

Consumer Property Law Review

# Estate agents and conveyancers: options for reform



## About the Consumer Property Law Review

The Consumer Property Law Review (the review) is examining four key pieces of consumer property legislation: the *Sale of Land Act 1962* (Sale of Land Act), the *Estate Agents Act 1980* (Estate Agents Act), the *Conveyancers Act 2006* and the *Owners Corporations Act 2006* (Owners Corporations Act).

The terms of reference for the review are to:

- assess the four Acts to identify improvements that could be made to the legislation, having regard to the experiences of stakeholders and to developments that have taken place since each of the Acts came into operation
- 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 the legislative arrangements set in place by these Acts.

Between December 2015 and April 2016, Consumer Affairs Victoria (CAV) released three issues papers as part of the review. The issues papers covered:

- licensing and conduct of estate agents, conveyancers and owners corporation managers and the institutional and regulatory arrangements that govern those licensing schemes (Issues Paper 1)
- owners corporations, specifically issues identified with the creation, functions and operation of owners corporations (Issues Paper 2), and
- the sale of land and business, specifically issues identified with the Sale of Land Act, including pre-contractual issues and contracts of sale (Issues Paper 3).

Options for reform of the Owners Corporation Act were released for public consultation in November 2016. The options identified responded to feedback on Part B of Issues Paper 1, and all of Issues Paper 2. That options paper received 100 submissions, which are currently being considered.

An options paper responding to feedback received in response to Issues Paper 3 and covering possible reforms to the Sale of Land Act was released for public consultation on 24 March 2017, and can be found on the [Consumer Property Law Review section of the Consumer Affairs Victoria website](http://www.consumer.vic.gov.au/consumerpropertylawreview) <[www.consumer.vic.gov.au/consumerpropertylawreview](http://www.consumer.vic.gov.au/consumerpropertylawreview)>.

Options for reform of the Estate Agents Act and Conveyancers Act set out in this options paper respond to feedback received in response to Part A of Issues Paper 1.

Submissions received on all the options papers released as part of the review will inform the government in determining the final suite of legislative reforms to the Acts under review. Amendments to the Sale of Land Act, Estate Agents Act, Conveyancers Act and Owners Corporation Act are proposed to be considered by Parliament in 2018.

## How to get involved?

We invite your views and comments on the potential options outlined in this paper.

Until **16 May 2017** you can make a submission:

**By mail:**

Consumer Property Law Review  
Policy and Legislation Branch  
Consumer Affairs Victoria  
GPO Box 123  
Melbourne VIC 3001

**By email:**

[consumerpropertylawreview@justice.vic.gov.au](mailto:consumerpropertylawreview@justice.vic.gov.au)

Unless you label your submission as confidential, your submission or its contents will be made publicly available in this and any subsequent review process. Submissions may be subject to Freedom of Information and other laws. CAV reserves the right to not publish information that could be seen to be defamatory or discriminatory.

## Glossary

ACL	Australian Consumer Law
BLA	Business Licensing Authority
CAV	Consumer Affairs Victoria
EAC	Estate Agents Council
OIEC	Officer in Effective Control
RTO	Registered Training Organisation
VCAT	Victorian Civil and Administrative Tribunal
VPF	Victorian Property Fund

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## Executive summary

Over 70 submissions were received in response to Issues Paper 1, *Conduct and institutional arrangements: estate agents, conveyancers and owners corporation managers*, which was released in December 2015 as part of the Consumer Property Law Review.

Feedback from stakeholders confirmed that there are significant opportunities to improve, clarify and modernise the Estate Agents Act. The Conveyancers Act, although structurally sound, could also benefit from some targeted amendments.

Stakeholders were particularly concerned about the training standards and work experience requirements required of applicants for estate agents' and conveyancers' licences, and the current system for disciplining licensees who engage in poor professional conduct. Significant feedback was also received on the application of consumer protection provisions in the Estate Agents Act to professional property developers, and on the issue of conveyancers paying referral fees to third parties in return for client referrals.

This paper presents a package of reform options addressing these, and other, issues. Options for reform are proposed in areas including:

- the definitions of 'estate agent' and 'conveyancing business'
- training, work experience and professional development requirements for estate agents and conveyancers
- conduct requirements for estate agents and conveyancers
- compliance measures
- trust account provisions
- administrative and institutional arrangements, and
- general modernisations.

For many issues, alternative options are presented. In other cases, a stand-alone option (or options) dealing with a single issue is presented.

Feedback is sought on these options, and related questions. It would also be helpful for any unintended consequences to be identified. If the status quo is preferred on any issue, views are sought on the rationale for that position. Evidence that supports or refutes a particular option or position would be particularly welcomed.

There are some issues that were canvassed in Issues Paper 1 for which no options have been developed. This is generally because, on balance, regulatory reform does not appear to be justified. Where stakeholders identified potential technical and drafting improvements, these have been noted and will be considered further.

# List of options and consultation questions

## Definitions

### Option 1 – Modernise and revise the definition of ‘estate agent’

#### Question

- 1 What other issues should be addressed in the revised definition of estate agent, and what is your evidence of the issue?

### Option 2 – Remove the definition of ‘conveyancing business’

#### Questions

- 2 Should section 4 of the Conveyancers Act be amended to clarify that ‘conveyancing work’ does not include legal work carried out for the purpose of preparing powers of attorney? Is there any other work that conveyancers should not be permitted to carry out?
- 3 Should conveyancers be permitted to lodge adverse possession applications under the *Transfer of Land Act 1958*?

## Training and work experience

### Estate agents

#### Option 3 – New licence categories with varying training and work experience standards

#### Option 4A – Increase training standards for agents’ representatives

#### Option 4B – Confine the role of an agent’s representative

#### Option 4C – Abolish agents’ representatives and provide an alternative work experience pathway

#### Questions

- 4 What would be the costs to industry of requiring all licensees in charge to undertake additional training, as proposed by option 3?
- 5 What transitional period do you think would be appropriate to provide estate agents who will need to apply for estate agent (licensee in charge) licences to undertake the additional 2 units of competency required to obtain a Diploma in Property Services (Agency Management)?
- 6 Which of options 4A, 4B and 4C is the best approach to address issues associated with agents’ representatives?
- 7 Are agents’ representatives likely to experience any difficulties getting their employers to attest to their having achieved core work experience competencies?

### Conveyancers

#### Option 5 – Increase training standards and strengthen work experience requirements

#### Questions

- 8 In addition to the eight units of competency currently prescribed for conveyancers, what additional competencies should prospective licensees be required to complete, as part of an Advanced Diploma?
- 9 What areas of competency should licence applicants be required to provide evidence of, to meet work experience requirements?

## Continuing professional development

**Option 6A – Mandate continuing professional development for estate agents, agents’ representatives and conveyancers**

**Option 6B – Deliver an ongoing and targeted information and training program for estate agents, agents’ representatives and conveyancers, in partnership with industry associations**

## Ineligibility and disqualification criteria

**Option 7 – Strengthen ineligibility and disqualification criteria in the Estate Agents and Conveyancers Acts**

## Permission application process

**Option 8 – Tighten threshold requirements for permission applications under the Estate Agents Act and Conveyancers Act**

### *Question*

- 10 Are there additional circumstances (other than those proposed in option 8) in which estate agents, agents’ representatives and conveyancers should be restricted from applying for permission to be licensed or employed?

## Professional indemnity insurance

**Option 9A – Require conveyancers to hold professional indemnity insurance in order to practise**

**Option 9B – Require conveyancers and estate agents to hold professional indemnity insurance in order to practise**

**Option 9C – Require conveyancers and estate agents to obtain professional indemnity insurance in order to be eligible to be licensed**

### *Question*

- 11 What is the appropriate level of monetary coverage for any one claim that should be specified for professional indemnity insurance for estate agents?

## Office management

**Option 10 – Amend the Estate Agents Act and Conveyancers Act to facilitate remote supervision of estate agencies and conveyancing businesses**

### *Question*

- 12 Are there any specific risks associated with removing requirements for physical supervision of an estate agency or conveyancing business that should be addressed?

## Officers in effective control (Estate Agents Act)

**Option 11 – Strengthen the duties of those who run estate agency businesses, require an outgoing OIEC to be replaced within 30 days and introduce the capacity to suspend a licence where an outgoing OIEC is not replaced**

## Licensing issues specific to conveyancers

### Option 12 – Establish a voluntary licence suspension process

#### Question

13 Is the three year timeframe proposed by option 12 appropriate, or do you have an alternative suggestion?

### Option 13 – Amend the Conveyancers Act to provide for automatic licence cancellation following non-payment of annual fee and failure to provide annual statements

## Roles and responsibilities of estate agents

### Option 14 – Amend professional conduct rules to include specific rules relating to property management

## Negotiating the sales authority

### Option 15 – Provide a ‘cooling-off’ period for sellers who have entered into sales authorities for residential properties

### Option 16 – Require estate agents to provide sellers of residential property with a fact sheet on sales authorities

#### Questions

- 14 Are there any other categories of sophisticated sellers who do not need the benefit of the protections offered under options 15 and 16?
- 15 Is a three business day period sufficient for the cooling-off right proposed by option 15? If not, what is the appropriate period of time?
- 16 Would there be merit in requiring sellers who have entered into sales authorities to ‘opt in’ to those authorities within three days, rather than providing an ‘opt out’ mechanism through the proposed cooling-off period?
- 17 What other information would be relevant to include in the fact sheet proposed by option 15?

## Financial benefits to agents

### Option 17 – Limit disclosure requirements under section 49A of the Estate Agents Act for ‘sophisticated sellers’

### Option 18 – Amend section 50 of the Estate Agents Act to enable commission to be retained in certain circumstances

### Option 19 – Amend section 49A to clarify that agreements between estate agents are not subject to disclosure requirements

### Option 20 – Provide for changes to commission-sharing arrangements to be disclosed

### Option 21 – Remove the ban on commissions under section 55 of the Estate Agents Act, but introduce additional protections for sellers

#### Question

18 Does a 21 day cooling-off period provide sufficient time (particularly for sellers in rural areas) to access independent legal advice on a sale?

### Option 22A – Retain and strengthen the prohibition on retaining rebates, improve disclosure provisions and clarify the meaning of ‘benefit’

### Option 22B – Permit estate agents to retain rebates provided they fully disclose the rebates to their clients, and clarify the meaning of ‘rebate’

## Professional conduct rules – payment of commissions (referral fees)

**Option 23A – Prohibit conveyancers from paying commissions in return for client referrals**

**Option 23B – Prescribe the form for disclosure of commission payments in return for client referrals**

### **Question**

19 Is there value in conducting research on effective consumer disclosure?

## Costs disclosure

**Option 24 – Improve existing costs disclosure provisions in the Conveyancers Act**

### **Question**

20 What would be a 'significant change' in legal costs that a conveyancer should disclose?

## VCAT inquiries and alternative approaches to address poor conduct

**Option 25A – CAV to be given limited disciplinary powers**

**Option 25B – CAV to take over VCAT disciplinary functions**

**Option 25C – A central licensing, regulatory and disciplinary body in CAV**

## Penalties

**Option 26 – Undertake a full review of the penalties under the Estate Agents Act**

## Placing trust money in interest-bearing accounts

**Option 27 – Enable conveyancers to deposit trust money in interest-bearing controlled money accounts**

## Offences relating to trust accounts

**Option 28 – Review and update trust account offences and penalties in the Estate Agents Act**

## Ban on large cash deposits

**Option 29 – Prohibit estate agents from accepting large cash deposits for property sales**

## Auditor requirements

**Option 30 – Amend the Estate Agents Act to enable government to introduce tighter controls on audits and auditors, if necessary**

## Keeping track of conveyancing records post closure or sale

**Option 31 – Establish stronger obligations for document retention post business closure or sale**

21 Should there be an obligation on conveyancers to return paper certificates of title to their clients, in the event that they close their business?

## Display of licence

**Option 32 – Remove the requirement for physical display of a licence by an estate agent or conveyancer**

## Roles and functions of the BLA and the Director of CAV

**Option 33 – Develop educational material explaining the roles and functions of the BLA and CAV**

## Role of and objectives for the EAC

**Option 34A – Retain the EAC, with amendments to refine its role and objectives**

**Option 34B – Abolish the EAC**

**Option 34C – Replace the EAC with a broader property industry advisory or reference group**

## Victorian Property Fund

**Option 35 – Modernise and clarify the basis for VPF claims and extend the purposes to which excess funds can be applied**

## Modernisation of the legislation

**Option 36 – Re-enact the Estate Agents Act and make minor amendments to the Conveyancers Act to reflect modern conveyancing practice**

# 1 Licensing of estate agents and conveyancers

This chapter sets out stakeholder feedback on the licensing framework for estate agents and conveyancers. Options for reform are presented in the following areas:

- the definitions of ‘estate agent’ and ‘conveyancing business’
- training and work experience requirements, including ongoing professional development
- licence ineligibility and disqualification criteria
- the permission application process
- professional indemnity insurance requirements
- office management, and
- requirements on OIECs of estate agencies.

No reform options are proposed for the licensing process for either conveyancers or estate agents, as stakeholder feedback did not raise concerns about excess or inappropriate information being required in licence applications.

## 1.1 Definitions

### **Issue**

The definition of ‘estate agent’ requires reform to better reflect the current roles and functions of real estate agents, and to capture people who negotiate for the sale or purchase of property on behalf of another.

### **Stand-alone option**

- **Option 1** – Modernise and revise the definition of ‘estate agent’

### 1.1.1 What is an estate agent?

#### **Background**

The Estate Agents Act requires individuals and corporations that are ‘estate agents’ to be licensed.

The term ‘estate agent’ is defined in section 4 of the Estate Agents Act and captures those who exercise, carry on or advertise that they are willing to carry on the business of selling, buying, letting or taking on the lease (or negotiating for the same) or collecting rents for, any real estate or business, on behalf of any person.

Estate agents are to be distinguished from ‘agents’ representatives’, who are employees of licensed estate agents and not required to be licensed.

The Issues Paper asked whether the definition of ‘estate agent’, which is largely the same as when the Estate Agents Act was introduced in 1980, is easily understood and applied, conforms to modern drafting standards, and whether it inadvertently captures or excludes any person from the need to be licensed.

#### **Stakeholder feedback**

Feedback largely focussed on certain intermediaries in the real estate industry, and whether their activity should be captured by the definition of ‘estate agent’.

