafted by a person whose entitlement to payment is dependent upon a contract being signed rather than upon acting in the best interests of the vendor.

Deposit moneys

Payment of money

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

The LIV submits that deposit moneys should be preserved until settlement. The Issues Paper refers to problems identified by the Parliamentary Committee of Inquiry into Conveyancing in 1979 where vendors were spending deposits before settlement and were unable to repay them to purchasers when sales fell through. Avoiding this outcome for purchasers is good justification for the current legislation, which requires the deposit moneys to be paid to a legal practitioner, conveyancer or estate as stakeholder until settlement.

25 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?

As stated in the Issues Paper, the Act requires deposits to be paid within 7 days of signing a contract to the vendor's estate agent, licensed conveyancer or legal practitioner or, alternatively, into a special purpose account in the joint names of the vendor and the purchaser.

This is reflected in general condition 11.1 of the standard contract of sale of real estate, which provides:

11.1 *The purchaser must pay the deposit:*

- (a) *to the vendor's licensed estate agent; or*
- (b) *if there is no estate agent, to the vendor's legal practitioner or conveyancer; or*
- (c) *if the vendor directs, into a special purpose account in an authorised deposit-taking institution in Victoria specified by the vendor in the joint names of the purchaser and the vendor.*

Given that the purchaser will be in breach of general condition 11 if the purchaser pays the deposit to the vendor directly, it appears that there will be very few circumstances where the vendor receives the deposit and fails to pay it over in accordance with the requirements of the Act.

In the few instances where there is such a failure by the vendor, the LIV does not consider that legislative amendment is required to entitle the purchaser to end the contract.

Early release of deposit

26 What is your experience of the effectiveness, or otherwise, of the 'early release' provisions?

LIV member feedback indicates that there often uncertainty regarding the 'early release' provisions in the Act. The Issues Paper concisely identifies key issues, such as:

- whether the Act entitles the early release of a deposit where the vendor has clear title;
- the meaning of 'condition enuring for the benefit of the purchaser'.

There is divided opinion amongst LIV members about the continued need for the early release provisions. The LIV therefore submits that the approaches adopted in other jurisdictions should be carefully considered in identifying a suitable approach for Victoria. The LIV understands that some other Australian jurisdictions do not permit the early release of deposits, and suggests that there would be merit in exploring the rationales underpinning this.

If there continues to be scope for early release of deposit, the LIV considers that:

- the Act should entitle the early release of a deposit where the vendor has clear title; and
- 'condition enuring for the benefit of the purchaser' should be confined to conditions that are contingent on some further action that benefits the purchaser. The LIV does not agree that the presence of **any** condition in the contract that benefits the purchaser should prevent early release of the deposit.

27 What information is essential to assist a buyer in determining whether or not to release the deposit before settlement?

The LIV considers that if the purchaser is provided with a letter from the vendor's mortgagee which states that the mortgagee will discharge the mortgage upon receipt of an amount not exceeding the net balance of funds available at settlement, this should be adequate for the purchaser to determine that the deposit can be released before settlement.

28 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?

The LIV considers that the test to entitle the purchaser to end the contract should be whether the purchaser has been materially and adversely affected by false information provided by the vendor. The vendor could be given 14 days' notice by the purchaser to rectify and if the vendor fails to do so, the purchaser should be entitled to end the contract.

Use of bank guarantees and deposit bonds

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

Following the decision in *Everest Project Developments Pty Ltd v Mendoza & Ors* [2008] VSC 366, it is relatively common for financial institutions to make the beneficiary under the bank guarantee the vendor's legal practitioner rather than the vendor. As noted in the Issues Paper, this can present issues because:

- the vendor's legal practitioner (who is not a party to the contract of sale of real estate) may be joined in any action brought by the purchaser to prevent the bank guarantee from being accessed for the vendor's benefit; and
- if the vendor changes legal representatives before settlement, a replacement bank guarantee will be required.

The LIV submits that, for off-the-plan transactions, legislation should require bank guarantees to be issued in favour of the vendor rather than the vendor's legal practitioner. Further, the bank guarantee should be held by an estate agent, Australian legal practitioner or licensed conveyancer.

The LIV also considers that, for off-the-plan transactions, the vendor should not be entitled to draw down on the bank guarantee until the plan of subdivision has been registered, and that penalties should apply for any breach. For non off-the-plan transactions, draw down on the bank guarantee should only be permitted in circumstances where the vendor would otherwise be entitled to the deposit or part thereof.

Damage to land or buildings before sale completed

Insurance coverage

30 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?

General condition 24 of the standard contract of sale provides that the vendor carries the risk of loss or damage to the property until settlement, and must deliver the property to the purchaser at settlement in the same condition it was on the day of sale (except fair wear and tear). Despite general condition 24 and even if the vendor has insurance, a prudent purchaser usually takes out their own insurance to cover the period between signing of the contract and settlement.

