Consumer Property Acts Review Options Paper No. 2

Sale of land and business: options for reform

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

Date: **4 May 2017**

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Introduction

In August 2016, the then 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, CAV's Issues Paper 2 on owners corporations and CAV's Issues Paper 3 on the sale of land and business between March and May 2016. In December 2016, the LIV provided comments on CAV's options paper for reform of the *Owners Corporations Act 2006* (Vic).

The LIV welcomes the opportunity to continue its contributions to CAV's review. This submission contains the LIV's response to the options and questions in CAV's paper, *Sale of land and business: options for reform* (Options Paper).

PART A: Sale of land process

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

Provision of estimates of financial liabilities for off-the-plan sales

In its response to question 1 of CAV's Issues Paper 3 on the sale of land and business (Issues Paper 3), the LIV supported introduction of an obligation for vendors 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. Therefore, the LIV supports CAV's proposal in Option 1 to improve pre-sale disclosures by requiring reasonable estimates of financial liabiltites for off-the-plan sales (such as rates, charges and owners corporation fees), but reiterates its view that this obligation should be limited to developments where a prescribed owners corporation will be established. The LIV also refers to its responses below to questions 1 and 2 of the Options Paper.

Disclosure of material facts about a property

The Options Paper suggests that the current provisions and offences regarding misleading and deceptive conduct do not go far enough to ensure that 'estate agents and others engaged in the sale of property have a legal obligation to disclose to prospective purchasers material facts about a property'; that is, facts that would be important to a reasonable person in deciding whether or not to proceed with a particular transaction.

As stated in its response to question 3 of Issues Paper 3, the LIV considers that the existing legislative provisions regarding misleading and deceptive conduct are adequate. The LIV is concerned that a positive obligation to 'disclose material facts' about a property will be very subjective, even if there are guidelines. There are many issues for consideration and elements of subjectivity, such as:

- what might disturb one purchaser might not disturb another;
- past associations are unlikely to impinge upon the actual usability of the property for the purpose for which it was purchased;
- a notorious crime should already have been factored into the market price, which then leads to the question as to the appropriate due diligence that a purchaser should undertake;
- should the distinction be between a crime and other 'unsavoury' circumstances? What happens if there was no crime or circumstance occurring at the property, but it was previously occupied by someone particularly 'unsavoury'?;
- where does one draw the line at the type, nature and impact of the crime or circumstances? Must it be 'notorious' or is an 'unexceptional' example of the same crime different? Where should the line be drawn between murder, manslaughter, assault or domestic violence or other such crimes?;
- how long ago did the event occur? For example, an event that occurred decades ago might lessen its significance for both the vendor and the purchaser;
- would it be relevant that a property may have been on an ancient burial site or be a former institutional building where historic unacceptable behaviour has occurred? For example, should the apartment owners in the former Kew Insane Asylum be forced to disclose what were historically accepted and lawful treatment of inmates which are not be acceptable by today's standards?; and
- what happens if the vendor did not know about the event, but should have because of its notoriety? In this regard, a requirement to 'disclose material facts' appears to compel a vendor to undertake a purchaser's due diligence. There are many circumstances where what is a 'material non-disclosure' on behalf of one vendor would not be a material non-disclosure by another vendor, but the end result for the purchaser of not knowing about the information would be the same. The LIV queries why a purchaser's lack of due diligence should be excused in one circumstance but not the other.

The LIV submits that a requirement for a vendor to disclose material facts about a property displaces the *caveat emptor* buyer beware principle that historically underpins Victorian property sales.

The LIV is also concerned that the requirement will lead to purchasers threatening litigation to re-negotiate issues with which they are unhappy, and not necessarily because of the subject matter of the 'material non-disclosure'.

The LIV also notes that CAV's 2012 review of section 32 of the Act considered the extent to which notices and orders should be disclosed in a vendor's statement. Section 32D(a) now provides that they only need to be disclosed if they affect the land both directly and currently. It would be inconsistent to require a greater degree of disclosure in relation to other matters that may or may not be "material".

The LIV, therefore, does not support this aspect of Option 1.

1 Are there any material obstacles to a seller complying with the proposed pre-sale requirement to provide prospective buyers with an estimate of financial liabilities applying to a lot in an off-the-plan sale?