There was significant concern about those known as ‘mediums’, ‘channels’, ‘introducers’ and ‘referrers’, including financial advisors and accountants, mortgage brokers, sales representatives at builders’ display homes, immigration agents and overseas companies marketing Victorian property to overseas buyers. Stakeholders advised that these persons often receive commissions or referral fees from estate agents or developers (of which their clients are possibly unaware) for referring their clients to purchasing opportunities in particular property developments. It was also noted that these people may negotiate all or most of the terms of a property purchase, even if the transaction is technically completed by a licensed estate agent.

The activities of sellers' and buyers' advocates were also raised as an issue.

The strong view was that mediums, as well as buyers' and sellers' advocates, ought to be captured by the definition of 'estate agent'.

It was also suggested that the definition of 'estate agent' should capture persons who provide advice about the marketing of a property, although stakeholders did not offer evidence of any problems arising from marketing that licensing would address.

There was some commentary around online real estate advertising sites and concern that online portals are portraying themselves as industry advice or news providers and introducing respondents to the site to agents as "buyers" or "sellers", then seeking commission sharing arrangements for those introductions.

It was also suggested that the definition should explicitly capture persons selling land or options in land banking schemes, or arranging vendor terms or rent-to-buy contracts. These issues are all dealt with in the second options paper released as part of this review, *Sale of land and business: options for reform*, available at the [Consumer Property Law Review section of the Consumer Affairs Victoria website](http://www.consumer.vic.gov.au/consumerpropertylawreview) <www.consumer.vic.gov.au/consumerpropertylawreview>.

Other suggestions included amending the definition to:

- refer to an estate agent's property management functions
- capture sales agents engaged by retirement village operators to sell units in a retirement village, and
- capture providers of short-term accommodation.

There was concern that the definition may inadvertently capture legal practitioners or licensed conveyancers who have been instructed to directly negotiate or conclude a sale or purchase of a property directly, as well as valuers, accountants and receivers who realise assets and online sale platform managers created or employed by development companies.

Finally, it was suggested that agents who manage commercial property on behalf of large property-owning entities should be excluded from the requirement to be licensed. On this point, it should be noted that it is government policy that the Act should apply to the commercial property sector, and therefore no reform proposal on this specific issue is being put forward.

The following stand-alone option is presented for feedback.

### **Option 1 – Modernise and revise the definition of 'estate agent'**

Under this option, the definition of 'estate agent' in section 4 of the Estate Agents Act would be redrafted to provide greater detail and clarity about the current functions and roles of an estate agent, for example, in relation to property management.

The definition would also be substantively amended to require all persons who perform the role of an estate agent (as currently defined) on behalf of another person<sup>1</sup> to be licensed.

This option would therefore extend the requirement to be licensed to any person who negotiates for the purchase or sale of property on behalf of a client (for example, financial advisors, mortgage brokers and other 'mediums' or 'channels'), irrespective of whether the person conducts such negotiations in the course of his or her business. However, the option does not include persons who merely advise or recommend that their clients purchase a particular property, as the purpose of the Estate Agents Act is to regulate persons who act for others in the sale, purchase or leasing, etc. of real estate and businesses, not to regulate persons who provide property investment advice.

Under this option, individuals and corporate entities (including property developers and retirement village operators) would still be permitted to market and sell their own property, without engaging the services of a licensed estate agent, as is the case currently. To require such persons to be licensed would be a significant departure from the status quo, involving significant costs which are unlikely to be justifiable in the absence of clear evidence of problems

<sup>1</sup> This option would not affect persons employed as agents' representatives. Agents' representatives are engaged to perform the functions of an estate agent on behalf of their employer (who must be a licensed estate agent): they do not perform the functions of an estate agent in their own right.

in the sector that cannot be resolved through, for example, an action for damages as a result of false or misleading representations made by a developer or one of their employees in relation to the sale of land.

Sellers' and buyers' agents who negotiate for the sale or purchase of a property on behalf of another in the course of their business are already captured within the existing definition of 'estate agent', and accordingly do not need to be specifically referred to.

The revised definition of 'estate agent' would not capture online sites that exist merely to advertise real estate that is being offered for sale, to introduce prospective sellers or buyers to estate agents, to assist sellers of real estate to choose an estate agent, or platforms which host online auctions operated by a third party. Evidence provided by stakeholders does not support the proposition that these businesses are performing the role of an 'estate agent'; rather, they appear to be concerned with providing ways for consumers of real estate services to navigate a complex market.

Similarly, this option will not require providers of short-term rental accommodation to be licensed as estate agents, as suggested in stakeholder feedback. The *Residential Tenancies Act 1997* expressly does not apply to premises ordinarily used for holiday purposes (unlike general residential tenancies) and the Estate Agents (Exemption) Regulations 2014 exempt a person who acts as an estate agent solely in relation to the letting of residential property for 90 days or less from the requirement to be licensed. No evidence of consumer detriment was cited in support of this proposal.

Section 5 of the Estate Agents Act already exempts legal practitioners from the requirement to be licensed, and similar exemptions exist for receivers. However, an additional exemption for conveyancers appears to be required, and would be a feature of this option. It is not proposed that valuers and accountants should be exempt from the requirement to be licensed.

### Question

- 1 What other issues should be addressed in the revised definition of estate agent, and what is your evidence of the issue?

## 1.1.2 What is 'conveyancing work'?

### Issue

The definition of 'conveyancing business' does not capture 'conveyancing work' that is undertaken purportedly for no fee or reward.

### Stand-alone option

- **Option 2** – Remove the definition of 'conveyancing business'

### Background

The Conveyancers Act requires a 'conveyancing business' (defined in section 4 of the Act) carrying out 'conveyancing work' for 'fee or reward' to be licensed, whether or not the carrying out of conveyancing work is the sole or dominant purpose of the business. The term 'conveyancing work' is broadly defined to mean legal work that is carried out in connection with any transaction that creates, varies, transfers, conveys or extinguishes a legal or equitable interest in any real or personal property.

The Issues Paper asked stakeholders whether the definition is sufficiently broad to capture all those who should be licensed as conveyancers, noting that it is difficult to prove that unlicensed conveyancing has taken place, where conveyancing work is undertaken purportedly for no 'fee or reward' despite a commission being received in the course of the transaction (for example, by a mortgage broker). It was suggested that one option may be to require that any person completing conveyancing work as a *business* for another entity or person should be licensed.

## Stakeholder feedback

While there was limited feedback on this issue, it was agreed that requiring a person who completes conveyancing work as a *business* for another entity or person to be licensed may address unlicensed conveyancing undertaken by, for example, mortgage brokers. It was pointed out that it would not, however, solve the problem of unlicensed persons who undertake conveyancing work for a relative or friend.

Other stakeholders focussed on the scope of the definition of 'conveyancing work', commenting that some conveyancers are confused about what type of work they can legitimately perform. It was suggested that some licensed conveyancers are preparing legal documents that they are not qualified to prepare, such as powers of attorney, on the basis that these documents are 'ancillary to a conveyancing transaction', as authorised by section 4(2) of the Conveyancers Act. It was noted that there are risks with these types of documents being prepared by conveyancers, as they can be complex and necessitate an intimate knowledge of the types of legal issues that can arise, in order to seek relevant instructions from a client.

Conversely, it was suggested that conveyancers should be permitted to lodge adverse possession applications under section 60 of the *Transfer of Land Act 1958*. Currently, only legal practitioners are permitted to lodge such applications; however, it was argued that there are a number of straightforward adverse possession applications that do not require legal analysis and could be lodged by conveyancers.

The following stand-alone option addressing the definition of 'conveyancing business' is presented for feedback.

### Option 2 – Remove definition of 'conveyancing business'

Under this option, the definition of 'conveyancing business' in section 3 of the Conveyancers Act would be repealed, and section 8 of the Act would be amended to provide that anyone who undertakes conveyancing work on behalf of another person is required to be licensed.

This option addresses stakeholder feedback, ensuring that those persons who undertake conveyancing work for others must be licensed, irrespective of whether they receive a 'fee or reward' for doing so, or whether they undertake the work on a one-off basis, and not as a business or part of a business. An individual would still be allowed – as is the case currently – to undertake their own conveyancing transactions. This approach is consistent with the approach proposed to be taken in the Estate Agents Act, under which all persons who perform the work of an estate agent on behalf of another person are required to be licensed.

#### Questions

- 2 Should section 4 of the Conveyancers Act be amended to clarify that 'conveyancing work' does not include legal work carried out for the purpose of preparing powers of attorney? Is there any other work that conveyancers should not be permitted to carry out?
- 3 Should conveyancers be permitted to lodge adverse possession applications under the *Transfer of Land Act 1958*?

## 1.2 Training and work experience

### 1.2.1 Estate agents

#### **Issues**

- 1 There is concern that current training standards and work experience requirements for estate agents are inadequate, particularly for those running their own businesses or acting as the OIEC for a corporate estate agency.
- 2 There is concern that current training standards for agents' representatives are inadequate.

#### **Stand-alone option – Estate agents**

- **Option 3** – New licence categories with varying training and work experience standards

and

#### **Alternative options – Agents' representatives**

- **Option 4A** – Increase training standards for agents' representatives
- **Option 4B** – Confine the role of an agent's representative
- **Option 4C** – Abolish agents' representatives and provide an alternative work experience pathway

### **Background**

Estate agents are required to satisfy certain training and work experience requirements to be eligible to be licensed.

A person must also complete certain training in order to be eligible to work as an 'agent's representative'. Under the Estate Agents Act, an agent's representative is any person who is not a licensed estate agent, but who is employed by a licensed estate agent and performs any of the functions of an estate agent. Estate agents are responsible in contract and in tort for the acts of their representatives.

To meet the training requirements to gain an estate agent's licence, an individual must complete either the Certificate IV in Property Services (Real Estate) from the national Property Services Training Package, or have previously completed one of a number of prescribed courses. An applicant for an estate agent's licence must also have completed the equivalent of 12 months' full-time experience as an 'agent's representative' in the three years before applying for a licence.

To work as an agent's representative in Victoria, an individual is required to complete three prescribed units of competency from the national Property Services Training Package. The prescribed units are drawn from the Certificate IV in Property Services (Real Estate), and focus on identifying legal and ethical requirements of property management and sales, and working in the real estate industry generally.

Stakeholders were asked for their views on the present training standards, and the potential costs of mandating higher standards, as well as on the value of estate agents' current work experience requirements.

### **Stakeholder feedback**

#### **Training requirements**

There was widespread concern about current training requirements for estate agents, with suggestions that the current training does not equip licensees with the skills and knowledge they need to perform their duties, in particular licensees who will be principals of their own estate agencies, or who will act as the OIEC of a corporate agency. It was suggested that a principal of their own business, and OIEC of a corporate estate agency, should be required to have a university degree or business diploma.

Particularly strong concern was expressed about the current training requirements for agents' representatives, with many stakeholders advising that the current requirements are inadequate to enable agents' representatives to competently perform their role and comply with their professional conduct obligations. This was identified as a factor in:

- poor professional conduct by agents' representatives working as property managers, resulting in significant tenant complaints
- misrepresentations made by agents' representatives in respect of pricing and legal contract conditions, and
- poor auction practices.

It was suggested that higher entrance standards for agents' representatives would ensure that persons working in this capacity have a comprehensive understanding of regulatory requirements, and are equipped to perform their role in a competent and professional manner.

Conversely, there was a suggestion that any increase in training standards should not apply to licensed estate agents working as commercial property managers or letting agents, on the basis that current requirements are largely irrelevant to these individuals.

A number of stakeholders criticised the national 'mutual recognition' scheme, which it was felt allows persons licensed in jurisdictions with lower entry standards to be automatically licensed in Victoria, and concerns were also raised about the quality and duration of training delivered to prospective licensees by some RTOs<sup>2</sup>.

The costs of mandating higher entry standards were identified as including a possible shortage of licensed estate agents, costs associated with developing and monitoring compliance with increased standards, and higher training costs. However, it was suggested that any costs would be outweighed by benefits including improved retention rates for agents' representatives, higher-quality service and advice, and a possible reduction in insurance claims.

### Work experience

There was also significant stakeholder support to require aspiring estate agents to have more comprehensive work experience, with stakeholders acknowledging that on-the-job training represents significant knowledge and skill development, and expressing concern that current requirements enable estate agents with little experience to run an agency. Stakeholders held differing views on the appropriate length of mandatory work experience, with suggestions ranging from 12 months to three years of full-time experience.

Stakeholders were also concerned that there is currently no guidance or minimum requirements for agents' representatives' work experience, creating a risk that it may be of poor quality or not particularly relevant or valuable.

A suggestion was to develop guidelines specifying areas of work experience, attested by a supervising licensed estate agent or OIEC.

Four options addressing the issues above are presented below for feedback.

**Option 3** is a stand-alone option that proposes a revised approach to licensing estate agents. **Options 4A, 4B and 4C** are three alternative approaches for dealing with specific concerns about agents' representatives.

It is proposed that **option 3** would be implemented in conjunction with one of **options 4A, 4B or 4C**.

### Option 3 – New licence categories with varying training and work experience standards

Under this option, the Estate Agents Act would be amended to provide for two categories of estate agent, with different training standards and work experience requirements to apply to the two categories.

The two licence categories would be:

- estate agent (employee), and
- estate agent (licensee in charge).

<sup>2</sup> In 2016, the Australian Skills and Qualifications Authority ('ASQA') conducted a strategic review examining the duration of vocational and education training delivered by RTOs, as courses of limited duration had been identified by ASQA as a potential risk to students gaining expected skills and competencies from vocational education and training courses. The results of the review have yet to be released.

The holder of an estate agent (employee) licence would be authorised to work in any estate agency business, for an estate agent (licensee in charge), and an estate agent (licensee in charge) would be able to carry on his or her own business, or act as the OIEC of a corporate estate agency.

In order to be licensed as an estate agent (employee), a person would be required to have successfully completed:

- (a) the Certificate IV qualification in Property Services (Real Estate) from the Property Services Training Package (including prescribed units of competency), and
- (b) either 12 months' full-time work experience as an agent's representative (see **options 4A and 4B** below) or a 12 month full-time traineeship (see **option 4C** below), and provide evidence – for example, a certificate signed by their employer – of having achieved prescribed core competencies during that work experience.

Applicants for estate agent (licensee in charge) licences would be required to have successfully completed:

- (a) a Diploma in Property Services (Agency Management) (including a number of prescribed units of competency) from the Property Services Training Package or equivalent, and
- (b) two years' full-time work experience, as a licensed estate agent (employee).

The Act would be amended to provide that it is a duty of an estate agent (licensee in charge) to properly supervise their employees. Guidance would be provided on what constitutes 'proper' supervision, and a failure to properly supervise would be an offence.