Feedback from LIV members indicates that the status quo remains appropriate.

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

The LIV refers to its response to question 30.

Right to end contract of sale if dwelling house destroyed

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

As specified in the Issues Paper, section 34 of the Act permits a purchaser of a dwelling house to end a contract of sale if the house is destroyed or damaged. The purchaser must make the election within 14 days of receiving notice of the damage. However, the election can be 'set aside' if the vendor reinstates the house prior to settlement. Obviously, such situations are rare.

In circumstances where a house is destroyed, the LIV considers it appropriate that the purchaser only have the right to rescind within a short specific timeframe, as this will ensure that both parties have certainty regarding the next steps. Consideration could be given to extending the 14 day rescission time period to 21 days to provide the parties with adequate time to consider their rights and options. However, LIV members are not aware of any situation where the existing provision and time period have proved to be inadequate.

PART B: Buying property 'off-the-plan'

How off-the-plan sales are regulated

Calculating the purchase price

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

The Issues Paper cites various issues that are apparently experienced by vendors in calculating the purchase price of the property which then determines the 10% deposit to be paid, as vendors are keen to ensure that the purchaser does not pay more than a 10% deposit (as this would entitle the purchaser to end the contract).

However, feedback from LIV members indicates that one of the greatest challenges facing a vendor of an off-the-plan development is securing sufficient 'eligible purchasers' to qualify for construction finance. Financiers define 'eligible purchasers' as those who have paid a 10% deposit under an enforceable contract. In the experience of LIV members, vendors usually do not set a 'conservative' purchase price when calculating a 10% deposit.

34 How could uncertainties about the true purchase price be addressed?

Section 9AA(1)(b) of the Act provides that a person must not sell an off-the-plan property unless 'the deposit moneys payable under the contract do not exceed 10 per cent of the purchase price of the lot'. The LIV considers that it might assist if the definition of 'purchase price' for the purposes of s.9AA(1)(b):

- expressly included consideration for goods; and
- provided for the calculation to be made as at the date of contract of sale, ignoring all discounts and rebates and also ignoring variations that might occur in future.

The LIV would welcome the opportunity to further discuss this with CAV to ensure that there is no consequential impact upon stamp duty payable.

Consideration should also be given in relation to capping the amount of discounts and rebates. The LIV suggests that a rebate of 2% of the purchase price is an appropriate cap.

The LIV suggests that there would be value in all rebates and discounts being specified in the particulars of sale in the contract of sale to ensure that there is transparency regarding the actual price payable. Rebates and discounts promote transparency for other purchasers who become aware only of the 'gross' price. This will also assist to ensure that financiers are not misled as to the actual price payable (noting that rebates can often be granted by side letter or a special condition located at the back of a lengthy contract and which are not disclosed to a financier).

Progression payments

35 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?

The LIV submits that vendors should not be entitled to access the deposit before registration of the plan of subdivision. Funds can instead be made available to vendors / developers through loans and by capital contributions to acquire shares or units. These non-routine transactions provide sufficient scope to cater for unique circumstances.

36 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.

The LIV considers that, provided the deposit moneys cannot be released prior to settlement, there is no point in imposing a 10% limit. On the other hand, if the deposit is merely a surety, 10% is usually sufficient to evidence that the purchaser is committed to the purchase.

The LIV suggests that for the sale of land only (that is, no construction) between commercial parties, the parties should be free to contract as they see fit.

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

The LIV refers to its responses to questions 35 and 36.

Transfer and release of deposit moneys

38 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?

The LIV does not consider that the Act prevents the transfer of deposit from the vendor's estate agent to a vendor's legal practitioner / conveyancer. Section 9AA(1) of the Act requires the contract to **specify** that the deposit will be **paid** to the vendor's legal practitioner, conveyancer or estate agent to be held on trust for the purchaser. Section 9AA(2) of the Act provides that it must be **paid** to the vendor's legal practitioner, conveyancer or estate agent; but it does not specify how it must be held and nor does it specify the powers of the trustee. In contrast, section 24(1) of the Act relates to deposit moneys **held** as stakeholder and section 24(2) provides that nothing "in this section" prevents a transfer of funds.

The LIV considers that the status quo (having regard to the above interpretation) is appropriate. There is no reason why there should be a restriction on the transfer of off-the-plan deposits.

39 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.

The LIV considers that different treatment is required because with an off-the-plan contract, only once the plan of subdivision is registered does the subject matter of the contract come into existence.

How off-the-plan sales are regulated

Disclosure of works affecting the land

40 What are your views on the current disclosure requirements in relation to works affecting a lot for sale?

As stated in the Issues Paper, information about the soil quality of the land is not necessarily required to be disclosed by vendors of off-the-plan lots under s9AB of the Act which requires disclosure of works. The LIV considers that soil type is an issue for all purchasers of vacant land (whether off-the-plan or already existing) because it will affect the foundations required and the cost of construction.