In the experience of LIV members, vendors / developers prepare information well in advance of sales campaigns and of settlement, and it is likely that there will be between eighteen months to three years between preparation of an estimate of financial liabilities and settlement. This may hinder the accuracy of the estimate. However, the LIV notes in the Options Paper that CAV proposes that the estimates be based on costs at the time the contract is entered into. The LIV suggests that information about this could be included in the Due Diligence Checklist.

The LIV also notes that a number of financial liabilities are beyond the control of the vendor / developer, such as increases in land tax, rates and and taxes or alterations in the way they are levied. This can also affect the accuracy of the estimate.

2 What should be the consequences for sellers who fail to provide reasonable estimates of financial liabilities? For example, should buyers be entitled to compensation?

The LIV reiterates its view that the obligation to provide reasonable estimates of financial liabilties should be limited to developments where a prescribed owners corporation will be established.

Where a vendor / developer fails to provide the estimates, the LIV supports introduction of a modest penalty coupled with a purchaser's entitlement to sue for loss.

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

In its response to questions 3 and 4 of Issues Paper 3, the LIV stated that the existing legislative provisions regarding misleading and deceptive conduct are adequate, but that any duplication regarding such offences should be addressed. The LIV, therefore, supports Option 2 which aims to ensure greater consistency in the use of language and concepts across the legislation dealing with misleading and deceptive conduct.

Auctions

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

In its response to question 10 of Issues Paper 3, the LIV agreed that the various issues regarding online auctions detailed in Issues Paper 3 need to be addressed, 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.

The LIV, therefore, supports Option 3, which proposes amendment to the Act to clarify that existing provisions relating to auctions, including offences, apply to online auctions.

The LIV also submits that these provisions should extend to informal bidding arrangements such as "boardroom auctions" and "kitchen auctions".The LIV recognises, however, that there are also other situations which would not be protected if such changes were made, such as where there is no contemporaneous meeting (physically or on-line) but an estate agent seeks to extract higher offers or bids from prospective purchasers by asserting that higher offers have been received.

3 What additional requirements, if any, might be appropriate for online auctions, and why? Should there be a requirement to verify the identity of bidders in online auctions prior to commencement, for example?

The LIV submits that verification of identity of bidders should not be mandatory for online auctions. By analogy, there is no such requirement for physical auctions. With a physical auction, the bona fides of a bidder are immediately confirmed when/if they pay a deposit. If they do not, there are various remedies and the property can be re-submitted for sale. An online auction does not appear to be materially different.

As a matter of practicality, the business model of an online auction provider would presumably need to address this issue before it becomes widely used by vendors, and would likely require bidders to prequalify, provide verification of identity and/or to have immediately available cleared funds for a deposit. Therefore, the LIV does not consider that regulation is necessary.

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

In its response to question 14 of Issues Paper 3, the LIV indicated that there should not be regulation prohibiting the holding of public auctions on ANZAC Day and that estate agents should be able to adopt a common sense approach regarding appropriate (and inappropriate) days to hold auctions. The LIV maintains this position and, therefore, does not support Option 4.

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

The LIV does not support Option 5A in relation to retention of the standard contract of sale prescribed by the Estate Agents (Contracts) Regulations 2008. The LIV notes that having a prescribed contract can impede updating of the LIV / REIV standard form of contract, as amendments to general conditions in the LIV / REIV standard form contract need to be made via special conditions before they can be incorporated into prescribed general conditions. These amendments are prepared by the LIV and the REIV in response to feedback from lawyers, conveyancers and estate agents as conveyancing practice evolves.

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

Repeal provisions for the prescribed standard form contract of sale

The Issues Paper provides that under Option 5B, the contract for the sale of real estate prescribed under the Estate Agents (Contracts) Regulations 2008 would be repealed on the basis that the prescribed contract is of limited value, as estate agents have access to the standard form of contract prepared by the LIV and the REIV as well as contracts prepared by legal practitioners and licensed conveyancers.

The LIV supports continuation of a standard form of contract (such as that prepared by the LIV and the REIV) as it reduces transaction time and cost in the majority of instances. As stated above, having a prescribed contract can impede updating of the LIV / REIV standard form of contract as amendments to general conditions in the LIV / REIV standard form contract need to be made via special conditions.

The LIV, therefore, supports the repeal of provisions for the prescribed standard form contract of sale proposed under Option 5B.