This option aims to address the following key concerns identified by stakeholders:

- insufficient training standards for estate agents who carry on their own businesses, or who act as an OIEC for a corporate business, and
- work experience of variable quality, and the consequences of this for the skills development of junior estate agents.

This option does not propose estate agent (employee) licensees should be required to complete additional training, as there is no clear evidence to suggest that the Certificate IV qualification does not provide prospective agents with an adequate foundation to competently perform the role of an employee estate agent. Instead, it aims to improve the quality of work experience provided to prospective licence applicants.

The proposal to lift both the training and work experience requirements for those who manage their own businesses (or act as an OIEC for a corporate estate agency) recognises that it is desirable that a person has some managerial skills, and a period of experience as a licensed estate agent employee in another person's business, before starting their own estate agency.

Persons who apply for mutual recognition of estate agents' licences obtained in other jurisdictions would be eligible for an estate agent (employee) licence, but would be required to undertake further study and complete additional work experience to be eligible to obtain an estate agent (licensee in charge) licence.

Under this option, all existing estate agent licences would be converted into either estate agent (employee) or estate agent (licensee in charge) category licences, and transitional arrangements would be put in place to require estate agents who currently carry on their own estate agency businesses, or act as OIECs in a corporate estate agency, to complete an additional two prescribed units of competency (that is, further training equivalent to a Diploma in Property Services (Agency Management)).

### Option 4A – Increase training standards for agents' representatives

This option would be implemented in conjunction with **option 3**. It is an alternative to **options 4B and 4C**.

Under this option, the Estate Agents (Education) Regulations 2008 ('the education regulations') would be amended to increase the number of units of competency a person who wishes to work as an agent's representative is required to complete from three to seven prescribed units of competency drawn from the Certificate IV qualification in Property Services (Real Estate) in the national Property Services Training Package.

The additional four units of competency agents' representatives would be required to complete would be determined by government, in consultation with industry and consumer representatives.

As noted in **option 3**, it would be the duty of an estate agent (licensee in charge) to properly supervise work performed by an agent's representative on the agent's behalf. Guidance would be provided on the meaning of 'proper supervision'.

The benefit of this option is that it retains the concept of an 'agent's representative' under the Estate Agents Act, and enables an agent's representative to continue to be permitted to perform any of the functions of an estate agent on behalf of their employer, as is the case currently. A person would therefore continue to be able to be employed as a career opportunity in and of itself, and also as a pathway to obtain the work experience required in order to apply for an estate agent (employee) licence.

This option directly responds to stakeholder concern that the current training requirements are insufficient to enable an agent's representative to perform the role they are authorised to perform, and to comply with their professional conduct obligations. It would require agents' representatives to complete an additional four units of mandatory training, in areas of greatest importance.

It is not considered that the additional training requirements would be a significant barrier to existing agents' representatives remaining in the real estate industry, or for prospective agents' representatives joining the industry.

Transitional arrangements would be developed in consultation with industry to enable existing agents' representatives to complete the new training requirements within an appropriate period of time, following the commencement of the amendments to the education regulations.

### Option 4B – Confine the role of an agent's representative

This option would be implemented in conjunction with **option 3**. It would be an alternative to **option 4A** and **option 4C**.

Under this option, the Estate Agents Act would be amended to either:

- (a) specify the activities that an agent's representative is authorised to perform on behalf of an estate agent (licensee in charge), or
- (b) prohibit an agent's representative from undertaking certain work on behalf of an estate agent (licensee in charge).

Sub-option (a) would involve a greater level of prescription, and therefore curtail the activities of agents' representatives to a greater degree than sub-option (b), as it would involve amending the Act to provide that agents' representatives may only perform certain functions, for example property management functions.

Under both sub-options (a) and (b), it would be an offence for:

- an agent's representative to undertake work that is not authorised (or that is prohibited), and
- an estate agent (licensee in charge) to authorise, or allow, an agent's representative to perform work that is not authorised (or that is prohibited) by the Act.

Under both sub-options, the training requirements for agents' representatives would also be amended where necessary, to ensure that agents' representatives are appropriately qualified to undertake the work they are permitted to perform.

As for **option 4A**, an estate agent (licensee in charge) would have an obligation to properly supervise work performed by an agent's representative on the agent's behalf. Guidance would be provided on the meaning of 'proper supervision'.

Sub-options (a) and (b) address the area of greatest concern in stakeholder feedback, namely the perception that agents' representatives are currently undertaking work for which they are not trained, and in respect of which they are not meaningfully supervised by their employers, to the detriment of consumers of real estate services. It is not considered that the amendments would impose a significant financial impost on persons wishing to enter the real estate sector as agents' representatives.

Importantly, this option would limit the work experience a person could undertake as an agent's representative, in preparation for applying for an estate agent's licence.

## Option 4C – Abolish agents’ representatives and provide an alternative work experience pathway

This option would be implemented in conjunction with **option 3**. It is an alternative to **options 4A** and **4B**.

Under this option, the role of an ‘agent’s representative’ would be abolished, and anyone who performs the functions of an estate agent would be required to be licensed as an estate agent (employee).

Transitional arrangements would be put in place to ensure that existing agents’ representatives have sufficient time to successfully complete additional training, before applying for a licence.

This option acknowledges stakeholder feedback that many agents’ representatives are currently performing work on behalf of licensed estate agents which they do not have the necessary skills or knowledge to perform, and that this has an adverse impact on consumers of real estate services.

The key benefit of this option is that it would significantly lift the knowledge and skills base of everyone in the real estate industry who performs the functions of an estate agent. Improved skills and knowledge could result in significant improvements in property management practices, less underquoting and better-run auctions.

However, abolishing the role of ‘agent’s representative’ under the Act would significantly disrupt the Victorian real estate industry. It would:

- require alternative work experience pathways for prospective estate agents to be established (for example, traineeships)
- impose significant training costs on more than 15 000 agents’ representatives who are currently employed across the Victorian real estate industry, and who wish to remain in the industry, and
- disturb current employment arrangements and business practices of Victorian real estate agencies, including possible staffing losses where agents’ representatives decide to leave the industry.

This option could also result in downward pressure on estate agents’ salaries, due to a significant increase in the number of licensed estate agents in the marketplace.

### Questions

- 4 What would be the costs to industry of requiring all licensees in charge to undertake additional training, as proposed by option 3?
- 5 What transitional period do you think would be appropriate to provide estate agents who will need to apply for estate agent (licensee in charge) licences to undertake the additional two units of competency required to obtain a Diploma in Property Services (Agency Management)?
- 6 Which of options 4A, 4B and 4C is the best approach to address issues associated with agents’ representatives?
- 7 Are agents’ representatives likely to experience any difficulties getting their employers to attest to their having achieved core work experience competencies?

## 1.2.2 Conveyancers

### Issue

There is concern that the current training standards and work experience requirements for conveyancers are insufficient.

### Stand-alone option

- **Option 5** – Increase training standards and strengthen work experience requirements

## Background

As is the case for estate agents, conveyancers must complete training and work experience to be eligible to be licensed.

An applicant for a conveyancer's licence must have successfully completed eight units of competency set out in the relevant national training package or have previously completed an equivalent course, such as a law degree (and have demonstrated competency in establishing, managing and administering trust accounts) commenced before 1 July 2008. Licence applicants must also have 12 months full-time work experience – completed within the last five years – carrying out conveyancing work under the supervision of a legal practitioner or licensed conveyancer, or have successfully completed a recognised law degree and the approved practical legal training requirements.

Stakeholders' views were sought on the current training standards and work experience requirements for conveyancers, and the potential costs of mandating higher standards.

## Stakeholder feedback

### Training requirements

There was some concern about the current training requirements for conveyancers, with suggestions that the minimum qualification for conveyancers be increased to either a university degree, or an Advanced Diploma of Conveyancing (the qualification required of conveyancers in NSW and South Australia (SA) and the qualification adopted by the national Australian Institute of Conveyancers).

There was anecdotal evidence of conveyancers who exhibit a lack of knowledge about standard conveyancing practice, including in relation to trust accounts, and advice that, in order to acquit their responsibilities, conveyancers need to have a comprehensive understanding of all laws affecting real property transactions, including owners corporations legislation.

Stakeholders were concerned about the quality of training provided by RTOs.

As was the case with estate agents, the potential costs of mandating higher entry standards were identified as including the costs of developing and monitoring compliance with the standards, and time and resources expended by conveyancers. However, it was considered that the costs of higher entry standards would be outweighed by the benefits obtained, for example, a likely increase in the quality of service (and a corresponding reduction in professional indemnity insurance claims and complaints made to regulatory and industry bodies about incompetent service). It was also thought that introducing stronger training (and experience) requirements may assist in preparing conveyancers for the more demanding e-conveyancing environment, in which misuse of PEXA can result in a conveyancer being banned from the system.

### Work experience

There was widespread concern about the adequacy of current work experience requirements, with a number of stakeholders suggesting that it is not possible for a trainee conveyancer to gain the experience necessary to be licensed in 12 months. There was support for increasing work experience requirements to two years, consistent with the requirements in place for new legal practitioners, and a suggestion that work experience requirements be prescribed.

Supervision of trainee conveyancers was also identified as a concern. It was suggested that supervision requirements should be tightened, to ensure that trainees are directly supervised.

The following stand-alone option is presented for feedback.

## Option 5 – Increase training standards and strengthen work experience requirements

Under this option, the Conveyancers (Qualifications, Experience and Fees) Regulations 2008 ('the qualifications regulations') would be amended to prescribe the minimum qualification required to be licensed as a conveyancer in Victoria to be an Advanced Diploma of Conveyancing, consistent with requirements for conveyancers in NSW and SA.

In order to attain the Advanced Diploma of Conveyancing qualification in the national Business Services Training Package, a person would need to complete 18 units of competency (incorporating the eight units of competency currently prescribed by the qualifications regulations).

Current conveyancing licensees would be required to complete the additional 10 units of competency from the Advanced Diploma qualification, within a certain period of time.

The increase in training standards proposed by this option responds to concerns that the current training standards do not provide conveyancers with an adequate level of technical expertise.

No increase to work experience requirements is proposed under this option. Although two years' experience was favoured by some stakeholders, consistent with the requirement for new legal practitioners to have two years' supervised practice, it should be noted that new legal practitioners are required to develop skills and practical knowledge in a significantly broader range of areas than conveyancers, which justifies a longer period of supervised practice. Further, a lengthier period of work experience for trainee conveyancers is no guarantee of exposure to the breadth of conveyancing transactions that a person may be required to complete as a licensee.

Nonetheless, in recognition of stakeholder feedback that work experience requirements require strengthening, and consistent with the approach proposed for applicants for estate agent (employee) licences, it is proposed that, at the time of applying for a conveyancer's licence, a person would be required to provide evidence of having achieved prescribed core competencies during their period of work experience.

The requirement for new conveyancers to obtain an Advanced Diploma of Conveyancing will establish a barrier to entering the conveyancing industry for those who cannot afford to obtain this qualification, and will also impose costs on existing licensees who are required to significantly upgrade their qualifications. However, it may also promote improved professional standards across the conveyancing industry.

### **Questions**

- 8 In addition to the eight units of competency currently prescribed for conveyancers, what additional competencies should prospective licensees be required to complete, as part of an Advanced Diploma?
- 9 What areas of competency should licence applicants be required to provide evidence of, to meet work experience requirements?

## 1.3 Continuing professional development

### **Issue**

Estate agents and conveyancers currently have no obligation to undertake ongoing professional development once licensed. It is important for these licensees to be up to date with legal developments and current practices.

### **Alternative options – Estate agents and conveyancers**

- **Option 6A** – Mandate continuing professional development for estate agents, agents' representatives and conveyancers
- **Option 6B** – Deliver an ongoing and targeted information and training program for estate agents, agents' representatives and conveyancers, in partnership with industry associations

### **Background**

Continuing professional development (CPD) is one of a number of approaches to ensuring that a practitioner's knowledge is up to date and that their skills are appropriately maintained. It does this by requiring a specified amount of training to be completed each year for a practitioner to qualify for continued registration or licensing.

Formal CPD is not part of the current Victorian licensing schemes for estate agents or conveyancers, although it is a requirement in other jurisdictions, including NSW.

Programs currently available to Victorian estate agents and conveyancers to assist them to maintain their knowledge and skills include the information services delivered by CAV and the voluntary CPD programs offered by the Real Estate Institute of Victoria ('REIV') and Australian Institute of Conveyancers (Vic) ('AIC (Vic)') to their members.

The Issues Paper invited stakeholders to provide their views about the need for mandatory CPD for estate agents and/or conveyancers, and what the costs would be.

### Stakeholder feedback

There was widespread, although not uniform, support from stakeholders for introducing mandatory CPD requirements for estate agents, with stakeholders considering that CPD would improve industry skills, promote higher standards, and increase the level of service provided to consumers (although the comment was made that CPD would be an unnecessary and unwarranted impost on estate agents who act solely on behalf of sophisticated commercial entities). There was also some support for mandating CPD for agents' representatives.

Stakeholders unanimously supported CPD requirements for conveyancers. There was feedback that CPD requirements for conveyancers should be consistent with the requirements for legal practitioners (10 units per year in the fields of ethics and professional responsibility, practice management and business skills, professional skills and substantive law) or the CPD model employed by the AIC (Vic), which involves 10 hours of CPD covering ethics, professional responsibility, practice management, technology and substantive legal issues.

It was recommended that any CPD program for estate agents or conveyancers not be so prescriptive as to make compliance unduly expensive or difficult, particularly for those located in outer suburbs or rural areas, and that it include both practical training and a minimum requirement for face-to-face delivery.

It was also suggested that, before implementing CPD requirements, a framework for ensuring quality and consistency of training should be developed. A number of stakeholders suggested that training should only be delivered by providers accredited by CAV.

Stakeholders suggested that any costs involved in CPD would be offset by improvements in the currency of knowledge and skills of conveyancers, estate agents and agents' representatives. It was suggested that conveyancers would be likely to incur similar costs to legal practitioners for annual CPD activities (anywhere from \$650 to \$1000), but also that there are forms of CPD activities, including online activities, which could decrease this cost substantially.

Two alternatives to address this issue are presented for feedback.

### Option 6A – Mandate continuing professional development for estate agents, agents' representatives and conveyancers

Under this option, estate agents, agents' representatives and conveyancers would be required to undertake a specified program of CPD each year.