However, the LIV considers that the disclosure requirements regarding soil quality should be confined to sales of vacant land and off-the-plan buildings of under 3 storeys.

The LIV submits that the disclosure requirements under section 9AB should not apply to buildings to be constructed which are 3 storeys or more, as the size of the development renders that type of information less important for purchasers.

41 How can buyers be best made aware of the potential financial implications associated with changes to the environment resulting from earthworks and construction?

The LIV suggests that information could be included in either the section 32 vendor statement or the due diligence checklist about the need for a purchaser of vacant (not off-the-plan) land to make enquiries and seek costings.

Disclosing amendments to plans

42 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?

The LIV submits that vendors should be required to provide a summary of the material changes together with the revised plan of subdivision. This could be done by way of the surveyor providing an overlay plan and a summary of all changes made.

43 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.

Feedback from LIV members indicates that whilst the time within which to object and the detail of the revised plans of subdivision can prevent purchasers from exercising their rights to end the contract of sale, in the vast majority of cases the changes are of no real significance or importance to purchasers.

44 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?

The LIV considers that it would be appropriate for a purchaser to have the right to end a contract if changes to design, specifications, fittings and finishes materially adversely affect the use or enjoyment of the property. This should be case regardless of whether the changes result from the requirements of a statutory authority.

Warning notice

45 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?

As stated in the Issues Paper, a contract of sale for an off-the-plan property must contain certain information for the purchaser. LIV members have not had direct experience regarding the effectiveness of the warning notice for off-the-plan sales, but suspect that the warning notice has limited value.

Rights to end an off-the-plan sale

Timeframe for exercising right to end the contract

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

The Issues Paper details a purchaser's rights to end an off-the-plan contract where:

- the contract does not include a provision that the deposit moneys are to be paid to the vendor's legal practitioner, conveyancer or estate agent to be held on trust for the purchaser until the plan of subdivision is registered;
- the deposit required under the contract exceeds 10% of the purchase price for the lot;
- the deposit paid before the plan of subdivision is registered is not paid to the vendor's legal practitioner, conveyancer or estate agent.

The LIV considers that existing rescission rights relating to deposit money should remain.

In terms of timeframes, the LIV proposes that time limits less than 30 days should be "business days" to avoid or reduce problems with holidays.

Noting the current uncertainties for vendors regarding the length of some of the purchaser's termination rights, the LIV submits that the purchaser's right to terminate the contract of sale should expire after a set period of time. A maximum time period of 60 days is suggested as being reasonable.

However, the LIV supports the existing limited time period of 14 days from receipt of the amendment for purchasers to terminate the contract of sale following an amendment to the plan of subdivision (provided that the vendor has provided a summary of the main changes together with a revised plan of subdivision as suggested by the LIV in its response to 42). A limited time period is appropriate because any delays could be critical in relation to building costs and penalties might then apply.

Plan of subdivision not registered by specified date

47 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?

In the experience of LIV members, parties have agreed on the extension of the date for registering the plan of subdivision. In these instances, at common law a new contract or a novated one comes into existence.

The LIV submits that parties should be able to extend the date for registering the plan of subdivision by mutual agreement without affecting the stamp duty position under the contract. Currently, if a new contract is required or comes into existence, stamp duty will be calculated from the day of sale of the new contract.

Preventing abuse of rights to end contracts

48 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?

The Issues Paper indicates that some vendors may be manipulating purchasers by deliberately creating an event to give rise to the purchaser's right to end the contract with the intention of forcing the purchaser to end the contract so that the vendor can offer the property at a higher price to others. LIV members do not consider that this is a widespread practice.

It appears that the most common method of manipulation by vendors is to delay construction so that the date specified in the contract of sale to register the plan of subdivision (the sunset date) expires.

LIV members have not reported any issues with purchasers abusing rights to end contracts.

49 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?

The LIV refers to its response to question 48.

Rights to end an off-the-plan sale

Insurance within 6 months of plan registration

50 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?

As stated in the Issues Paper, the obligation on vendors to take out the required owners corporation insurance is limited to the first 6 months after registration of the plan of subdivision. For larger developments, organising insurance is one of the jobs routinely attended to by the initial developer.

51 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?

The LIV notes that there are existing rights under the *Owners Corporations Act 2006 (Vic)* for lot owners to commence proceedings in VCAT in relation to an owners corporation's failure to comply with its insurance obligations under that Act.

In any event, LIV members have indicated that this issue does not appear to be causing problems in practice.

Requirement to hold insurance at point of sale

52 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?

The Issues Paper provides that there is currently uncertainty as to whether the offence of selling land within an owners corporation without the required insurance applies to off-the-plan sales that occur before the plan of subdivision is registered. The LIV considers that this uncertainty should be removed by amending the Act to ensure that there is no obligation on vendors to require an entity that does not yet exist to perform any act.