Clarify what constitutes 'filling up' a contract by estate agents

Under s53A of the *Estate Agents Act 1980* (Vic), estate agents can 'fill out':

- a standard form contract permitted by the Estate Agents (Contracts) Regulations 2008;
- a standard form contract approved by the Victorian Legal Services Commissioner or the LIV (as a local professional association within the meaning of the *Legal Profession Uniform Law Application Act 2014* (Vic));
- a contract prepared by an Australian legal practitioner; or
- a contract prepared by a licensed conveyancer.

The LIV agrees that estate agents should be confined to 'filling out' the administrative details of the sale, and should not be entitled to draft special conditions or to remove or amend conditions that were originally inserted by a lawyer or a conveyancer.

The LIV supports the aspect of Option 5B which proposes clarification, through regulatory or non-regulatory means, as to what constitutes 'filling up' a contract.

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

The Options Paper indicates that Option 5C would mandate, through regulation, conditions that would apply to all residential contracts of sale, which could not be altered through the use of special conditions.

In its response to question 20 of Issues Paper 3, the LIV stated that market forces and a 'common sense' approach should dictate the type of special conditions (including onerous special conditions) in contracts. The LIV does not support restrictions on amending general conditions. The LIV considers that the LIV / REIV contract of sale represents an accepted baseline risk profile which is the starting point for negotiations, but is not always accepted as the sole 'fair' risk profile. Parties should not be impeded from negotiating the conditions of a contract of sale, including the general conditions.

The LIV also notes that there is an almost infinite variety of properties and situations for which contracts of sale must cater and that, although a standard form can deal with the vast majority, there needs to be flexibility to deal with the unusual.

Therefore, the LIV does not support the prescription of a minimum set of general conditions proposed by Option 5C.

4 What are the benefits and risks of options 5A, 5B and 5C relating to standard form contracts of sale? For example, could repealing the prescribed standard form contract of sale result in an increase in the cost of the standard form contract prepared and endorsed by professional bodies?

The LIV refers to its comments above in relation to Options 5A, 5B and 5C.

In relation to repeal of the prescribed standard form contract of sale, the LIV does not consider that this will result in an increase in the LIV's selling price of the standard form contract prepared and endorsed by the LIV and the REIV. The LIV has not sought the views of the REIV about any impact on the REIV's selling price of the LIV / REIV contract of sale if the prescribed standard form contract of sale is repealed.

5 If option 5C was adopted, what general conditions might be appropriate to apply to all real estate contracts, industry wide, without modification? Are there any circumstances in which it would be appropriate to negotiate every aspect of a real estate contract (with commercially sophisticated parties, for example)?

The LIV refers to its comments above regarding Option 5C. Other than the obligation to provide clear title at settlement, the LIV does not consider that there are any general conditions that might be appropriate to apply to all real estate contracts, industry-wide, without modification. The range of properties and circumstances of vendors and purchasers are such that all general conditions are subject to negotiation and amendment.

As to whether there are any circumstances in which it would be appropriate to negotiate every aspect of a real estate contract, some LIV members have indicated that it is common to negotiate most parts of high value commercial and residential contracts. This is a process that often takes weeks or months.

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

In its response to question 26 of Issues Paper 3, the LIV indicated that there is divided opinion amongst LIV members about the continued need for early release provisions. The LIV, therefore, does not have a position regarding adoption of either Option 6A or Option 6B.

The LIV further stated that if there continues to be scope for early release of deposit:

- 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.

The LIV reiterates this view.

6 If early release of deposits was abolished, what would be an appropriate length of time to transition to the new arrangements, and why?

If early release of deposits is abolished, the LIV suggests that six months would be an appropriate length of time to transition to the new arrangements. This appears to be adequate to enable education of estate agents, legal practitioners and licensing conveyancers about the changes.

Also, the LIV considers that the change should only apply to Contracts of Sale entered into **after** the expiry of the transition period.

7 In relation to option 6B:

(a) Are there any additional or alternative amendments that would improve the operation of section 27?

The LIV refers to its respose to question 26 of Issues Paper 3 and also its comments above in relation to Options 6A and 6B.

The LIV also considers that if section 27 is to remain, it would be beneficial for s27(6) to specify the time frame that applies for the release of the deposit where a purchaser's grounds for objection to the particulars provided is satisfied by the vendor – does time continue to run, does it re-commence? The LIV also suggests that the section should set out what are the next steps if the purchaser gives notice that the purchaser is not satisfied with the particulars. As the legislation stands, the purchaser may state that it is not satisfied for reasons that are not justified and the deposit will not be released.