The requirement could be part of the annual statement process for estate agents and conveyancers, while agents' representatives could be required to maintain records of CPD, which could then be audited by CAV. Estate agents who run their own businesses, or act as the OIEC for a corporate estate agency, would be responsible for ensuring that their employees have complied with CPD requirements.

The key features of CPD under this option would be:

- completion of a specified number of points of training each year for an estate agent or conveyancer to be eligible to continue to be licensed, and for an agent's representative to continue to be eligible to work as an agent's representative
- specification of the:
  - eligible topics and types of training
  - points for different types of training, and
  - organisations eligible to deliver training for the CPD program
- requirements for estate agents and conveyancers to record and verify training, and submit evidence of training, as part of their annual statement obligations, and requirements for agents' representatives to record and verify training, and submit evidence upon request by CAV, and

- penalties would apply for failure to comply with CPD requirements.

CPD would apply to both existing and new estate agents, agents' representatives and conveyancers, with transitional arrangements to allow existing industry participants to build their CPD points before, for example, their first eligible annual statement date.

The purpose of CPD is to reduce risks for consumers and improve productivity for business, although there appears to be limited formal evidence of its benefits and cost effectiveness, which is an important factor given that it constitutes a barrier to entry.

Before any CPD regime could be introduced, a formal analysis would need to be conducted to provide a fuller assessment of the benefits and cost effectiveness of a mandatory CPD scheme.

### **Option 6B – Deliver an ongoing and targeted information and training program for estate agents, agents' representatives and conveyancers, in partnership with industry associations**

Under this option, CAV would develop and deliver an annual program of information and training for estate agents, agents' representatives and conveyancers, in partnership with the REIV and AIC (Vic), respectively.

Under such a program, CAV would provide information tailored to the needs of the real estate and conveyancing industries on changes to law and on systemic legal and practice issues that pose a risk for consumers. The information could be provided in a variety of traditional and innovative ways, including through web-based tools that allow estate agents, agents' representatives and conveyancers to access to information when and where they most need it.

In addition, REIV and AIC (Vic) would be supported to develop the information and tools into training packages for estate agents and conveyancers that could be incorporated into their voluntary CPD programs, and which are a condition of estate agents' and conveyancers' memberships of those industry associations.

The benefits of this option are that information would be targeted to particular problems or issues. Where information and tools are incorporated in training provided by REIV and AIC (Vic), the programs would be less vulnerable to exploitation by training organisations and participants and could be more structured with clear and measurable learning outcomes.

This option also has the potential of providing a more flexible and timely response to emerging issues than a pre-determined annual program of CPD. While this approach to the provision of information and training for estate agents and conveyancers would minimise the overall burden and cost for industry, the opportunities for the broader skill development of members of these groups would remain the responsibility of employers, the REIV and AIC (Vic).

## **1.4 Ineligibility and disqualification criteria**

### ***Issue***

The current ineligibility and disqualification criteria that apply to applications for estate agents' and conveyancers' licences are not sufficiently robust.

### ***Stand-alone option***

- **Option 7** – Strengthen ineligibility and disqualification criteria in the Estate Agents and Conveyancers Acts

### **Background**

Under the Estate Agents Act, certain people are ineligible to hold an estate agent's licence or be employed as an agent's representative. The Conveyancers Act also specifies that certain people are disqualified from being licensed as conveyancers.

In both Acts, a person is ineligible to hold a licence if he or she has had a claim allowed against the VPF, is an insolvent under administration or has, within the last 10 years, been convicted or found guilty of certain criminal offences. Each of the Acts also have other criteria that disqualify a person from holding a licence.

The Issues Paper requested stakeholders' feedback about current ineligibility and disqualification criteria.

It should be noted that, in certain circumstances, a person who is otherwise ineligible to hold, or is disqualified from holding, an estate agent's or conveyancer's licence, may nonetheless apply for and be granted permission to be licensed. This 'permission' process is discussed further in the following section of this Chapter [[section 1.5](#)].

### Stakeholder feedback

There was general stakeholder support for tightening ineligibility and disqualification criteria under both the Estate Agents Act and Conveyancers Act, including in the ways canvassed in the Issues Paper, i.e. by disqualifying persons who have been convicted or found guilty of possessing child pornography, unlicensed trading (in relation to the Estate Agents Act), breaching the Corporations Act 2001 of the Commonwealth, or who have failed to pay a fine imposed under the relevant laws. Other suggestions were to preclude persons convicted of terrorism offences, as well as any offences which would trigger disciplinary action against legal practitioners, from being eligible to obtain a licence.

Although not opposing the tightening of these criteria, other stakeholders noted – in relation to the proposal to extend the offences that would render a person ineligible for a licence – that automatic disqualification is a serious matter that requires due consideration of the issues of rehabilitation, and whether the exclusion of an individual is warranted, or is overly harsh in the circumstances.

Those stakeholders who commented on the issue did not support a reduction in the current 10 year period during which convictions or findings of guilt for criminal offences are relevant to a licensing decision. It was suggested it would be worthwhile enabling an offence to be ignored on the grounds of triviality or due to the passage of time.

The following stand-alone option is presented for feedback.

### Option 7 – Strengthen ineligibility and disqualification criteria in the Estate Agents and Conveyancers Acts

Under this option, the ineligibility and disqualification criteria in the Estate Agents Act and Conveyancers Act would be strengthened so that the following additional persons would be ineligible to obtain a licence:

- persons who have been convicted or found guilty of sexual offences (including possessing child pornography, and grooming offences) punishable by more than three months imprisonment, irrespective of whether the offence involved violence
- persons who have been convicted or found guilty of unlicensed trading offences
- persons who have been found to have breached the Commonwealth Corporations Act 2001 by, for example, failing to exercise powers with care and diligence or in good faith or for a proper purpose, misusing their position or information to gain advantage or cause detriment to a company, breaching the prohibition not to trade while insolvent, and failing to comply with financial reporting requirements, and
- persons who have failed to pay a fine imposed under the Estate Agents Act or Conveyancers Act.

The current 10 year period during which convictions and findings of guilt are relevant would be retained in respect of all offences.

It is not proposed to enable offences of the type set out in the four dot points above (or other offences set out in the ineligibility/disqualification provisions of both Acts) to be ignored on the grounds of triviality or due to the passage of time, as these matters are open to be considered in any application for permission to be licensed. The permission application process is discussed in the following section of this paper [[section 1.5](#)].

This option would not affect current licensees who were ineligible to, or disqualified from, holding a licence, but who obtained their licences following successful permission applications.

## 1.5 Permission application process

### **Issue**

The process by which ineligible persons may be granted permission to be licensed is being misused.

### **Stand-alone option**

- **Option 8** – Tighten threshold requirements for permission applications under the Estate Agents Act and Conveyancers Act

### **Background**

Under the Estate Agents Act, individuals who have had VPF claims allowed against them, are insolvent or who have criminal records that would otherwise render them ineligible for a licence, can apply to the BLA for permission to hold a licence or be employed as an agent's representative. In all cases, the BLA may give its permission if it is satisfied that it is not contrary to the public interest for it to do so. The permission application process also extends to corporations, where one of a corporation's directors would otherwise be ineligible.

Under the Conveyancers Act, a permission application can only be made if the person is ineligible for a licence because of a criminal record or because they were the subject of a successful claim against the VPF. A corporation may also apply for permission if one of its directors would otherwise be ineligible.

Most permission applications the BLA receives are from persons who have a criminal record.

The Issues Paper sought stakeholders' views on the merits of continuing to enable individuals (who would otherwise be ineligible to be licensed) to seek permission from the BLA to hold a conveyancers or estate agent's licence or to be employed as an agent's representative, including whether certain 'threshold' criteria must be satisfied before a permission application can be made. It was noted, for example, that frivolous applications (for example, from persons who are still in prison) can currently be made.

### **Stakeholder feedback**

Feedback on the existing permission application process was mixed. Although there was support for retaining the process, some stakeholders suggested that permission applications are more appropriately considered by a Court or VCAT, rather than the BLA. However, others supported the BLA retaining this capacity.

With respect to 'threshold criteria' for applications, there was support for prohibiting permission applications from persons who are still in custody or under the supervision of a Court. It was also suggested that:

- persons convicted of indictable offences should not be able to apply for permission to be licensed
- persons who have been convicted of unlicensed trading should not be able to apply for permission to be licensed
- permission applications should not be considered where applicants make more than two applications within a certain time, and
- only applications from those with prior industry experience and a written job offer should be considered.

The following stand-alone option is presented for feedback.

### **Option 8 – Tighten threshold requirements for permission applications under the Estate Agents Act and Conveyancers Act**

Under this option, the permission application process under the Estate Agents Act and Conveyancers Act would be retained but would be tightened in order to ensure that a person will not be able to apply for permission to hold a licence, or permission to be employed as an agent's representative, where the person:

- is currently in custody, or under the supervision of a Court (this would include persons subject to a community correction order or any form of bond, as well as those who have given an undertaking to a Court) is disqualified from holding a licence by reason of having been convicted or found guilty of an indictable offence (including those heard summarily) within the last 3 years, or the offence of unlicensed trading, or
- has unsuccessfully applied for permission to hold a licence in the preceding two years.

This option is intended to balance tightening of the permission application process – particularly in respect of applications from individuals with criminal records – with the desire to ensure that people who have rehabilitated themselves are able to have their individual circumstances considered in a licensing decision.

Permission applications would continue to be made to the BLA, with applicants to retain the capacity to appeal a decision of the BLA about whether to grant permission at VCAT.

### **Question**

- 10 Are there additional circumstances (other than those proposed in option 8) in which estate agents, agents' representatives and conveyancers should be restricted from applying for permission to be licensed or employed?

## 1.6 Licensing process

### **Issue**

Applications for estate agents' and conveyancers' licences are required to include certain information. Stakeholder feedback does not indicate that there is scope to reduce the level of information provided.

No reform option is proposed.

### **Background**

The Issues Paper asked for feedback about the level and value of information that is required to be provided as part of the licensing process and whether there are opportunities for red tape reduction. For example, it was noted that efficiencies may be gained in reducing the number of addresses individuals and corporations are required to provide as part of a licence application.

### **Stakeholder feedback**

No areas for reduction of red tape in the Conveyancers Act or Estate Agents Act were identified by stakeholders. As such, no specific option to reduce red tape has been developed for feedback.

## 1.7 Professional indemnity insurance

### **Issues**

- 1 Conveyancers are currently required to have professional indemnity insurance in order to be licensed. An alternative could be to require professional indemnity insurance as a pre-condition to practise.
- 2 Estate agents are not currently required to be covered by professional indemnity insurance. It has been suggested that estate agents should be required to have this insurance.

### **Alternative options**

- **Option 9A** – Require conveyancers to hold professional indemnity insurance in order to practise
- **Option 9B** – Require conveyancers and estate agents to hold professional indemnity insurance in order to practise
- **Option 9C** – Require conveyancers and estate agents to obtain professional indemnity insurance in order to be eligible to be licensed

### **Background**

Professional indemnity insurance helps a person to meet the cost of legal claims arising from the person's alleged negligence or breach of duty in the delivery of services.

Conveyancers must be covered by a professional indemnity insurance policy that is specified in a Ministerial Order published in the Government Gazette. Under the Conveyancers Act, a person must have professional indemnity insurance cover to be eligible for a licence, although in other states, for example NSW, insurance is a pre-condition for practise, rather than a requirement for licence eligibility.

The Estate Agents Act does not require licensees to be covered by professional indemnity insurance, although many agents obtain insurance voluntarily or as a condition of membership of an industry association.

The Issues Paper asked for feedback on the impact, if any, of removing the requirement for a conveyancer to obtain professional indemnity insurance as a licensing criterion and instead prescribing it as a pre-condition for practise. Comments were also sought on the impacts of mandating professional indemnity insurance for estate agents.

## Stakeholder feedback

Views were mixed about the possible impact of removing the requirement for a conveyancer to obtain professional indemnity insurance as a licensing criterion and instead prescribing it as a pre-condition for practise. Some stakeholders viewed such a change as unlikely to have any negative effect, while others thought it preferable to retain the status quo. For example, the likely difficulty of enforcing a requirement for a conveyancer to hold professional indemnity insurance before commencing work was pointed out.

Other suggestions were that minimum insurance coverage for conveyancers should be set at \$5 million, and that conveyancers should have the option of selecting their own professional indemnity insurance.

There was unanimous support from stakeholders for requiring estate agents (other than employees working exclusively for another licensee, or non-practising estate agents) to hold professional indemnity insurance, although there was no evidence that the current absence of this requirement causes problems. Stakeholders acknowledged that such a requirement would involve costs for the industry, but suggested that these costs would be outweighed by the benefits to the public of ensuring that their claims against estate agents can be met. It was suggested that the minimum insurance coverage should be \$5 million for any one event.

Three alternative options are presented below, for feedback.

### Option 9A – Require conveyancers to hold professional indemnity insurance in order to practise

Under this option, the Conveyancers Act would be amended to remove the requirement that a conveyancer have professional indemnity insurance cover in order to be eligible for a licence. Instead, conveyancers' licences would only be valid for practise once such insurance is obtained. Conditions would be placed on conveyancers' licences to this effect.

As the professional indemnity insurance market for conveyancers is still in its infancy, with limited availability, conveyancers would continue to be required to obtain insurance in accordance with the current Ministerial Order prescribed under section 41(3) of the Conveyancers Act. The minimum amount of professional indemnity insurance for conveyancers was reviewed in May 2016 and increased to \$2 million dollars per claim. It is not proposed to increase the minimum coverage at this time.

Estate agents would not be obliged to hold professional indemnity cover, on the basis that – unlike conveyancers, whose work is legal and technical in nature and involves significant risks to consumers if documents are prepared incorrectly, or the wrong advice is given – the key financial risk to consumers arising from misconduct by estate agents arises through defalcations, for which claims for compensation from the VPF can be made.

This option recognises that requiring conveyancers to obtain professional indemnity insurance in order to be licensed may result in conveyancers paying for insurance for periods of time in which they do not undertake work as a conveyancer, and is consistent with the requirements for legal practitioners. It also recognises the different category of risks associated with poor estate agency practice (compared with poor conveyancing practice).

### Option 9B – Require conveyancers and estate agents to hold professional indemnity insurance in order to practise

Under this option, the Conveyancers Act would be amended as proposed under **option 9A**.

In addition, the Estate Agents Act would also be amended to require estate agents to hold indemnity insurance in order to practise. However, there would not be the same requirements to obtain insurance in accordance with a Ministerial Order, as the market for estate agents' professional indemnity insurance is well-established.