In relation to the obligation on vendors to ensure that the owners corporation holds insurance at the point of sale where there is an existing owners corporation, the Issues Paper expresses concern about the ability of vendors to comply where the owners corporation is inactive. However, the LIV submits that a vendor who, as a member of the owners corporation, has failed to cause the owners corporation to

comply with its statutory obligations, is rightly obliged to take out the required insurance (if necessary, by paying the premiums in person).

Possession and occupation fees

53 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?

In the experience of LIV members, it is not common for purchasers to take possession before a plan of subdivision is registered.

While the LIV acknowledges that occupation by the purchaser should not generally occur before the issue of the occupancy permit, there are instances where the purchaser has no alternative place to reside. Any such occupation is only for short period, and can be documented in a simple licence which specifies the parties' rights and obligations.

PART C: Terms contracts and other specialised sale of land contracts

Terms contracts

Continuing rationale for terms contracts

54 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?

While the LIV acknowledges that terms contracts are less frequent these days due to the more competitive mortgage market, the LIV considers that they are still useful. As indicated in the Issues Paper, terms contracts are used by farmers in rural areas as well as for the sale of property within families. The LIV therefore supports the continuation of the terms contract regime.

However, the LIV suggests that there should be exemptions for high-value contracts and contracts less than 12 months. The LIV refers to its 18 June 2013 submission (attached) to Consumer Affairs Victoria, which relevantly provided as follows:

Exemption for high-value contracts

LIV members have also expressed concern that the consumer protection focus of the terms contracts provisions has the potential to interfere with more sophisticated "professional" parties conducting their commercial arrangements.

LIV member feedback indicates that there have been numerous instances where experienced developer/investor parties have wished to enter into "terms contracts" for significant sums of money, but the contract would have been voidable under the "two or more payments" test.

The LIV acknowledges the importance of the terms contracts provisions in protecting "mum and dad" purchasers of blocks of land, but submits that the provisions should not hinder well-resourced professional parties who wish to transact on this basis.

Accordingly, the LIV proposes that CAV consider an exemption for any contract with a value in excess of \$2 million (or higher, if CAV deems necessary). This would allow professional developers and investors (who have access to sophisticated advice) to carry on business without being hindered by regulation aimed more at other types of consumers.

Exemption for contracts less than 12 months

LIV members indicate that it is not uncommon to have a conditional contract with settlement of less than 12 months after the day of sale which currently triggers the terms contract provisions due to the

purchaser asking to be allowed entry before settlement, as explained above, or additional payments being made under the contract. For example, a purchaser might buy the land conditional upon obtaining a planning permit by a certain date, and the contract might allow the purchaser to extend the date for satisfying the condition or to extend settlement by paying an additional amount or increasing the deposit. The LIV submits that the terms contract provisions should not apply to such contracts with settlement less than 12 months after the day of sale. The 12 month period has been identified as this is likely to represent the longest 'cash contract' settlement period which might commonly be encountered in practice and it would permit early access or further payments to be made under conditional contracts, as detailed above.

Effectiveness of existing remedies

55 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?

Subdivision 4 of Division 4 of the Act deals with mortgages and terms contracts and seeks to:

- prevent terms contracts where vendors might not become the registered proprietor in time to settle the sale;
- prevent terms contracts where the balance payable at final settlement might not be sufficient to discharge all encumbrances and for clear title to be provided;
- provide both the vendor and the purchaser with an option of calling for a transfer and mortgage back.

The LIV suggests that the scope to simplify Division 4 should be explored noting that, for example, s29M(c) of the Act appears to have little application and is out of step with current circumstances due to the changed mortgage market. In principle, the LIV supports the first two objectives above, but suggests that the third objective may be an unnecessary statutory option.

56 Should there be greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries? If yes, what would you favour:

- **offences and remedies directed at intermediaries?**
- **requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?**
- **other approaches? Please provide your ideas.**

The Issues Paper states that there is an increasing trend for terms contracts to be struck between vendors and purchasers through facilitation by intermediaries who introduce the parties to each other and organise the sale. The LIV submits that the same levels of scrutiny that apply to licensed estate agents should apply to such intermediaries.

'Rent-to-buy' contracts

57 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?

LIV members have not had significant experience with rent-to-buy contracts. However, the LIV considers that similar protections to those conferred on purchasers under terms contracts are required for tenants/purchasers under rent-to-buy contracts. It is arguable that rent-to-buy contracts are intended to circumvent the terms contract provisions and therefore require regulation.

Land banking

- 58 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?**

The LIV supports the introduction of protections for purchasers who purchase property under land banking schemes. This is particularly so for a purchaser where the vendor defaults under a mortgage over the land. The LIV suggests that vendors of undeveloped land which is yet to be approved for development by the relevant planning authority should be required to provide a section 32 vendor statement which will provide some protection to the purchaser if the purchaser seeks legal advice.