(b) What are the strengths and weaknesses of the proposal that any property with a caveat over it (with the exception of a purchaser's caveat) should be precluded from early release of the deposit?

The LIV does not support a proposal that any property with a caveat over it be precluded from early release of the deposit. The LIV considers that it would be difficult to draw legislated distinctions between particular types of caveats. For example, it is quite common for easements and leases to be caveated, and these do not interfere with the sale process or have an impact on the fundamentals of the current entitlement to a deposit. It is quite likely that other caveatable interest occupy this 'non-threatening' category. Given that the range of caveatable interests is not closed at law, it appears that it would be difficult to appropriately legislate on this.

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

Off-the-plan sales

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

The LIV supports the modernising of provisions relating to off-the-plan sales with some some improved protections for buyers. However, it also favours the increase of the deposit cap to 20 per cent for investors purchasing off-the-plan sales, so prefers Option 7B to Option 7A.

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

The LIV refers to its comments above regarding Option 7A.

8 In relation to option 7A, what might be an appropriate timeframe for a buyer to end an off-the-plan sale after being advised of an amendment to the plan of subdivision?

In its response to question 46 of Issues Paper 3, the LIV indicated support for the existing limited time period of 14 days from receipt of an amendment for purchasers to terminate the contract of sale following an amendment to the plan of subdivision. However, this is strictly on the basis that the vendor has provided a summary of the material changes (including changes to areas or measurements) together with a revised plan of subdivision. The LIV suggested in its response to question 42 of the Issues Paper 3 that this could be done by way of the surveyor providing an overlay plan and a summary of all changes made.

If a summary of material changes and a revised plan of subdivision is not provided by the vendor, the LIV considers that the purchaser should have 30 days to end an off-the-plan sale after being advised of an amendment to the plan of subdivision. This will ensure that the purchaser can seek appropriate legal and survey advice.

9 In relation to option 7B:

(a) Can you identify any impacts of increasing the deposit cap to 20 per cent for investors or owner-occupiers buying off-the-plan property?

The LIV considers that increasing the deposit cap to 20 per cent for owner-occupier purchasers buying off-the-plan property would unfairly disadvantage those purchasers if a dispute arises during the conveyancing transaction. Therefore, the LIV does not support increasing the deposit cap to 20 per cent for owner-occupiers.

The LIV supports increasing the deposit cap to 20 per cent for investors in principle, but suggests that the following potential consequences warrant consideration:

- the detriment to small investors, who might not appreciate the significant time period between the delivery date promised by a developer during marketing and the actual delivery date. Having a 20 per cent deposit (rather than a 10 per cent deposit) locked up for a number of years can have significant cash flow and other implications for small investors;
- the proposal assumes that it is easy to distinguish between someone who is an investor and an owner-occupier where the purchaser is an individual. In reality, the purchaser may not have formed the intention at the date of purchase and there are many legitimate reasons why a purchaser may change its mind during the course of lengthy construction;
- presumably, the onus will be on the vendor to determine whether the purchaser is an investor or an owner-occupier and the vendor would presumably require a warranty from the purchaser in the contract. The LIV considers it unlikely that an investor would elect to warrant that they are an investor in many circumstances (particularly if they have a legitimate expectation that they may change their minds). Therefore, the level of investors in a development is likely to be understated. This would not deliver the financing benefits assumed under the proposal and could increase the financing risk if the developers and their financiers do not have a clear picture of which 'owner occupiers' may in fact be (or become) 'investors'; and
- a market norm of a 20 per cent deposit for investors could reduce the ability of a vendor to obtain finance. The market for '20 per cent investors' is presumably thinner than the market for '10% investors', even though the 10 per cent investors may actually be as committed to the purchase and as solvent as the 20 per cent investors. The likely effect is to make marginal developments even more marginal which may affect other government policy goals such as the supply of new housing.

The LIV considers that if a 20 per cent cap is introduced then the legislation will need to take into account what percentage of the deposit will be forfeited to the vendor if the purchaser defaults under the contract. It is usually accepted that it is reasonable for a 10 per cent deposit to be forfeited to the vendor, however, the LIV submits that it would be onerous on a purchaser to forfeit 20 per cent.

(b) What should be the penalty for a developer who accepts a deposit of more than 10 per cent from an owner-occupier buyer of property?