This option also recognises feedback that estate agents' clients would benefit from estate agents being required to hold professional indemnity insurance, although it should be noted that the absence of a requirement for estate agents to have professional indemnity insurance does not appear to have caused any problems for consumers of real estate services.

### **Option 9C – Require conveyancers and estate agents to obtain professional indemnity insurance in order to be eligible to be licensed**

Under this option, the existing requirement that a conveyancer have professional indemnity insurance cover in order to be eligible for a licence would be retained.

The Estate Agents Act would be amended so that a person would be required to have professional indemnity insurance cover in order to be eligible for an estate agent's licence. Transitional provisions would be inserted into the Act to provide time for already-licensed estate agents to obtain professional indemnity insurance cover.

This option recognises stakeholder concern about the potential difficulty of enforcing a requirement for a conveyancer to hold professional indemnity insurance before commencing work, although it should be noted that this does not appear to be an issue of concern in NSW, where professional indemnity insurance is a condition of practice.

As with alternative **option 9B**, this option also recognises feedback that estate agents' clients would benefit from estate agents being required to hold professional indemnity insurance, although it is not clear that the absence of such a requirement is causing any problems in the real estate sector.

#### **Question**

- 11 What is the appropriate level of monetary coverage for any one claim that should be specified for professional indemnity insurance for estate agents?

## **1.8 Office management**

### **Issue**

The Estate Agents and Conveyancers Acts require physical management of estate agencies and conveyancing businesses; however, technological developments mean that these requirements are no longer necessary, as a business owner can now supervise their business remotely.

### **Stand-alone option**

- **Option 10** – Amend the Estate Agents Act and Conveyancers Act to facilitate remote supervision of estate agencies and conveyancing businesses

### **Background**

Currently, the Estate Agents Act has a clear emphasis on establishing direct and physical regulation of the real estate office environment (that is, branches of the estate agency business).

Day to day office operations in a branch office must be managed by an estate agent and estate agents are prohibited from managing more than one estate agency office. Formal arrangements must be put in place when a manager is absent from the office. If a period of absence is greater than 30 days the BLA must approve a replacement manager.

The Conveyancers Act also requires a licensee who carries on a conveyancing business from more than one place of business to appoint a licensee to manage the day-to-day operations of each place. In addition, a licensee can only manage the day-to-day operations of one place of business. In case of a greater than seven day absence of the managing licensee at a place of business, another licensee must be appointed temporarily and the BLA notified in writing.

The Issues Paper asked stakeholders whether it remains necessary to prescribe a management approach that requires an estate agent or conveyancer to physically manage the day to day operations at each place of business and, if not, what, if any, office management requirements should be prescribed.

### Stakeholder feedback

Most stakeholders agreed that it is unnecessary to require that branches of a conveyancing business or estate agency be physically managed, in light of technological developments that can facilitate remote supervision.

Instead, stakeholders confirmed that the emphasis should be on licensees having the necessary policies and procedures in place to ensure their professional obligations are being met at each of their branch offices. It was noted as especially important that principals in smaller or 'sole practitioner' firms be able to take 'mental health' breaks.

Stakeholders confirmed that, if the requirement for physical attendance and supervision at branch offices were to be removed, the concepts of a 'branch manager' and 'branch office' under the Estate Agents Act, along with the requirement to notify the BLA of a branch manager's absence, would be redundant and could be removed.

The following stand-alone option addressing the issues above is presented for feedback.

### Option 10 – Amend the Estate Agents Act and Conveyancers Act to facilitate remote supervision of estate agencies and conveyancing businesses

Under this option, the Estate Agents Act would be amended to repeal:

- the requirement that each branch office of an estate agency be managed by a licensed estate agent
- the prohibition on estate agents managing more than one estate agency
- references to 'branch offices' and 'branch managers', and
- the requirement for estate agents who manage offices to make formal arrangements when they are absent from the office and, if the period of absence is greater than 30 days, notify the BLA so that the BLA can approve a replacement manager.

A clear obligation would be placed on licensed estate agents who carry on estate agency businesses and OIECs of corporate estate agency businesses to put in place the necessary policies and procedures to ensure that their legislative obligations are being met at each branch of their business. Failure to put in place these policies and procedures would be an offence.

Equivalent amendments would be made to the Conveyancers Act to remove requirements for physical supervision of branches of a conveyancing business.

#### **Question**

- 12 Are there any specific risks associated with removing requirements for physical supervision of an estate agency or conveyancing business that should be addressed?

## 1.9 Officers in effective control (Estate Agents Act)

### **Issues**

- 1 Existing provisions in the Estate Agents Act imposing duties on OIECs of corporate estate agencies and individual licensees who run estate agency businesses do not ensure the proper conduct of estate agency work and office procedures.
- 2 The Estate Agents Act does not require a corporate licensee to replace an OIEC who resigns from his or her position. This presents a risk for the licensee.

### **Stand-alone option**

- **Option 11** – Strengthen the duties of those who run estate agency businesses, require an outgoing OIEC to be replaced within 30 days and introduce the capacity to suspend a licence where an outgoing OIEC is not replaced

### **Background**

The Issues Paper asked for views as to how obligations in the Estate Agents Act on licensed estate agents who carry on estate agency businesses and OIECs of corporate estate agencies could be improved to facilitate the proper conduct of estate agency work and office procedures.

Stakeholders were also asked whether there are risks associated with a corporate estate agency not having or not immediately replacing an OIEC and whether these risks should be addressed in the Act.

### **Stakeholder feedback**

Stakeholders generally agreed that the introduction of more stringent training requirements would go a significant way towards facilitating the proper conduct of estate agency work, and appropriate office procedures.

The only specific suggestions for reforming existing duties on OIECs and licensees who carry on businesses (set out in section 29B of the Estate Agents Act) were to:

- increase the existing penalty for offences against section 29B from 25 penalty units to 100 penalty units, and
- revise the existing duty in relation to the supervision of agents' representatives, so that the duty is to ensure that representatives receive appropriate training and professional development.

It was also suggested that disciplinary conduct should be taken against an OIEC who is found guilty of breaching section 29B, so that it can be determined whether they are a fit and proper person to hold a licence. This is already possible under the disciplinary provisions of the Estate Agents Act.

Most stakeholders agreed that the absence of an OIEC presents risks for an estate agency corporation, such as the opportunity for improper conduct in relation to trust moneys, non-compliance with legislation, and a lack of leadership and supervision of agency employees.

It was agreed that an OIEC who leaves a corporation permanently or for a significant period needs to be replaced, and suggested that where a corporation fails to appoint an OIEC within 30 days of the departure of the nominated OIEC, the corporation's licence should be suspended, at the BLA's discretion.

The following stand-alone option is presented for feedback.

### **Option 11 – Strengthen the duties of those who run estate agency businesses, require an outgoing OIEC to be replaced within 30 days and introduce the capacity to suspend a licence where an outgoing OIEC is not replaced**

Under this option, section 29B of the Estate Agents Act would be amended to:

- remove the requirements for licensed estate agents who carry on estate agency businesses and OIECs of corporate estate agencies to be regularly and usually in charge, and give regular and substantial attendance at their principal offices, consistent with the approach proposed in **option 10** in this chapter

- require agents who carry on businesses and OIECs to establish processes and procedures to ensure that their employees comply with relevant laws. Currently, the requirement is that ‘reasonable steps’ be taken to ensure that staff comply with relevant laws, however, this does not appear to be sufficient, as a large percentage of calls to CAV are from estate agents and agency employees clarifying the law
- require estate agents who carry on businesses and OIECs to establish processes and procedures to ensure that employees are updated on changes to the law, and
- increase the maximum penalty that can be imposed for an offence against section 29B to a level that better reflects its seriousness.

In recognition of the risks that may arise where a corporate licensee is without an OIEC (either because the former OIEC has resigned or because the OIEC is likely to be away for a significant period), under this option the Estate Agents Act would be amended to require a licensee to replace an outgoing OIEC within 30 days. It would be an offence not to comply with this requirement. Amendments would be made to enable a licence to be suspended, if an OIEC is not replaced within the specified period.

## 1.10 Licensing issues specific to conveyancers

### **Issue**

Conveyancers are currently unable to suspend their licence for a period of time (for example, to take maternity leave), and re-enter the workforce at a later date.

### **Stand-alone option**

- **Option 12** – Establish a voluntary licence suspension process

### 1.10.1 Voluntary suspension of licence

#### **Background**

Unlike the Estate Agents Act, the Conveyancers Act does not currently provide for the voluntary suspension of a conveyancer’s licence for a limited period. This is problematic for sole traders who surrender their licence and seek to re-enter the workforce at a later date, as they cannot satisfy the work experience component of the application process (because as sole traders they cannot provide evidence of having been supervised by another fully licensed conveyancer or a legal practitioner within the relevant time period). Stakeholders were asked about ways to facilitate conveyancers re-joining the workforce, after taking a leave of absence.

#### **Stakeholder feedback**

There was significant support for enabling a conveyancer to suspend their licence for a period of time, and re-enter the workforce, provided that the conveyancer undertakes certain training.

Most stakeholders endorsed the approach taken for legal practitioners, i.e., voluntary suspension for up to three years, provided that on return they undertake ‘approved training’ within six months. An alternative approach was to require conveyancers who voluntarily suspend their licences to complete CPD during their time away from the industry, in order to remain eligible to work in the future.

It was suggested that, in addition to the proposal above, a person who has held a licence in the previous five years should have their work experience recognised and, subject to approved training being undertaken, be eligible to be re-licensed; however, this does not appear to be necessary if voluntary suspension of a licence is available.

The following option addressing this issue is presented for feedback.

#### **Option 12 – Establish a voluntary licence suspension process**

Under this option, consistent with the approach taken for legal practitioners, the Conveyancers Act would be amended to enable a person to voluntarily suspend their licence for up to three years.

The key features of this option would be as follows:

- there would be specific provision for a person who has voluntarily suspended their licence to apply to the BLA to reinstate the licence
- the BLA would be empowered to reinstate the licence, subject to a condition that the person undertake 'approved training' within six months.
- the Director of CAV would have the power to approve training, and
- a failure to comply with the condition to undertake approved training within six months would result in the licence reinstatement lapsing.

### **Question**

13 Is the three year timeframe proposed by option 12 appropriate, or do you have an alternative suggestion?

## 1.10.2 Cancellation of licence

### **Issue**

A licensed conveyancer's failure to provide an annual statement or pay their annual fees cannot currently lead to licence cancellation until a full year of non-compliance has passed.

### **Stand-alone option**

- **Option 13** – Amend the Conveyancers Act to provide for automatic licence cancellation following non-payment of annual fee and failure to provide annual statements

### **Background**

Currently under the Conveyancers Act, a person's licence may only be cancelled due to failure to comply with the annual statement and licence fee requirements after a full year of non-compliance passes. In comparison, under the Estate Agents and Owners Corporations Acts, a licence can be cancelled if an annual statement is not provided by a licensee and fees are not paid. The Issues Paper asked stakeholders whether any issues would arise if the Conveyancers Act was amended in line with the Estate Agents Act process.

### **Stakeholder feedback**

Most stakeholders supported aligning the process under the Conveyancers Act where an annual statement has not been lodged or annual fees not paid, in line with the approach taken in the Estate Agents Act.

It was noted that where a licence is cancelled, a conveyancer's clients may be affected, and as such, external intervention could be explored.

The following option addressing this feedback is presented for feedback.

### **Option 13 – Amend the Conveyancers Act to provide for automatic licence cancellation following non-payment of annual fee and failure to provide annual statements**

Under this option, the Conveyancers Act would continue to require a licensee to pay an annual licence fee and provide an annual statement to the BLA on the anniversary of the day on which the licensee was last granted a licence, and licensees would continue to be able to apply to the BLA for an extension of time, or further extension of time, in which to comply with this requirement.

However, the Act would be amended to provide for the automatic cancellation of a licensee's licence following a failure to comply with the requirement to provide the BLA with an annual statement and pay the annual fee by the date required (taking into account any extensions granted by the BLA). This approach is consistent with the approach taken under the Estate Agents Act.

As the Conveyancers Act already contemplates external intervention where a licensee's licence has been cancelled, there would be no need to specifically provide for the appointment of a statutory manager.

## 2 Conduct of estate agents

This chapter sets out stakeholder feedback on, and presents options relating to, the following issues:

- the conduct of estate agents in managing and selling property
- the negotiation of sales authorities
- the obtaining of financial benefits by estate agents and others, and
- rebates received by estate agents in respect of expenditures paid for by clients.

### 2.1 Roles and responsibilities of estate agents

#### **Issue**

The Estate Agents Act does not currently set out an estate agent's duties in relation to sellers, buyers, landlords and tenants.

No reform option is proposed.

#### **Background**

Stakeholders were asked about establishing guiding principles about the role of estate agents in the Estate Agents Act or setting out in the Act an estate agent's duties in relation to sellers, buyers, landlords and tenants. There is currently limited guidance on agents' duties toward these parties in the Estate Agents (Professional Conduct) Regulations 2008 ('professional conduct regulations').

#### **Stakeholder feedback**

A number of stakeholders supported clarifying an estate agent's duties in relation to sellers, buyers, landlords and tenants, advising that it may assist in establishing reasonable expectations. Others acknowledged that some consumers may be confused about agents' roles and duties but did not accept that the position is legally unclear, and considered that any attempt to introduce principles or duties is not only unnecessary, but would cause conflicts with existing legislative obligations and could embroil agents in conflicts of interest.

Some other respondents noted, simply, that the professional conduct regulations are a sufficient statement of estate agents' duties, and education on these may be more effective.

In light of stakeholder feedback, no reform option is proposed.

#### 2.1.1 Conduct in property management

#### **Issue**

Professional conduct rules for estate agents and agents' representatives do not include specific conduct standards for property management.

#### **Stand-alone option**

- **Option 14** – Amend professional conduct rules to include specific rules relating to property management

#### **Background**

Stakeholders were asked whether additional information should be included in the Estate Agents Act about the role estate agents play in property management, and what sanctions should be in place for estate agents who display poor behaviour in the property management space.

## Stakeholder feedback

There was mixed feedback on this issue.

Some stakeholders viewed this change as unnecessary, in light of agents' existing legislative and general professional conduct obligations. However, others saw value in the idea, and it was suggested that specific property management provisions could be included in the professional conduct regulations.