Private sales online

- 59 What are your experiences with selling and buying property privately online?**

LIV members have not had experience with selling and buying property privately online, and suggests that the views of the Real Institute of Victoria be sought.

However, the LIV suggests that the *Estate Agents Act* 1980 could be expanded to apply to online private auctions in circumstances where a person is holding themselves out to be an estate agent or intermediary for selling property.

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

Small business statement

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

The Issues Paper states that the requirement for a small business statement was introduced to protect 'inexperienced and gullible buyers'. The LIV considers that such purchasers still benefit from the requirement for the vendor and its agent to provide a small business statement.

Statement concerning finance

- 61 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?**

The LIV suggests that the views of the Real Institute of Victoria be sought in relation to this question.

Builders and subdividers of land

- 62 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?**

LIV members have not had any experience in relation the practice of builders and developers recommending financial providers to prospective buyers. However, the LIV suggests that builders and developers should continue to be regulated when making such recommendations through a requirement that they provide purchasers with certain financial information.

PART E: Modernisation of the Sale of Land Act

Purpose of the Sale of Land Act

63 What should the purposes of the Sale of Land Act include?

The LIV suggests that the Act and one of its key purposes should be the regulation of contracts of sale of land.

The LIV would welcome the opportunity to discuss other purposes with CAV once there is clearer direction about how the Act will be amended.

Definitions

64 What are the key terms that should be defined in the Sale of Land Act?

The decision in *Tan v Russell* [2016] VSC 93 suggests a need to define 'vendor' for the purposes of section 27 of the Act as expressly including any estate agent named in the contract of sale. Alternatively, section 31 of the Act could be amended to clarify that a cooling off notice can be provided to the vendor's estate agent named in the contract of sale.

The LIV otherwise suggests that other terms that will require definition will become apparent when the Act is re-drafted. The LIV refers to its response to question 65.

65 How can the current definitions be improved? Where have you experienced areas of inconsistency or confusion?

The Issues Paper highlights many issues regarding existing terms and definitions in the Act, including definitions which have not been amended for some time and terms which have multiple definitions throughout the Act. The LIV agrees that the the interpretation of the Act can be difficult due to outdated concepts being used. Specifically, the LIV suggests that:

- the definitions of "land" and "mortgage" need to be updated to reflect a more contemporary meaning; and
- the term "prescribed contract of sale" should be revisited because it does not describe the type of contract to be entered into. Consideration should be given to using the term "off-the-plan contract" which is now a recognised term in practice.

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

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

The Issues Paper provides that section 8 of the Act sets out how mortgage moneys are to be apportioned when land that is subject to a mortgage is subdivided, and enables dissatisfied parties to apply to an arbitrator for a determination. LIV members are not aware of this process being used. The LIV suggests that the views of legal counsel at the major banks should be sought regarding section 8 of the Act.

67 What other opportunities can you identify to modernise the Sale of Land Act?

The LIV considers that sections 9AA to 17 of the Act should be rewritten to deal with off-the-plan contracts of sale using modern terminology. Regulation of the use of bank guarantees and deposit bonds could be dealt with in this new division. Recognition should also be given to the fact that different concepts are required for different types of land subdivision such as:

- greenfield subdivisions;
- small building / townhouse subdivisions;
- large building / tower subdivisions.

PART F: Dispute resolution, offences and remedies

Arbitrators

68 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?

Based on feedback from LIV members, it appears that the arbitration system under the Act has been rarely, if ever, used.

The LIV therefore proposes that Part 1, Division 2 of the Act (which deals with arbitrators) should be abolished. The types of disputes regarding where arbitrators now have powers to make determinations should instead be dealt with by VCAT.

69 What types of disputes would benefit from arbitration and what body should undertake this role?

The LIV refers to its response to question 68. The LIV also suggests that a specialist property division or panel at VCAT could be established to undertake an arbitration and determination role in relation to all sale of land disputes in the first instance.

Conciliation and mediation of disputes

70 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?

The LIV refers to its responses to question 69 and 71.

71 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?

Although there are mechanisms for dispute resolution via VCAT and the courts (such as in s49(1) of the *Property Law Act 1958* (Vic) which provides for vendor and purchaser summons), the LIV considers that one of the failings of the current system is that a mechanism for speedy and inexpensive resolution of disputes is not available. However, a mandatory requirement may cause unacceptable delay for parties in some circumstances, such as where:

- a purchaser is attempting to recover a deposit after a contract of sale is terminated; or
- a vendor is attempting to remove a caveat in order to re-offer a property for sale.

The LIV acknowledges that there may be benefits for mandatory mediation in other cases.

The LIV also highlights that it offers a property law dispute resolution service regarding general property disputes as an alternative to court proceedings. Further information is available on the LIV's website about this service.

