

27 April 2017

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Via email: [Simon.Cohen@justice.vic.gov.au](mailto:Simon.Cohen@justice.vic.gov.au)

Dear Simon

**Consumer Property Law Review – Sale of land and business: options for reform – Tribunal submission**

Thank you for the opportunity to respond to the options paper, Sale of land and business: options for reform (Options Paper).

I enclose *Tribunal Response – Sale of land and business: options for reform*. It addresses section 1.1 and questions 21 and 22 in the Options Paper, as these raised jurisdictional, procedural and/or substantive issues affecting VCAT. The Tribunal does not ordinarily comment on policy matters more properly the domain of Government or the Department.

Yours faithfully,



**Justice Greg Garde AO RFD**  
President

Attachment: Tribunal Response - *Sale of land and business: options for reform*.

## **Tribunal Response – Sale of land and business: options for reform**

### **Section 1.1 – Pre-sale information**

The Tribunal referred in its response to question 6 of the *Sale of Land and Business Issues Paper* (Issues Paper), that s 32 of the *Sale of Land Act 1962* (SoL Act) should be amended to require a vendor to disclose the following:

- Any current/unresolved claims against the builder for defective building works.
- The resolution of any prior building disputes/claims including details of:
  - any claims against the builder for defective building works, including any settlement or judgment,
  - the existence of any releases and continuing rights against the builder,
  - any claims on the warranty insurance, and
  - whether the maximum amount for all claims on the warranty insurance has been reached and/or the balance remaining on the policy for future claims.

In the Tribunal's Building and Property List (BPL), a refusal by the owner of a property to agree in a settlement agreement (commonly known as Terms of Settlement) to disclose the above information in a future s 32 statement (should the property be sold), will inhibit a builder from settling a building dispute at VCAT as a result of a mediation or compulsory conference. A subsequent owner of the property has the same rights as the previous owner to sue the builder. The builder requires the owner to disclose this information, so as to inform a future owner of the position. This may affect the builder's liability for claims for building defects by a subsequent owner of the property.

Generally, a mediation or compulsory conference is conducted in private. Evidence of anything said or done in the course of a mediation or compulsory conference is inadmissible in any hearing before the Tribunal in the proceeding, except in limited circumstances.<sup>1</sup> A settlement agreement may also be subject to a confidentiality requirement. To promote the resolution of building disputes at VCAT through Alternative Dispute Resolution (ADR), consideration should be given to broadening the scope of any amendments to s 32 of the SoL Act, to include information concerning building disputes/claims.

### **Question 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?**

The Tribunal welcomes the expansion of its jurisdiction under the SoL Act as it would clarify VCAT's jurisdiction to deal with disputes concerning the sale of land and overcome the current constraints of the *Australian Consumer Law (Victoria)* (ACLV) and the *Australian Consumer Law and Fair Trading Act 2012* (ACLFT Act). The Tribunal noted in its response to questions 3 and 7 of the Issues Paper the jurisdictional issues that arise under the ACLV and the ACLFT Act. Disputes concerning contraventions of the SoL Act are often tied in with domestic building disputes, so it is highly desirable for all related matters to be heard and determined at the same time.

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<sup>1</sup> Sections 85 and 92 of the *Victorian Civil and Administrative Tribunal Act 1998*.

To improve the community's access to justice, consideration should be given to expanding VCAT's jurisdiction under the SoL Act beyond minor disputes, to include all disputes and irrespective of whether or not the transaction or conduct occurred 'in trade or commerce' (as required under the ACLFT Act). The SoL Act does not address off-the-plan sales of high rise apartments, so any amending or new legislation to expand the Tribunal's jurisdiction should include provisions to deal with the sale of off-the-plan sales apartments.

The Tribunal provides parties with a less formal; less expensive; and more efficient dispute resolution service. VCAT employs ADR wherever possible. Division 5 of Part 4 to the *Victorian Civil and Administrative Tribunal Act 1998* (VCAT Act) contains provisions in relation to mediation and compulsory conferencing. Compulsory conferencing allows the Tribunal member to take a proactive role which tends to facilitate the resolution of disputes. Even if not successful in resolving a dispute, ADR may assist in reducing the complexities and often leads to shorter, more efficient VCAT proceedings. ADR at VCAT is provided free of charge to parties, whereas Court directed ADR usually requires parties to bear the costs of retaining a mediator, including any fee for mediation rooms. This is in addition to the parties' legal costs of the mediation. VCAT fees are lower, in comparison to the courts. Fee relief is available to applicants experiencing financial hardship. A holder of a Commonwealth Health Care Card is automatically eligible to pay a concession fee and an application may be made to waive, reduce or postpone fees.

As to the proposal in Option 13A to retain arbitration for certain disputes under the SoL Act, the Tribunal's response to question 69 of the Issues Paper, outlines the expense and limited benefit of arbitration for a narrow band of disputes under the SoL Act. For practical and cost reduction reasons, VCAT supports Option 13B.

Additional resources will be required to support any expansion of VCAT's jurisdiction under the SoL Act.

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

When considering the scope of a 'minor dispute' and how to define it in any amending or new legislation, the Tribunal notes the following:

- VCAT has an unlimited monetary jurisdiction in the Civil Claims List. There is also no monetary limit in the BPL for building disputes.
- Defective works in an apartment building can result in multimillion dollar claims.
- Any monetary limit should not be set too low. To protect against the need for further legislative change and to keep pace with increasing property values, consideration should be given to expressing the amount in dispute in monetary units rather than a figure.
- The VCAT case of *Keogh v John Kennedy Real Estate Pty Ltd*<sup>2</sup> which concerned a purchaser's claim against an estate agent on the ground of misleading conduct and was highlighted in the Tribunal's response to question 7 of the Issues Paper, concerned a claim for loss and damage of about \$310 000.

The Tribunal's preference is that it have an unlimited monetary jurisdiction under the SoL Act. Alternatively, the median price of a house in Melbourne or a proportion of the median price (for example, 50 per cent) could be used as a guide for setting a monetary limit. In the three months to 31 March 2017, the current median price of a house in Melbourne is \$826 000.<sup>3</sup>

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<sup>2</sup> [2015] VCAT 1471.

<sup>3</sup> Real Estate Institute of Victoria Ltd., *Perfect Storm Delivers Strongest Quarterly Increase in Four Years*  
<https://www.reiv.com.au/property-data/median-prices>.