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

 *~ Incorporated in 1966 ~*

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 1 May 2017

Consumer Property Acts Review

Policy and Legislation Branch

Consumer Affairs Victoria

consumerpropertylawreview@justice.vic.gov.au

Dear Sirs,

**Re: Sale of land and business: options for reform**

The Institute welcomes this opportunity to make the following submission in respect to the above, and we thank you for the extension granted.

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.

Pre-sale disclosure

Option 1 – Improve pre-sale disclosures by requiring reasonable estimates of financial liabilities for off-the-plan sales, and ensuring material facts about a property for sale are disclosed appropriately to prospective buyers

Sellers should be required to give a reasonable estimate based on information known at that time, and particularly where Owners Corporations are involved. Compensation may be appropriate where the actual liabilities at the time of arranging settlement exceed 15% of the original estimate provided.

We suggest that the CAV Due Diligence Checklist could be expanded to include information for buyers in respect to initial enquiries and factoring in matters which could alter prior to settlement, particularly in relation to a lengthy settlement period.

We also refer to our response to Consumer Property Acts Review Issues Paper No. 3 of 23 May 2016.

In relation to the disclosure of ‘material facts’, we believe it would be extremely difficult for a seller to comply with this – one would need to first of all define what is ‘material’, also noting that what might be material to one buyer will not be material to another. Mandating such a broad requirement would, we believe, impose an unfair burden upon a seller and ‘open the floodgates’ to litigation on the basis of what might be ‘material’ in the particular circumstances (or not).

We would agree it would be reasonable that a seller/seller’s agent be required to honestly respond to a buyer’s question where the answer is within the knowledge of the seller; provided that the scope is clearly outlined.

Misleading and deceptive statements about land for sale

Option 2 – Retain offences in the Sale of Land Act and Estate Agents Act relating to specific types of conduct but, where appropriate, consolidate those offences into the Sale of Land Act and review and update penalties

We agree with the proposal to consolidate offences into one Act.

Auctions

Option 3 – Clarify the law relating to online auctions, and develop specific additional regulation where necessary

On the basis that online auctions should for the most part mirror ‘in person’ auctions, it would appear appropriate that the same position be maintained in regard to both, i.e. that the identity of a bidder is not verified prior to auction. This is not to say that those holding an online auction may not wish to take additional steps themselves.

Option 4 – Introduce reforms to prohibit or limit the conduct of auctions on ANZAC Day

As stated in our earlier submission, we believe many in our community would 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.

Contract for sale

Option 5A – Retain the standard form contract of sale prescribed in the Estate Agents (Contracts) Regulations 2008, and clarify (by regulatory or non-regulatory means) what constitutes ‘filling up’ a contract by estate agents

Option 5B – Repeal provisions for the prescribed standard form contract of sale, and clarify what constitutes ‘filling up’ a contract by estate agents

Option 5C – Repeal the prescribed standard form contract, but prescribe a minimum set of general conditions for inclusion in any contract for residential property sales; and clarify what constitutes ‘filling up’ a contract by estate agents

As we stated in our earlier submission, we believe that mandating a base, 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 to general conditions, 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.

We believe a standard form contract reduces costs to the consumer due to a reduction in the time needed to be spent by the Lawyer or Conveyancer perusing the same.

At the very least, we believe that ‘standard’ general conditions should be legislated. Parties should be free to contract, and so general conditions should continue to be able to be changed by way of (clear) special conditions.

Deposit moneys

Option 6A – Repeal the process for early release of deposits under section 27

Option 6B – Retain early release of deposit moneys, but with amendments to improve and clarify the operation of these provisions

We believe the facility for an early release should be retained. However, objection to release in relation to ‘conditions enuring for the benefit of the purchaser’ should only relate to specific ‘subject to’ conditions such as finance conditions; and not, arguably, conditions such as handing over the property at settlement in the same condition.

A Caveat (other than a Purchaser’s Caveat) can materially affect a seller’s obligation to do all things necessary to enable registration of the purchaser, and so we would be in favour of restricting early deposit release in this circumstance.

Off-the-plan sales

Option 7A – Modernise provisions relating to off-the-plan sales, with some improved protections for buyers and sellers

Option 7B – Modernise provisions relating to off-the-plan sales with improved protections for buyers and sellers, as with option 7A, and increase the deposit cap to 20 per cent for investors purchasing off-the-plan sales

We refer to our earlier submission. If the deposit cap were increased to 20%, the buyer must be made well aware of the minimum deposit they are obliged to pay, which should be retained at 10% to mirror other usual sale of land arrangements. If a deposit in excess of 10% were paid, then consideration needs to be given to the amount forfeited by a buyer through default.

Terms contracts and rent-to-buy arrangements

Option 8 – Prohibit all rent-to-buy arrangements, and the use of terms contracts for residential home ownership sales

We refer to our earlier submission.

We believe there can still be a need for parties to be able to contract on a terms basis. However, the ability for parties to withdraw from what is clearly a ‘cash’ contract, on the basis of a technicality whereby the cash contract ‘converts’ to a non-compliant terms contract, for example purporting to grant possession before settlement, should be removed. We believe this issue might be addressed by determining the minimum contract period needed before a contract can be deemed a ‘terms’ contract, such as 12 months (excluding off-the-plan sales).

Land banking

Option 9 – Amend the Sale of Land Act to require that moneys paid to buy an ‘option’ to purchase land in the future be held in trust and the right to exercise the option be limited as to time

We refer to our earlier submission.

Sale of land and business protections within the Estate Agents Act

Option 10 – Relocate small business statement provisions to the Sale of Land Act, and review to ensure information in the statement is relevant and meaningful

We believe the small business statement should be retained in the Estate Agents Act, and not the Sale of Land Act which concerns the sale of land.

Option 11 – Generalise requirements to provide financial statements so they apply to any person selling land who makes a promise about finance, and relocate these provisions to the Sale of Land Act

We believe these should be retained in the Estate Agents Act, although for clarity the Sale of Land Act should include a reference to that Act and financial statement promises. This would avoid any necessity to update multiple Acts when changes occur.

Modernisation of the Sale of Land Act

Option 12 – Modernise the Sale of Land Act and improve its readability and operation

We refer to our earlier submission.

Dispute resolution

Option 13A – Retain arbitration, but extend VCAT’s jurisdiction for some minor disputes

Option 13B – Remove arbitration and extend VCAT’s jurisdiction for some minor disputes

VCAT would be an appropriate forum for minor disputes in the first instance.

Offences and remedies

Option 14 – Address inconsistencies in terminology relating to remedies under the Sale of Land Act and consider expanding the circumstances under which a seller may argue ‘honest and reasonable mistake’ as a defence

We believe an example of ‘honest and reasonable mistake’ would be not disclosing an overlay or matter affecting the property which is unknown to the seller. This might be the designation that the property is affected by an area of Aboriginal cultural heritage sensitivity – we understand anecdotally that sellers whose properties are affected are, in the majority of cases, if not all, unaware of this until informed by their representative after pre-sale searches are conducted. Not all representatives may conduct the specific pre-sale searches which indicate this overlay, as very rarely does the client wish to outlay more than what s/he views as ‘absolutely necessary’ for vendor’s statement purposes.

Option 15 – Retain offences and review penalties

We agree with the proposal. However, we believe that ‘repeat offenders’ should be liable to a higher penalty than first-time ‘Mum&Dad’ offenders; the latter being those who would likely only be involved in a property transaction once in a 5-10 year period, and who may have offended unintentionally.

Yours faithfully,



(Miss) Roz Curnow

Chief Executive Officer

On behalf of the Council of the Institute

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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.*