Offences and remedies

Remedies under the Sale of Land Act

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

The LIV submits that penalties for breaches of the Act which are never enforced are of no benefit.

As stated in the Issues Paper, some of the rescission rights in the Act are absolute while others are limited, preventing a purchaser from rescinding the contract if the vendor acted honestly and reasonably and if the purchaser is substantially in as good a position as if the relevant provision that triggered the rescission right had been complied with.

The LIV is aware that there are conflicting arguments: on the one hand, substantial injury should be sufficient to allow a purchaser to avoid, on the other hand, a vendor who has acted honestly and reasonably should not have to suffer the loss. The LIV would welcome the opportunity to further explore this with Consumer Affairs Victoria.

Regardless of the position adopted, the LIV supports amendment to the Act to ensure that termination / rescission rights are uniform throughout.

73 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.

The LIV refers to its response to question 72. However, the LIV notes that if the purchaser has suffered a significant loss or disadvantage as a result of the vendor's breach, this loss or disadvantage is no less if caused by an honest or reasonable mistake by the vendor.

Consumer law remedies

74 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?

In the experience of LIV members, purchasers are more likely to use the *Sale of Land Act* remedies if they wish to terminate the contract of sale because they are unhappy with the property. They may also use these remedies as a bargaining tool to reduce the purchase price or obtain some other concession from the vendor.

Remedies under the Australian Consumer Law are uncommon and would generally only arise in situations where the purchaser is seeking damages.

Offences and enforcement

75 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.

The Issues Paper provides that in a sale of land context, the wronged party to a dispute has usually exercised a right to end the contract of sale rather than Consumer Affairs Victoria prosecuting offenders. The LIV agrees with this assessment, and that the threat of losing the sale provides a greater incentive for vendors to discharge their obligations appropriately than any threat of prosecution.

76 What are your views on the current offences and penalties applying under the Sale of Land Act?

LIV members observe that the penalties under the Act are generally not enforced but may serve as a deterrent to bad practice. The LIV considers that care should always be taken where penalties are proposed as a sanction for poor contractual behavior.



18 June 2013

Ms Claire Davie
Senior Legal Policy Adviser
Consumer Affairs Victoria
GPO Box 123
MELBOURNE VIC 3001

Dear Ms Davie

Terms Contract Definition under the *Sale of Land Act 1962* (Vic)

In 2012, Consumer Affairs Victoria (CAV) issued a discussion paper on the definition of "terms contract" in the *Sale of Land Act 1962*. The Law Institute of Victoria (LIV) made the attached submission in respect of the issues canvassed in CAV's discussion paper. The LIV is now pleased to have an opportunity to comment on CAV's proposed amendments to the definition of "terms contract".

Section 29A(1)(a)

CAV has identified three options regarding the amendment of s29A(1)(a) of the *Sale of Land Act 1962*. Your correspondence indicates that the purpose of the amendment is "to remove the element of early entitlement to possession or rents and profits from s29A(1)(a)". However, the LIV seeks confirmation that the amendment to s29A(1)(a) is instead to ensure that a terms contract can be created as a result of multiple payments towards the purchase price (as well as in cases where the purchaser enters into possession before final settlement).

The three options are:

- amending s29A(1)(a) to revert to the pre-2008 definition "obliged to make two or more payments to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or", and repealing s29A(2); or
- amending s29A(1)(a) to "obliged to make one or more payments (other than a deposit or final payment) to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or", and repealing s29A(2) to leave the terms "deposit" and "final payment" undefined for the purposes of the provision; or
- amending s29A(1)(a) to "obliged to make one or more payments (other than a deposit or final payment) to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or", retaining the current definition of "final payment" in s29A(2), and amending the definition of "deposit" in s29A(2) to "an amount of money agreed by the parties to the contract to be paid by the purchaser to act as a security for the purchaser's completion of the purchase".



Consistent with the LIV's previous submission to CAV, the LIV is in favour of the option detailed in the first bullet point above. Section 29A(1)(a) would therefore read as italicised below:

"29A(1) For the purposes of this Act a contract is a terms contract if it is an executory contract for the sale and purchase of any land under which the purchaser is –

- (a) *obliged to make 2 or more payments to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or*"

CAV has indicated that other stakeholders consulted regarding the proposed amendments to s29A(1)(a) do not favour the option in the first bullet point above. CAV has also advised that the other stakeholders contend that the pre-2008 definition created some uncertainty in cases where purchasers paid deposits in one or more instalments, and might not have adequately catered for deposits paid in a series of electronic funds transfer (EFT) transactions.

In response to this concern, the LIV emphasises the importance of the word "obliged". If a contract says that the deposit is 10% payable on the execution of the contract, the purchaser is not "obliged" to make more than one payment. If the purchaser is unable to pay the 10% on that date it is in default until the full 10% is paid.