The idea of sanctions for estate agents who display poor behaviour in the property management space also attracted mixed feedback. One view was that it would be undesirable to create specific offences for poor property management, as poor behaviour in any area of real estate practice should attract general sanctions. Those who supported specific tools suggested sanctions including fines, monetary penalties, licence demerit points, requirements to enter into written undertakings, public warnings, criminal prosecution and disciplinary proceedings (for example, licence suspensions).

The following stand-alone option is presented for feedback.

### Option 14 – Amend professional conduct rules to include specific rules relating to property management

Currently, the professional conduct rules for estate agents and agents' representatives are general in nature, dealing with (among other things) an agent's duty to act fairly and honestly, avoid conflicts of interest and act on a client's instructions.

Under this option, the professional conduct rules would be amended to include specific property management rules applying to estate agents and agents' representatives, in line with the approach taken in Part 2 of Schedule 2 to NSW's *Property, Stock and Agents Regulation 2014*. As a result, estate agents and agents' representatives who manage property would be required to comply with both general rules of professional conduct, and specific professional conduct rules relating to property management.

This option provides a targeted way to address stakeholder concerns about, and evidence of, particular types of poor behaviour in the property management space, such as a failure to respond to requests for maintenance of, and repairs to a rental property.

CAV would engage with industry and consumer representatives in developing specific rules, to ensure that the rules do not create conflicts with existing legislative obligations, are fair and balanced, and do not impose an unreasonable impost on the real estate industry. Before implementation of any changes to the rules, CAV would work with industry to deliver an appropriate education campaign.

Failure to comply with the specific property management conduct rules would result in disciplinary sanctions.

## 2.1.2 Conduct in selling property

### **Issue**

Professional conduct rules do not include specific conduct standards for the sale of property.

No reform option is proposed.

### **Background**

Stakeholders were invited to provide their view on the merits of clarifying and directly expressing in the Estate Agents Act the duties and obligations, if any, that an estate agent has towards buyers of property.

### **Stakeholder feedback**

Generally stakeholders were not convinced of the merits of amending the Estate Agents Act to clarify duties and obligations of an estate agent towards buyers of property, on the basis that the Act and associated regulations are already clear about any obligations that do exist, and provide (along with ACL provisions) adequate protections for buyers in the event the obligations are not met. There was a sense that any attempt to clarify the role of estate

agents in the Act would lead to greater confusion about the role of an estate agent, for both the public and estate agents.

However, other stakeholders considered that there would be merit in prescribing estate agents' duties and responsibilities toward buyers of property in the professional conduct regulations, suggesting in particular estate agents should be required to:

- communicate all genuine written offers made by prospective buyers of land to their clients
- inform buyers about the existence of an owners corporation affecting land being sold by a seller, and
- be responsible for quoting realistic prices at which they expect properties to be sold.

It was also suggested that it would be useful for estate agents to provide parties – particularly those in the domestic real estate market – with a summary of their duties and responsibilities at the outset of a transaction.

Unlike estate agents' conduct in property management, which has been the subject of significant concern and is proposed to be dealt with through amendments to the professional conduct regulations (see **option 14** in this chapter, above), the areas of specific concern identified by stakeholders above are already regulated. The professional conduct regulations require an estate agent or agent's representative to communicate all written or verbal offers to purchase, sell or lease real estate or a business, made to the agent; section 32 of the Sale of Land Act provides for disclosure of land affected by an owners' corporation; and the Estate Agents Act requires an estate agent to provide a seller with a realistic estimate of the likely selling price for a property and prohibits underquoting.

No option has been developed for this issue, on the basis that reform does not appear to be necessary and could cause confusion.

## 2.2 Negotiating the sales authority

### **Issue**

There is concern that sellers may be pressured into signing unfavourable sales authorities, are not being provided with adequate disclosures, and have no remedies if unsatisfied with an estate agent's sales performance.

### **Stand-alone options**

- **Option 15** – Provide a 'cooling-off' period for sellers who have entered into sales authorities for residential properties
- **Option 16** – Require estate agents to provide sellers of residential property with a fact sheet on sales authorities

### **Background**

The Estate Agents Act requires agents to disclose certain information to a seller before a sales authority is signed, and provides for the termination of exclusive sales authorities within certain timeframes, in circumstances where the authorities do not specify the length of the agreement.

However, the process leading up to a seller signing a sales authority is not regulated and sellers who are unhappy with the level of service provided by their agent once an authority is signed have no specific remedies. CAV receives regular complaints from consumers who have signed sales authorities that they subsequently regret.

Stakeholders were asked whether there is evidence of sellers making decisions about sales authorities in haste, under pressure or without appropriate information. Feedback was also sought about the costs and benefits of regulating estate agents' conduct in negotiating sales authorities, and the content of authorities.

## Stakeholder feedback

Views on this issue varied.

Some stakeholders considered that no change to the regulation of sales authorities is required, because sellers are offered significant disclosure and have the ability to negotiate the terms of the authority as they would any other contract.

However, other stakeholders were in favour of increased regulation. For example, there was feedback that authorities are too complex, and that pressure is often placed on sellers to sign authorities without their contents being explained, indicating that a 'cooling off' period may be appropriate. It was also suggested that agents should be obliged to inform sellers that they can enter into either an exclusive sale authority or general sale authority (and the implications of each), that there should not be a concept of a 'continuing authority period', and that the events that will entitle an estate agent to receive a sales commission should be more clearly stated. There was some support for providing remedies to sellers who are dissatisfied with the service provided by an estate agent, although feedback on this issue was limited and it is not clear how significant an issue this is in practice.

A number of stakeholders expressed concern that the Estate Agents Act currently requires estate agents selling off-the-plan properties for property developers to have sales authorities of specified duration (given that off-the-plan developments are often sold over very long periods of time), although it was not clear why this category of sales authority should not have a specified end date, negotiated between the parties, taking into account commercial risk and the possibility that the authority will not be renewed.

The following stand-alone options are presented below, for feedback.

### Option 15 – Provide a 'cooling-off' period for sellers who have entered into sales authorities for residential properties

Under this option, the Estate Agents Act would be amended to give a seller who signs either a general or exclusive sales authority for a residential property a right to 'cool-off', within three clear business days from the day after signing the authority.

The cooling-off right could not be removed through a contractual term in the authority.

This option addresses the feedback that there is anecdotal evidence of sellers being pressured into signing sales authorities that they later regret. Where sellers decide to cool-off, this may result in an estate agent losing the sale, or alternatively renegotiating the authority with the seller on more acceptable terms.

This protection would not apply to sophisticated sellers. A sophisticated seller would be defined as a professional property developer.

### Option 16 – Require estate agents to provide sellers of residential property with a fact sheet on sales authorities

Under this option, the Estate Agents Act would be amended to require an estate agent to give a seller a fact sheet that includes certain information about sales authorities.

The fact sheet, which would be required to be in a form approved by the Director of CAV, would advise sellers:

- about the distinction between a general and exclusive sales authority
- about the events that entitle an estate agent to receive a sales commission under sales authorities, and
- if **option 15** is pursued, that the seller has cooling-off rights under the authority.

Other information may also be relevant.

Estate agents would not be required to provide the fact sheet to sophisticated sellers.

This option addresses stakeholder feedback that sellers are often unaware of the effects of the authority that they are signing, and that critical information in relation to the authority should be clearly disclosed. This approach is an alternative to requiring all sales authorities to be in the 'prescribed form', which would impose a regulatory burden on estate agents, and for which no case has been established.

### Questions

- 14 Are there any other categories of sophisticated sellers who do not need the benefit of the protections offered under options 15 and 16?
- 15 Is a three business day period sufficient for the cooling-off right proposed by option 15? If not, what is the appropriate period of time?
- 16 Would there be merit in requiring sellers who have entered into sales authorities to 'opt in' to those authorities within three days, rather than providing an 'opt out' mechanism through the proposed cooling-off period?
- 17 What other information would be relevant to include in the fact sheet proposed by option 16?

## 2.3 Financial benefits to agents

The Estate Agents Act places constraints on the financial benefits (in particular, commission and rebates) that flow to estate agents. Commission is defined in the Estate Agents Act to include fees, charges, reward or other remuneration whether monetary or otherwise. Rebates are defined to include any discount, commission or other benefit.

### 2.3.1 Disclosure of financial benefits

#### Issue

The level of information about financial benefits an estate agent is required to disclose is generally appropriate, except in relation to sales involving sophisticated sellers (namely, professional property developers).

Estate agents who have failed to strictly comply with disclosure requirements, but who have nonetheless acted honestly and reasonably, should be entitled to be paid their commission.

#### Stand-alone options

- **Option 17** – Limit disclosure requirements under section 49A of the Estate Agents Act for 'sophisticated sellers'
- **Option 18** – Amend section 50 of the Estate Agents Act to enable commission to be retained in certain circumstances
- **Option 19** – Amend section 49A to clarify that agreements between estate agents are not subject to disclosure requirements

### Background

A key protection under the Estate Agents Act is that an estate agent is not entitled to any payments from a client for work performed or outgoings incurred by the agent unless certain information about commission, fees, rebates and other outgoings has been disclosed to a seller before a sales authority is signed. This disclosure ensures that the client is aware of all payments that would be expected of them and any rebates that will flow back to the agent and which are required to be passed through to the client.

Stakeholders were asked about the current level of information required to be disclosed regarding commission, fees, rebates and other outgoings, and the appropriate consequence if an estate agent fails to meet these requirements (that is, whether there are circumstances in which an estate agent should be entitled to any commission or other moneys).

The disclosure requirements also extend to agreements put in place between estate agents (for example, to share a listing). Stakeholders were invited to comment on whether this is required.

## Stakeholder feedback

### Current level of disclosure

In general, the current disclosure requirements were considered to be sufficient, although it was noted that disclosure of rebates, and costs associated with online advertising, can be problematic.

The main concern stakeholders identified with the disclosure requirements concerned their application to sales authorities involving sophisticated sellers, particularly professional property developers selling property off-the-plan.

A number of stakeholders advised that the current requirements to disclose a percentage and dollar amount of commission and the estimated sales price for every lot serve no purpose in the context of off-the-plan sales in large developments, because prices of lots shift constantly over the life of the development. There was concern that developers have relied on technical non-compliance with disclosure requirements (in particular, the requirement to disclose a dollar amount of commission) to withhold commissions from estate agents. This was contended to be unduly harsh, unfair and beyond the intended policy objective of the disclosure provisions. It was argued that disclosure requirements in relation to commissions, fees, rebates and other outgoings should either:

- not apply to business-to-business transactions involving sophisticated sellers (for example, professional property developers), or
- should continue, but be limited to rebates and outgoings, as well as a percentage-based commission, which can be readily calculated.

Other suggestions in relation to the disclosure of financial benefits were that consideration should be given to requiring disclosure to be in a prescribed form, the 'final amount' a client is required to pay should be disclosed, and the Estate Agents Act should address the position and disclosure requirements of buyers' advocates' fees, outgoings and rebates.

### Consequences of failure to meet disclosure requirements

There was strong support that an estate agent who has failed to strictly comply with the disclosure requirements, but who has nonetheless acted honestly and reasonably, should be entitled to be paid a commission for the work they have undertaken. It was suggested that a court should be empowered to order that an estate agent be entitled to retain any commission or money in respect of outgoings, where:

- the court considered this to be reasonable, with what is 'reasonable' to be assessed objectively having regard to all the relevant circumstances, or
- the court is satisfied that the agent has acted honestly and reasonably and ought fairly to be excused for the contravention, and the seller is substantially in as good a position as if the disclosure requirements had been met.

### Disclosure of agreements between agents

There was little support for requiring agreements between estate agents to be subject to the same disclosure requirements (that is, under section 49A of the Act) as agreements between estate agents and their clients, on the basis that estate agents are industry professionals and do not require the same protections as sellers of real estate.

The following stand-alone options are presented for feedback.

### Option 17 – Limit disclosure requirements under section 49A for 'sophisticated sellers'

Under this option, section 49A of the Estate Agents Act would be amended to provide that estate agents need only disclose information about rebates and outgoings, as well as a percentage-based commissions, in a sales authority entered into with a 'sophisticated seller' (namely, a professional property developer).

This means that a sales authority between an estate agent and sophisticated seller would not include a statement expressing a dollar amount to be paid as commission for every lot, or the estimated sales price of every lot.

This option is preferred to removing disclosure requirements for sales involving sophisticated sellers, in line with stakeholder advice that light touch regulation assists industry by ensuring that parties have a shared understanding of what is required.

### Option 18 – Amend section 50 of Estate Agents Act to enable commission to be retained in certain circumstances

Under this option, section 50 of the Estate Agents Act would be amended to ensure that an agent may retain their commission where a court is satisfied that the agent has acted honestly and reasonably and ought fairly to be excused for the contravention, and the seller is substantially in as good a position as if the disclosure requirements had been met.

This formula is proposed as it is already used in the Sale of Land Act, in circumstances where a seller of land has provided false or misleading information in a section 32 statement, and the buyer of the relevant land has a right to rescind the contract. Feedback from stakeholders on the operation of that provision (obtained in the course of the 2014 review into the operation of section 32 of the Sale of Land Act) suggests that it is effective in ensuring that disputes over false and misleading statements do not lead to rescinded contracts, where this would not be appropriate.

### Option 19 – Amend section 49A to clarify that agreements between estate agents are not subject to disclosure requirements

Under this option, section 49A of the Estate Agents Act would be amended to clarify that agreements between estate agents are not subject to disclosure requirements in relation to commissions.

## 2.3.2 Commission sharing

### **Issue**

The Estate Agents Act does not set out the consequences if a commission sharing arrangement changes.

### **Option**

- **Option 20** – Provide for changes to commission sharing arrangements to be disclosed

### Background

Estate agents are permitted to share commission, provided that, before obtaining a person's signature to a sales authority, the agent ensures the person is given a commission sharing statement which sets out the name and other details of any other person who is entitled to share the commission with the estate agent. The Estate Agents Act does not set out the consequences of what should happen if a commission sharing arrangement is entered into after a sales authority is signed.

The Issues Paper sought stakeholder feedback about when an estate agent should disclose details of a person entitled to a commission, and what disclosure requirements should apply if commission sharing arrangements change.

### Stakeholder feedback

Some stakeholders considered that commission sharing arrangements do not need to be disclosed, as they are normal practice and do not disadvantage sellers. However, others considered that current disclosure requirements are appropriate, and advised that changes to commission sharing arrangements should be disclosed in a commission sharing declaration form or statement.

The following stand-alone option is presented for feedback.

### Option 20 – Provide for changes to commission sharing arrangements to be disclosed

Under this option, section 48 of the Estate Agents Act would be amended to provide that changes to commission sharing arrangements are to be disclosed to a client in a new commission sharing statement, in a prescribed or approved form.