The LIV considers that a purchaser should be entitled to call for immediate restitution of the margin beyond 10 per cent. If the vendor fails to refund the difference within a certain timeframe, the purchaser should be entitled to terminate the contract.

(c) To what extent would increasing the deposit cap to 20 per cent for investors increase the ability of developers to raise finance for the development?

This question is beyond the scope of experience of the LIV and its members.

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

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

The LIV does not support a complete prohibition of terms contracts for residential home ownership sales. The LIV refers to its response to question 54 of Issues Paper 3, in which the LIV stated that there should be exemptions for high-value contracts and contracts less than 12 months. The LIV refers to its 18 June 2013 submission 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 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.*

The LIV reiterates this position.

10 Are there potential risks with prohibiting all rent-to-buy arrangements and the use of terms contracts for residential property sales, and how might they be mitigated?

In its response to question 57 of Issues Paper 3, the LIV indicated that its members have not had significant experience with rent-to-buy contracts. However, it suggested that similar protections to those conferred on purchasers under terms contracts are required for tenants/purchasers under rent-to-buy contracts. This is on the basis that it is arguable that rent-to-buy contracts are intended to circumvent the terms contract provisions and, therefore, require regulation.

11 Should commercial property sales be exempt from any of the terms contract provisions in the Sale of Land Act? If so, which provisions and on what basis?

The LIV refers to its response to its comments above in relation to Option 8.

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

The LIV does not support Option 9 and the proposed amendment of the 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. LIV members indicate that options to purchase are regularly used for legitimate commercial reasons, including tax planning, cash flow planning, and to allow for contractual pre-conditions like obtaining development approvals. The LIV is concerned that any reform will result in inadvertent regulation of what is current, widespread and unexceptional market practice.

12 Does this option address the key risks of land banking schemes for buyers? If not, what other protections should be considered?

The LIV does not consider that Option 9 addresses the key risks of land banking schemes for purchasers on the basis that purchasers are often developers. Such developers will usually seek financial and legal advice before entering into this type of transaction.

While most options relate to commercial property, they regularly apply to residential property, particularly where:

- the purchase of a residence is contingent on the purchaser/developer obtaining development and other regulatory approvals;
- it is part of a plan for a larger site aggregation play; or
- where one of the parties wants certainty of availability for purchase, but needs to move the actual sale to a different time period (for example, a different financial year).

The LIV acknowledges that there may be a category of sub-investors entering into financial arrangements regarding land who require protection (such as in relation to schemes offered by Henry Kaye), but this should be treated as distinct to 'option agreements'. The LIV submits that amending the Act would not be an appropriate solution to this issue.

Despite the above, consideration could be given to New South Wales legislation which requires certain residential purchasers to be given the opportunity to cool off or obtain legal advice before they are bound to an option agreement involving residential land (sections 66ZH and 66ZF of the *Conveyancing Act 1919* (NSW)).

13 What should be the time limit on the duration of an option agreement?

Having regard to its comments above, the LIV does not support any time limit on the duration of an option agreement.

14 Can you identify any unintended consequences of proceeding with this option?

The LIV refers to its comments above regarding Option 9 and its response to question 12.

PART D: 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

Relocate small business statement provisions to the Sale of Land Act
The LIV does not support relocation of the small business statement provisions to the Sale of Land Act on the basis that the sale of business process does not appear to have any relevance to the sale of land.

Review the statement to ensure that information is relevant and meaningful
The LIV supports this aspect of Option 10, and agrees that existing elements of due diligence could be enhanced as well as consequences of non-disclosure.

15 If this option is adopted, how might the small business statement be improved to make it relevant and useful to buyers, while being reasonable for a seller to prepare?

The LIV refers to its comments above regarding Option 10.

The LIV considers that the small business statement remains an important part of the transaction process, not only to ensure consumer protection for purchasers of small businesses, but also to provide vendors with protection against potential claims under the Australian Consumer Law if they have properly discharged their disclosure obligations.

16 Should requirements to provide a small business statement continue to apply only for businesses valued at up to $350,000? If not, what threshold would be more appropriate?

The LIV submits that the current threshold amount of $350,000 is too low. In the experience of LIV members, it is very rare for a business these days to be valued below $350,000. The LIV suggests that a threshold of $500,000 could be explored.

17 Are there any risks of unintended consequences associated with relocating provisions for the small business statement into the Sale of Land Act?