As some purchasers do not have the ability to pay 10% in a single payment (for example, due to credit card limits), the LIV notes that this used to be addressed in the old agent's contract note by having a date for payment of the full deposit and acknowledging the part payment, and is now addressed in the payment item in the particulars of sale of the current contract of sale of real estate prescribed by the *Estate Agents (Contracts) Regulations 2008*. In the prescribed contract, the payment item is as follows:

Payment (general condition 11)

Price \$

Deposit \$ by /..... /20..... (of which \$ has been paid)

Balance \$ payable at settlement

The purchaser has until the fixed date inserted in the spaces provided to pay the balance of the deposit in as many instalments as the purchaser wishes and, provided that the full amount is paid by that date, the purchaser will not be in default. The purchaser is "obliged" to pay the balance deposit within the designated timeframe but is not **obliged** to make multiple payments which would trigger a terms contract. Using the above wording, with a deposit split into an initial payment and a balance there would not be an **obligation** to make 2 or more payments after the initial payment is made on execution of the contract and before the final payment at settlement. LIV members have indicated that this system continues to work well.

The LIV's reasons for suggesting reverting to the pre-2008 definition are largely based upon the fact that this worked well for many years. The LIV is concerned that if "deposit" is not defined or is defined as suggested in the third dot point above, contracts could be structured by unscrupulous vendors so that a payment of, for example, up to 90% of the price would fit the definition or general understanding of the word "deposit". The LIV considers it arguable that any amount of money paid by a purchaser prior to final settlement and transfer of title could be said to be an amount of money paid to act as a security for the purchaser's completion of the purchase.

Section 29A(1)(b)

CAV has also sought the LIV's views regarding the removal of the words "or occupation" from s29A(1)(b). This was proposed by the LIV in its previous submission and, therefore, is supported.

The LIV's original concerns arose from a situation where a vendor, trying to assist a purchaser, might allow the purchaser access to the property being sold to store belongings or carry out works prior to settlement.

To address the current concerns that there could be unintended consequences flowing from the removal of the words "or occupation", another possible way of addressing this issue could be to insert an example in s29F(2) to the effect that the two tests in s29F(2)(a) and (b) would, in most cases, be satisfied if a purchaser was allowed access at the purchaser's request to store belongings or carry out works to the property sold before the purchaser becomes entitled to a conveyance or transfer of the land.

This example would then relate to a standard cash contract of sale which could, inadvertently, become a terms contract as a result of the vendor agreeing to the purchaser's request.

This will also have the effect of preventing unscrupulous purchasers from trying to avoid contracts for a technical contravention of the *Sale of Land Act* 1962, which was not initiated by the vendor.

Amended section 29A

In addition to consideration of the issues identified by CAV regarding the terms contracts provisions, the LIV has also been considering other ramifications of the decision in *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd & Anor* [2011] VSC 222 (*Ottedin case*).

Some LIV members have expressed concern about the risk that unscrupulous purchasers would attempt to take advantage of the terms contract provisions and create a terms contract following negotiations with the vendor to remedy the purchaser's default.

The LIV refers to the decision in *Munro & Anor v Humphries* [2008] VSC 600 in which the purchaser agreed to purchase the land and pay the balance ten months later. The purchaser – an experienced builder who was aware of the ramifications of the *Sale of Land Act* 1962 and had in the past exploited them to his advantage when buying property – then contended that the contract was a terms contract on the basis of a special condition, inserted at his request, which granted him 'immediate possession of the vacant land to start planning and building' and called for a transfer. The vendors disputed the creation of a terms contract and denied him early possession. The court ruled in the purchaser's favour, thus enabling him to avoid the contract on the basis of a legal technicality of his own creation.

Another example is the *Ottedin* case. In that case, a defaulting purchaser under a cash contract negotiated an extension of settlement in exchange for a further payment to be made prior to settlement. The purchaser subsequently sought to avoid the contract altogether on the basis that it had, by virtue of the extra payment, become a terms contract with a mortgage remaining unpaid more than 90 days after the entry into the contract. Whilst the purchaser did not succeed on the particular facts of the case, the danger to a vendor of acceding to a defaulting purchaser's request for extra time to complete provided a further payment is made is evident.

The LIV is concerned that these types of scenarios highlight how a purchaser might assert the creation of a terms contract in order to obtain the benefit of the terms contract provisions to the disadvantage of the vendor. This highlights the importance of legislative amendment to the terms contract provisions in the *Sale of Land Act* 1962 which will make it difficult to 'convert' (intentionally or inadvertently) a contract to a terms contract mid-contract.

The LIV suggests that CAV could consider amending s29A of the *Sale of Land Act 1962* to provide that a terms contract is not created as a result of any arrangements made between the parties for a further payment or payments to be made by a purchaser following the purchaser's default under the contract or if the purchaser is in contemplation of a default arising under the contract. New sub-ss29A(2) to (4) could be inserted to address this and other concerns raised by LIV members as referred to below.