### 2.3.3 Ban on commission if the agent obtains a beneficial interest

#### **Issue**

An estate agent is currently banned from receiving a commission, in circumstances where the agent, their representative or their relative obtains a beneficial interest in property the agent has been commissioned to sell.

#### **Stand-alone option**

- **Option 21** – Remove the ban on commissions under section 55 of the Estate Agents Act, but introduce additional protections for sellers

#### **Background**

Section 55 of the Estate Agents Act prohibits a person who is an estate agent, agents' representative or relative of the estate agent or agent's representative from obtaining a beneficial interest in (that is, buying) any real estate or business the estate agent has been commissioned to sell unless:

- the person obtains written acknowledgement and consent from the seller before the contract of sale is entered into and the person acts honestly and reasonably in relation to the transaction,
- no commission or other reward is payable in relation to the transaction, and
- the seller is in substantially as good a position as if the real estate or business were sold at fair market value.

Stakeholders have stated that the ban on receiving commissions in these circumstances significantly diminishes the earnings of estate agencies in towns with smaller populations, and creates risk management problems for larger agencies.

The Issues Paper asked for feedback about the safeguards that should be in place in these circumstances, and the distinction, if any, between an estate agent personally buying a property that is listed with the agency, and their representatives or relatives buying the property.

#### **Stakeholder feedback**

##### **Safeguards where beneficial interest obtained**

A number of stakeholders considered that the existing safeguards – including the ban on commissions – should remain in place, although it was acknowledged that this may be unfair for an estate agent.

There was a view that only in circumstances where a relative of an estate agent is the highest bidder at a publicly advertised auction, and the seller is aware of the relationship between the bidder and the estate agent, could a case be made for the agent being entitled to a commission.

However, other stakeholders thought the ban on commissions could be repealed, subject to additional protections being introduced for sellers, in particular:

- a requirement that the Director of CAV approve or modify terms of sales to persons currently captured by section 55
- a 'cooling off' period, within which a seller could withdraw from a sale contemplated by section 55
- mandatory independent valuations, with the sale price not to be lower than this valuation
- provisions designed to slow a sale down so as to give a seller time to consider the deal and to make it easier for sellers to prove that an estate agent has acted wrongfully.

##### **Distinction between beneficial interests obtained by estate agents, agents' representatives and relatives**

Some stakeholders suggested that a case could be made for an estate agent receiving a commission where a property is sold to relatives of the estate agent, and even their agents' representatives, although there was feedback that no commission should ever be payable where an estate agent's spouse or an entity in which the agent would receive the benefit purchases the property.

Others suggested that estate agents, their representatives and relatives should all be able to purchase property the agent has been commissioned to sell, provided appropriate disclosures have been made, although there was a view that an independent valuation should be carried out, and a sale price set that reflects the market value of the property.

The following stand-alone option to address the issues above is presented for feedback.

### **Option 21 – Remove the ban on commissions under section 55 of the Estate Agents Act, but introduce additional protections for sellers**

Under this option, section 55 of the Estate Agents Act would be amended to remove the ban on an estate agent being paid a commission in circumstances where the estate agent, their representative or their relative obtains a beneficial interest in the property the agent has been commissioned to sell.

An estate agent or agent's representative who buys a property they have been commissioned to sell (or whose relative buys the property) would be required to act honestly and reasonably, and obtain the seller's consent to both the sale and the payment of the commission in the approved form. The requirement that a seller be in 'substantially' as good a position as if the property were sold at fair value would be retained.

In addition, to protect a seller's interest, section 55 would be amended to:

- provide a 21 day cooling-off period for sellers after signing the contract of sale, during which time they could obtain independent legal advice about the sale, and
- establish a cause of action against an estate agent or agent's representative for compensation, in circumstances in which the seller is not in substantially as good a position as if the property were sold at fair value.

Importantly, the proposed 21 day cooling-off period for sellers would not apply where a sale occurs following a publicly advertised auction, as it would introduce too much uncertainty into the auction process. In addition, a seller who triggers cooling-off rights in this situation would be disadvantaged, by having to bear the costs of an unsuccessful auction.

Guidance would be provided as to the meaning of 'in substantially as good as a position'.

#### **Question**

- 18 Does a 21 day cooling-off period provide sufficient time (particularly for sellers in rural areas) to access independent legal advice on a sale?

## **2.4 Rebates**

### **Issue**

There is concern that 'indirect' benefits received by estate agents in respect of their clients' outgoings are not being passed on to their clients, as required under the rebate provisions of the Estate Agents Act.

### **Alternative options**

- **Option 22A** – Retain and strengthen the prohibition on retaining rebates, improve disclosure provisions and clarify the meaning of 'benefit'
- **Option 22B** – Permit estate agents to retain rebates provided they fully disclose the rebates to their clients, and clarify the meaning of 'rebate'

### **Background**

The Estate Agents Act prohibits estate agents from retaining any rebates they receive in respect of outgoings, prepayments made by their client and payments made by the client to another person in respect of work. Rebates are defined to include any discount, commission or other benefit. The value of non-monetary rebates obtained as benefits is specifically regulated.

The Issues Paper invited stakeholder comments on whether the current arrangements in the Estate Agents Act sufficiently deal with rebates, and whether 'indirect' benefits or incentives should be captured (and if so, how they should be accounted for). Stakeholders were also asked whether rebates should be permitted in certain circumstances, or whether there are other alternatives to prohibiting rebates.

## Stakeholder feedback

Although some stakeholders considered the current arrangements applying to rebates are sufficient, others were of the strong view that amendments are required.

A number of stakeholders expressed concern that the current provisions do not adequately capture indirect benefits or incentives provided to estate agents by suppliers in return for advertising the agent's listings. It was argued that the Estate Agents Act should prohibit suppliers from providing payments or benefits to agents in return for any service they provide on behalf of a seller or landlord.

It was generally agreed that both direct and indirect rebates should be disclosed to clients (although it was queried how disclosure of this type could realistically be enforced). As indirect benefits may take some time to manifest, it was suggested agents should be required to disclose indirect benefits that they may receive within next two years. Another suggestion was that agents who own shares in publishing companies or groups that advertise on the internet should be required to disclose that they are a shareholder in that company, unless it is a public company listed on the stock exchange.

Feedback on whether estate agents should be permitted to retain rebates varied widely.

As noted above, most stakeholders were of the view that the current regulatory requirements are appropriate. It was also suggested that permitting estate agents to retain rebates would lead to industry confusion, although the reason for this possible confusion was not specified. Another suggestion was that disclosure requirements be broadened to require agents to disclose any rebate receivable by 'related companies', and to ensure that payments made to these related entities are returned to the agent's client.

However, a few stakeholders expressed support for permitting estate agents to retain rebates, subject to the rebates being disclosed.

The following alternative options to address this issue are presented for feedback.

### Option 22A – Retain and strengthen prohibition on retaining rebates, improve disclosure provisions and clarify the meaning of 'benefit'

Under this option, the current prohibition on estate agents retaining rebates would be retained, with amendments to specifically clarify that the term 'benefit' for the purposes of the definition of 'rebate' includes indirect incentives or benefits, for example, any benefit or reward or opportunity or chance for a prize offered by a person as an inducement for an estate agent to obtain goods or services from that person.

In addition, estate agents would be required to specifically disclose:

- rebates received by parties that are 'related' to the estate agent, with amendments to relevant offence provisions requiring that payments made to these related entities be returned to the agent's client
- if they own shares in publishing companies or groups that advertise on the internet or in print media (unless the company is publicly listed), and if they have collateral or sponsorship agreements with any advertising or publishing entities, and
- benefits that the agent may receive within next two years.

This option may address stakeholder concerns about the development of schemes that are not currently directly contemplated in the definition of 'rebate' that are nonetheless designed to financially reward estate agents for obtaining goods and services from particular providers (for example, media companies).

However, it may simply drive providers of such goods and services to develop innovative 'rewards' that do not fall into the definition of 'benefit'. In this circumstance, there may be no net benefit from such an amendment.

### **Option 22B – Permit estate agents to retain rebates provided they fully disclose the rebates to their clients, and clarify the meaning of ‘rebate’**

This option is an alternative to **option 22A**, and would involve removing the existing prohibition on estate agents retaining rebates they receive, although agents would still be required to fully disclose rebates received in respect of their client’s outgoings.

As for **option 22A**, there would be amendments to clarify that the term ‘benefit’ for the purposes of the definition of ‘rebate’ includes indirect incentives or benefits, for example, any benefit or reward or opportunity or chance offered by a person as an inducement for an estate agent to obtain goods or services from that person.

This option is consistent with the approach taken in a number of other jurisdictions, addresses concerns that passing on rebates may be impracticable given the indirect nature of some of the indirect incentives offered by third parties, and reflects the inherent difficulty in enforcing a prohibition on the retention of rebates. However, it does not address the fundamental issue of estate agents financially benefitting from arrangements that have been paid for by their clients, and which may not necessarily advantage their clients.

## 3 Conduct of conveyancers

This chapter summarises stakeholder feedback on, and presents reform options for, the following issues:

- the payment of commissions or referral fees by conveyancers, in return for client referrals, and
- conveyancers' costs disclosure obligations.

### 3.1 Professional conduct rules – payment of commissions (referral fees)

#### **Issue**

Some conveyancers are asked, or offer, to pay a commission, or 'referral fee', to third parties in return for client referrals. Provided that they are disclosed as a potential conflict of interest, these types of payments are not illegal. Nonetheless, there is concern that they create legal and ethical dilemmas for conveyancers, and may disadvantage conveyancers' clients.

#### **Alternative options**

- **Option 23A** – Prohibit conveyancers from paying commissions in return for client referrals
- **Option 23B** – Prescribe the form of disclosure for commission payments in return for client referrals

#### **Background**

The Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008 (the regulations) made under the Conveyancers Act prescribe rules of professional conduct for conveyancers. These include obligations to act honestly, fairly and professionally, comply with fiduciary duties, act in a client's best interests and avoid conflicts of interest.

The Issues Paper invited stakeholders to comment on whether the existing professional conduct rules are sufficient, whether any changes or additions to the rules should be considered, and whether the rules should align with relevant rules for legal practitioners, where practicable.

Specific feedback was also invited as to what regulation, if any, is needed to deal with the circumstance in which a conveyancer is asked (or offers) to pay a commission, or 'referral fee', to a third party who refers a client to the conveyancer. Provided that they are disclosed by conveyancers to their clients as a 'potential conflict of interest' in accordance with section 49 of the Conveyancers Act, these payments are not illegal. However, during preliminary consultation it was suggested they should be banned.

#### **Stakeholder feedback**

Feedback from stakeholders suggested that, generally, the current professional conduct rules continue to be relevant and mostly sufficient to deal with matters that conveyancers should observe in the conduct of their businesses. There was some support for aligning the rules (where relevant and practicable) with equivalent rules that apply to legal practitioners, consistent with the aim of providing conveyancers and legal practitioners with a 'level playing field', although not all stakeholders considered alignment to be necessary.

There was widespread concern about conveyancers who pay third parties in return for client referrals. There was a sense that such payments undermine the integrity of the conveyancing industry, and exploit consumers. It was considered that the practice is, effectively, shopping clients as a commodity, and there was concern about the effect on clients of referrals where the referring party does not have a genuine belief in the conveyancer's ability.

However, despite widespread concern about the practice of conveyancers paying for referrals, stakeholders held differing views as to whether, and how, this issue should be addressed.

While it was noted that prohibiting referral payments would be consistent with the approach taken in SA (for example), others considered that such a ban would be impractical and difficult to enforce. For example, it was noted that estate agents often make referrals, and expect and obtain referral fees.

A number of stakeholders supported conveyancers disclosing the nature of any payment or financial benefit payable in return for a referral in line with legal practitioners' obligations under rule 12 of the Legal Profession Uniform Law Australian Solicitors Conduct Rules, which – among other things – requires disclosure of the payment or financial benefit that has been paid or received. However, an alternative suggestion was to undertake research into effective consumer disclosure, rather than immediately adopting the approach taken with lawyers, on the basis that disclosure of conflicts of interest is a complex area that can lead to perverse outcomes, where consumers place greater trust than is warranted in the person making the disclosure. Alternatively, it was suggested that consideration could be given to establishing disclosure requirements that include the amount paid in referral fees, the recipient, and whether the referral fee was paid as part of a repeat referral arrangement.

Two alternative options that address the issue of payment of commissions are presented below, for feedback.

As submissions to the Issues Paper suggested that (other than in relation to referral payments) the rules are generally sufficient to address matters conveyancers should observe in their conduct, reforming the rules so that they more comprehensively align with equivalent rules for legal practitioners is not considered necessary.

### **Option 23A – Prohibit conveyancers from paying commissions in return for client referrals**

Under this option, the Act would be amended to prohibit conveyancers from paying commissions or 'referral fees' to third parties in return for client referrals, or receiving commissions from third parties. The prohibition would be drafted to cover monetary and non-monetary gifts, favours and benefits offered or paid by a conveyancer or an associate of a conveyancer to a third party, or received by a conveyancer or their associate from a third party.

It would be a criminal offence to breach this prohibition.

If this prohibition were introduced, section 49 of the Conveyancers Act would be amended to remove the existing requirement for licensed conveyancers to disclose if the licensee, or one of their associates, pays or receives, or is to pay or receive, a commission in respect of a transaction relevant to a client.

The prohibition would not prevent estate agents or developers from referring clients to conveyancers; it would simply prohibit conveyancers from paying for referrals, and receiving referral payments from third parties.

This prohibition would address stakeholder concerns about conveyancers obtaining clients other than through reputation, skill and experience, and clients being 'referred' to conveyancers in circumstances where the referral is not genuine. It also deals with concerns about the value, or effectiveness, of disclosure in this scenario, by entirely removing the need for disclosure.

However, prohibiting payment of commissions or 'referral fees' will not guarantee that such commissions are not paid. There is a risk that a proportion of the market would continue to pay commissions for referrals in secret, despite such activity being illegal. This would create an imbalance in the market, and is likely to be difficult to enforce.

Prohibiting conveyancers from paying for referrals would also be a restriction on the way conveyancers obtain business, and is inconsistent with the position in other industries (for example, the real estate industry and legal profession), in which payment, and receipt, of commissions is acceptable practice, provided the commission is disclosed. In particular, it may lead to legal practitioners who are able to pay commissions for client referrals being favoured by estate agents and developers over conveyancers, placing conveyancers who abide by the prohibition at a significant disadvantage.