The LIV refers to its comments above regarding Option 10. As an alternative to introducing specific legislation regarding the sale of business, the LIV considers that the provisions should remain in the *Estate Agents Act 1980* under a 'Sale of Business' division.

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

Representations about the availability of finance appear to be no different to representations about the performance characteristics of the subject land or business. The LIV suggests that in both cases, if misleading or deceptive representations cause loss or damage, prospective purchasers should have remedies at law. As stated in its response to question 3 of Issues Paper 3, the LIV considers that the existing legislative provisions regarding misleading and deceptive conduct are adequate.

LIV members can recall few, if any, situations where:

- proving that such representations were made was assisted by a statement given under section 51 of the *Estate Agents Act* 1980; and
- an estate agent or its representative was prosecuted for offering finance without supplying a complying s51 statement.

Unless such situations do occur, section 51 appears to be superfluous.

18 Are there any alternative ways of ensuring buyers are well-informed about representations about finance made by estate agents, builders, or other people involved in the sale of land?

The LIV refers to its comments above in relation to option 11.

19 Are there any risks associated with relocating these provisions into the Sale of Land Act, and broadening their application to any person selling land who makes promises with respect to finance? If so, how might these risks be addressed?

The LIV refers to its comments above in relation to option 11.

PART E: Modernisation of the Sale of Land Act

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

The LIV supports Option 12.

20 Are there any potentially redundant or out of date provisions in the Sale of Land Act that should be considered for repeal or amendment?

The LIV considers that the amendments made to section 32 of the Act effected by the *Sale of Land Amendment Act 2014* evidence the need to revise the Act to remove duplication of definitions.

PART F: Dispute resolution, offences and remedies

Dispute resolution

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

In its response to question 68 of Issues Paper 3, the LIV indicated that the arbitration system under the Act has been rarely, if ever, used. The LIV, therefore, suggested that Part 1, Division 2 of the Act (which deals with arbitrators) should be abolished, and that the types of disputes regarding where arbitrators now have powers to make determinations should instead be dealt with by VCAT.

The LIV maintains this view.

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

The LIV refers to its comments above in relation to Option 13A and supports Option 13B, subject to its comments below.

21 What would be the advantages and disadvantages of expanding VCAT's jurisdiction to consider a range of minor disputes under the Sale of Land Act?

In its response to question 69 of Issues Paper 3, the LIV suggested that a specialist property division or panel at VCAT be established to undertake an arbitration and determination role in relation to all sale of land disputes in the first instance. The LIV considers that this represents a speedy and cost-effective way to deal with sale of land disputes.

The LIV notes, however, that by conferring such jurisdiction on VCAT in the interest of promoting access to justice, there is a danger of a proliferation of disputes where the amount or other subject of the

dispute would otherwise have counselled against taking the matter further. Appropriate steps would be required such as setting hearing fees, limiting the length of hearings or requiring payments into trust prior to hearings.

At the other end of the scale, where the subject matter of the dispute is substantial, VCAT's jurisdiction should not preclude a subsequent hearing *de novo* by the Courts.

22 What might constitute a 'minor dispute' under the Sale of Land Act capable of being resolved by VCAT?

The LIV suggests that all sale of land disputes could be heard by VCAT, provided that there are no restrictions on either party electing to take a matter before the courts. As such, complex matters can be heard by the courts, if a party consider that this is desirable.

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

Address inconsistences in terminology relating to remedies under the Act

The LIV supports this aspect of Option 14, which proposes that the terminology relating to remedies be reviewed to ensure consistency and clarity.

Expansion of circumstances under which a seller may argue 'honest and reasonable mistake' as a defence

The LIV does not agree that the circumstances under which a vendor may argue 'honest and reasonable mistake' as a defence should be expanded. The LIV considers that section 32K of the Act is sufficient in terms of where the vendor has acted 'honestly and reasonably', and also ensures that purchasers are protected if they suffer a significant loss or disadvantage as a result of the vendor's breach (regardless of whether it was caused by an honest and reasonable mistake by the vendor).

23 Can you provide examples of specific provisions in the Sale of Land Act under which a seller should be able to argue honest and reasonable mistake as a defence to a breach in the circumstances described in option 14?

The LIV refers to its comments regarding Option 14.

Option 15 – Retain offences and review penalties

The LIV supports option 15, which proposes review of the penalties attached to offences, as they have not been reviewed for some time.