Under s29O(1) of the *Sale of Land Act 1962*, a terms contract can provide for any mortgage affecting the land sold to be discharged before the purchaser becomes entitled to possession or to the receipt of rents and profits and for the deposit and all other money payable under the contract (other than money payable in excess of the amount required to discharge the mortgage) to be paid to a legal practitioner, conveyancer or licensed estate agent to be applied in or towards discharging the mortgage.

Then, under sub-section (2), if the mortgage is not discharged within 90 days of the making of the contract, the contract is voidable by the purchaser at any time before the mortgage is discharged. However, s29(O)(2) only allows a purchaser who is not in default under the contract to avoid the contract before the mortgage is discharged.

This is the concept which LIV members have drawn upon to suggest a possible new s29A(2) and (3). However, it might also be possible to expand the excusing provision in s29F(2) so that a terms contract can never be voidable by the purchaser if the purchaser is in default.

The provisions of s29F(2) could also be amended so that, for example, if a purchaser is in default under a contract, a court only needs to be satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention in accordance with sub-section (2)(a) and does not have to consider the further test in sub-section (2)(b) that the purchaser is substantially in as good a position as if all the relevant provisions of the *Sale of Land Act 1962* had been complied with.

Definition of 'deposit moneys'

The LIV queries whether, if the word "deposit" is to remain in s29A, the definition of "deposit moneys" in s23 of the *Sale of Land Act 1962* is to be amended or any changes to Division 4 will clarify that that definition does not apply to terms contracts.

Under this definition, **all** moneys paid prior to a purchaser taking possession or becoming entitled to receive rents and profits (which could be at final settlement) would be a deposit.

Exemption for high-value contracts

LIV members have also expressed concern that the consumer protection focus of the terms contracts provisions has the potential to interfere with more sophisticated "professional" parties conducting their commercial arrangements.

LIV member feedback indicates that there have been numerous instances where experienced developer/investor parties have wished to enter into "terms contracts" for significant sums of money, but the contract would have been voidable under the "two or more payments" test.

The LIV acknowledges the importance of the terms contracts provisions in protecting "mum and dad" purchasers of blocks of land, but submits that the provisions should not hinder well-resourced professional parties who wish to transact on this basis.

Accordingly, the LIV proposes that CAV consider an exemption for any contract with a value in excess of \$2 million (or higher, if CAV deems necessary). This would allow professional developers and investors (who have access to sophisticated advice) to carry on business without being hindered by regulation aimed more at other types of consumers.

Exemption for contracts less than 12 months

LIV members indicate that it is not uncommon to have a conditional contract with settlement of less than 12 months after the day of sale which currently triggers the terms contract provisions due to the purchaser asking to be allowed entry before settlement, as explained above, or additional payments being made under the contract. For example, a purchaser might buy the land conditional upon obtaining a planning permit by a certain date, and the contract might allow the purchaser to extend the date for satisfying the condition or to extend settlement by paying an additional amount or increasing the deposit. The LIV submits that the terms contract provisions should not apply to such contracts with settlement less than 12 months after the day of sale. The 12 month period has been identified as this is likely to represent the longest 'cash contract' settlement period which might commonly be encountered in practice and it would permit early access or further payments to be made under conditional contracts, as detailed above.

Some suggested revised wording of s29A is attached to address all of the above issues. The LIV believes that the suggested re-write of the section strikes a fair balance between the competing interests of vendors and purchasers of land.

If you would like to discuss any of the matters raised in this submission, please do not hesitate to contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on ph 9607 9522.

Yours faithfully



Reynah Tang
President
Law Institute of Victoria

SUGGESTED RE-WRITE OF SECTION 29A OF THE SALE OF LAND ACT 1962

29A What is a terms contract?

- (1) For the purposes of this Act a contract is a terms contract if it is an executory contract for the sale and purchase of any land under which the purchaser is—
 - (a) obliged to make 2 or more payments to the vendor after the execution of the contract and before the purchaser is entitled to a conveyance or transfer of the land; or
 - (b) entitled to possession of the land before the purchaser becomes entitled to a conveyance or transfer of the land.
- (2) Any payment or payments which a purchaser who is in default under the contract is obliged to make pursuant to an agreement or variation of the contract made with the vendor following such default shall be disregarded for the purposes of section 29A(1)(a).
- (3) For the purposes of section 29A(2), a purchaser who has notified the vendor in writing that a default under the contract on the part of the purchaser will or may occur is deemed to be a purchaser who is in default and such notification is deemed to be a default under the contract.
- (4) Despite section 29A(1), a contract is not a terms contract if –
 - (a) the sale price exceeds \$2 million or such sum as is prescribed from time to time; or
 - (b) the date for payment of the balance of the purchase price is not more than 12 months after the date on which the contract is entered into.