### **Option 23B – Prescribe the form for disclosure for commission payments in return for client referrals**

An alternative to **option 23A** is to amend the regulations to prescribe a form for disclosure of commission payments made, or received, by licensees.

Section 49(3) of the Conveyancers Act already enables a form to be prescribed which a licensee must use to disclose actual or potential conflicts of interest that a licensee has in relation to any transaction relevant to a client, however, no such form is currently prescribed.

Under this option, the prescribed form of disclosure would require licensees to disclose certain information in respect of commissions that a licensee or licensee's associate pays or receives, or is to pay or receive, in respect of a transaction, including:

- the amount paid in referral fees
- the recipient, and
- whether the referral fee was paid as part of a repeat referral arrangement.

Section 49 of the Conveyancers Act would be amended to provide that it is an offence not to disclose a conflict of interest in the prescribed form (if any).

Rather than prohibiting such payments, prescribing the way in which commissions or 'referral fees' must be disclosed recognises the prevalence of these payments in the conveyancing and associated industries, and seeks to ensure that a conveyancer's clients are aware that the conveyancer has paid a third party to induce the client to engage the conveyancer's services.

Unlike **option 23A**, this option does not have any apparent impact on competition between conveyancers (other than to the extent that some conveyancers may choose not to disclose the payment of commissions, and risk prosecution). However, it is also unclear the extent to which disclosure of commission payments would be effective in warning consumers that they have been deliberately 'directed' to a particular conveyancer, and that the referral may not be a genuine recommendation.

### **Question**

19 Is there value in conducting research on effective consumer disclosure?

## 3.2 Costs disclosure

### **Issue**

Consumers are not able to easily compare different conveyancers' quotes and can be taken aback by unexpected increases (namely, where additional work is undertaken and separately disclosed).

### **Stand-alone option**

- **Option 24** – Improve existing costs disclosure provisions in the Conveyancers Act

### **Background**

Under the Conveyancers Act a licensee must disclose to their clients the costs (fees and charges) of the conveyancing work that they are to carry out, at the time they are appointed, or as soon as practicable afterwards. Information to be disclosed includes the amount of the costs or, if that amount is unknown, the basis for their calculation, the manner in which the client will be invoiced and avenues open to the client in the event of a dispute in relation to costs.

Issues have arisen where conveyancers have disclosed their costs in a manner that confuses consumers and results in a larger than expected invoice (for example, by providing a costs disclosure form in an initial email, then sending additional 'for information only' emails outlining additional costs). The Issues Paper sought views on whether conveyancers' current costs disclosure provisions are sufficient and, if not, how they should be amended.

Stakeholders were also asked whether conveyancers' costs disclosure requirements should be aligned with those for legal practitioners. Under the Legal Profession Uniform Law, if a legal practitioner's costs exceed \$750 (excluding GST and disbursements), he or she is required to give a written costs disclosure as soon as practicable after instructions are given, including estimated total legal costs, the basis on which costs will be calculated and the client's rights including in the event of a costs dispute. Where total costs are likely to be between \$750 and \$3,000 a 'short form' costs disclosure statement can be used. The Legal Profession Uniform Law also requires further disclosure where there is a significant change in circumstances, including legal costs.

## Stakeholder feedback

There was mixed feedback on questions relating to conveyancers' costs disclosure obligations.

There was some support for aligning conveyancers' obligations with the equivalent obligations for legal practitioners where relevant. It was suggested that this would provide consumers with a good basis for comparison between legal practitioners and conveyancers' costs, and ensure that persons undertaking work experience with legal practitioners have the same understanding of costs disclosure as those undertaking experience with conveyancers.

However, there was a contrasting view that alignment is unnecessary, and would result in higher costs for consumers. Specific support was also expressed for conveyancers continuing to disclose all fees and disbursements, unlike legal practitioners, who are currently only obliged to disclose costs when their fees are likely exceed \$750.

Other comments made by stakeholders were that:

- a significant problem with current costs disclosure is differing quotation practices (for example, quotes that are inclusive/exclusive of GST and disbursements), which make it difficult for consumers to compare quotes. It was also suggested that some conveyancers manipulate their quoting system so they can charge excessively for disbursements, or charge for services that other conveyancers would include in their professional fees
- clearer disclosure of commissions paid by conveyancers in existing costs disclosure notices (for example, the amount paid in referral fees, the recipient, and whether the referral fee was paid as part of a repeat referral arrangement) should be considered [Note that this issue is dealt with in [section 3.1](#) of this chapter].
- a 'range' provision for conveyancing costs could address the potential for genuine cost variation where, for example, further or different instructions are provided by a client (although another stakeholder was of the view that, if additional work is undertaken, another costs disclosure notice should be provided), and
- costs disclosure notices should be clear, and use a legible typeface (although it should be noted that there was no suggestion that unclear or illegible notices are a problem in the marketplace).

One stand-alone option is presented below for stakeholder feedback.

### Option 24 – Improve existing disclosure provisions in Conveyancers Act

Currently, section 47 of the Conveyancers Act requires licensees to disclose 'costs' associated with licensing work, but does not specify how those costs are to be described. Section 47 also does not explicitly contemplate the disclosure of changes to costs associated with conveyancing work (as a result of necessary additional work).

Under this option, a licensee would be required to provide, in a prescribed or approved form:

- a breakdown of costs to be incurred by a client, so that the client is made aware of specific costs associated with professional fees, disbursements, commissions or 'referral fees' (if not prohibited) and GST, and
- to disclose, as soon as practicable, any significant changes to the amount of the costs to be incurred by a client, or any changes to the basis for the calculation of costs, as a result of necessary additional work.

This option addresses feedback that differing quotation practices make it difficult for consumers of conveyancing services to compare quotes. Requiring conveyancers to disclose the costs of conveyancing work consistently could assist consumers to choose the conveyancer who represents the best value for money.

This proposal is consistent with existing requirements for legal practitioners who must provide their clients with information about any significant change to the costs that will be payable by the client, and also reflects stakeholder feedback that additional work undertaken by a conveyancer should be the subject of a specific disclosure.

However, in the absence of a demonstrated need and clear support for such a change, this option does not propose that costs disclosure requirements for conveyancers should be aligned with those for legal practitioners. Rather, the intention of the option is to ensure that conveyancers' clients understand how they are being charged for conveyancing work, are able to compare quotes, and are given notice where additional work is undertaken that may change their costs exposure.

It is not proposed to amend the Act to contemplate a 'range' of costs that may be payable in respect of a conveyancing transaction: this would be a significant departure from the current approach, which requires a conveyancer to either disclose the actual costs payable for a conveyancing transaction, or be clear about the basis on which costs will be calculated.

**Question**

20 What would be a 'significant change' in costs that a conveyancer should disclose?

## 4 Compliance measures

This chapter summarises stakeholder feedback on the current system for disciplining licensed estate agents and conveyancers, as well as feedback on factors relevant to a review of penalties for offences under the Estate Agents Act. Reform options are presented in respect of both of these issues.

### 4.1 VCAT inquiries and alternative approaches to address poor conduct

#### **Issue**

There are concerns that the VCAT inquiry system for disciplining licensees is time-consuming and does not deter licensees who are the subject of disciplinary proceedings from continuing to engage in poor conduct.

#### **Alternative options**

- **Option 25A** – CAV to be given limited disciplinary powers
- **Option 25B** – CAV to take over VCAT disciplinary functions
- **Option 25C** – A central licensing, regulatory and disciplinary body in CAV

#### **Background**

Under both the Estate Agents Act and the Conveyancers Act:

- the BLA is responsible for assessing and determining licence and permission applications for estate agents and conveyancers
- the Director of CAV is responsible for monitoring and enforcing estate agents' and conveyancers' compliance with the relevant Acts, including by prosecuting criminal offences against the Acts in the Magistrates' or County Court and/ or applying to VCAT to hold a disciplinary inquiry into a licensee, and
- VCAT is empowered, after holding a disciplinary inquiry, to 'discipline' licensees who do not comply with regulatory requirements, or who are guilty of conduct that renders them unfit to hold a licence. Among VCAT's powers are the powers to suspend or cancel a licence, and to direct a licensee to do (or refrain from doing) something.

The Issues Paper sought stakeholders' feedback on their experience of the current VCAT disciplinary inquiry system, and any opportunities that may exist to improve the VCAT process, including changes to the range of orders and penalties open to VCAT in a disciplinary inquiry.

Views on the merits of alternative disciplinary approaches referred to in the Issues Paper, and any other approaches for dealing with poor conduct by estate agents, agents' representatives and conveyancers, were also sought.

#### **Stakeholder feedback**

Submissions suggested that there is a degree of concern about the VCAT inquiry process. General areas of concern raised by stakeholders related to:

- the time taken to conduct VCAT proceedings<sup>3</sup> (although it should be noted that this concern was not shared by all stakeholders)
- the effectiveness of VCAT orders in deterring licensees whose behaviour is not sufficiently poor to result in licence cancellation or suspension from engaging in ongoing unprofessional conduct, to the continued detriment of consumers
- a licensee's livelihood being a factor in decisions whether or not to cancel a licence, where there has been demonstrated misconduct, and

<sup>3</sup> On this point, it should be noted that in an inquiry, a VCAT member is obliged to consider all relevant factors which may or may not lead to a disciplinary action, as the member considers appropriate.

- perceived inconsistency in disciplinary decisions<sup>4</sup>.

Notwithstanding their general concerns about the VCAT inquiry process, stakeholders were generally comfortable with the orders and penalties available to VCAT in disciplinary proceedings. The only specific recommendations were to empower VCAT to:

- impose civil penalties on estate agents and agents' representatives who are found to have breached an obligation under the *Residential Tenancies Act 1997* ('RTA') (similar to the power under section 166 of the *Owners Corporation Act 2006*), and
- refer professional misconduct of estate agents to CAV.

No suggestions were made regarding possible improvements to the VCAT disciplinary inquiry process. Rather, it was suggested that it is preferable for CAV to mediate and resolve an issue before a matter goes to VCAT, and that a more effective regulatory approach may be to give CAV the ability to directly sanction licensees (for example, by cancelling a licence, following an internal hearing). Were such an approach to be implemented, it was suggested that the range of measures available to CAV to deal with misconduct should reflect the wide and nuanced range of measures available to regulators under the ACL.

There was some support for the alternative enforcement approaches identified by stakeholders during preliminary consultation. Establishing a system of 'demerit points' for licence holders was identified as an idea worth considering, although there was a contrary view that this would send the wrong message to the licensed industry, and may lead to the perverse result of operators relaxing their standards, until such time as they appear likely to lose their licence. The idea of introducing a third party regulatory body, such as an ombudsman, attracted limited support, with a suggestion that the fees for such a service should be paid by industry participants, in order to incentivise good service. On this point, it should be noted that ombudsmen are typically more appropriate for industries involving essential services (for example, gas and electricity), a market that is characterised by large firms and limited competition (leading to power imbalances), significant information asymmetry, and large dispute numbers. Only one of these factors (information asymmetry) is arguably present in the estate agents' and conveyancers' industries. Other suggestions about ways to address poor conduct by estate agents and conveyancers focussed on educational programs and training.

Three alternative options are presented below for feedback, each of which proposes changes to VCAT's current disciplinary jurisdiction.

In considering these alternatives, it is important to note that retaining the status quo (i.e. VCAT retains its current disciplinary jurisdiction) is also a reasonable and supportable option.

VCAT has performed disciplinary functions in respect of various licensing schemes since its establishment in 1998, and engages highly qualified members with significant expertise to conduct disciplinary inquiries and make disciplinary orders. Retaining VCAT as the body responsible for disciplining estate agents and conveyancers recognises its considerable expertise in this area, its inherent value as an independent tribunal and its commitment, as part of its customer service improvement program, to improve the accessibility, responsiveness, effectiveness and efficiency of VCAT services.

VCAT also employs alternative dispute resolution ('ADR'), wherever possible, to explore areas of common ground between parties to proceedings. ADR assists with reducing hearing complexities and often leads to shorter, more efficient VCAT proceedings.

Stakeholders who consider that the status quo is preferable to any of the alternative options identified below are invited to provide reasons for that view, as well as advice about any changes (in addition to those already recommended by stakeholders<sup>5</sup>) that could improve the general effectiveness of VCAT disciplinary inquiries into estate agents and conveyancers.

4 On this point, it should be noted that cases at VCAT are determined on their merits, and turn on their own facts. This may at times lead to different decisions, as is the case in other courts.

5 That is, the power for VCAT to impose civil penalties on estate agents and agents' representatives who have breached the RTA, and the power to refer professional misconduct to CAV.

### Option 25A – CAV to be given limited disciplinary powers

Under this option, as is the case currently, the BLA would remain responsible for considering estate agents and conveyancers' licence and permission applications and placing conditions on such licences at the time they are granted.

CAV would continue to remain the body responsible for monitoring and enforcing compliance with the Estate Agents Act and Conveyancers Act, but would take over responsibility for disciplining licensees and former licensees – currently the sole responsibility of VCAT – for low-level offending.

In respect of 'low-level offending' CAV would be empowered to impose certain sanctions, including:

- cautions or reprimands
- directives
- enforceable undertakings
- mandatory training, education, counselling or supervision
- monetary penalties up to a certain threshold, and
- conditions on licences.

Unlike VCAT, CAV would not have the ability to cancel or to suspend a licence. If CAV was of the view that a licensee's (or former licensee's) conduct was so serious that it affected the licensee's capacity to continue to hold a licence, the matter would be referred to VCAT for determination. The current capacity for the Chief Commissioner of Police to instigate a disciplinary inquiry into the conduct of an estate agent would be removed.

Under this option, VCAT's role would be to:

- determine appeals against licensing decisions made by the BLA, as well as appeals against disciplinary sanctions imposed for low-level offending by CAV
- hold disciplinary inquiries in relation to serious misconduct and impose sanctions it considers appropriate (including suspension or cancellation of a licence), and
- deal with damages claims (arising under the *Australian Consumer Law and Fair Trading Act 2012* ('ACLFTA')) brought by individuals, in relation to goods and services provided by licensees and former licensees.

VCAT would be given additional powers to impose civil penalties on estate agents and agents' representatives who are found to have breached an obligation under the RTA, and to refer professional misconduct of estate agents to CAV.

Courts would continue to impose criminal sanctions (including fines and jail time) for offences against the Estate Agents Act and Conveyancers Act prosecuted by CAV.

This model of enforcement is similar to the way in which complaints about the conduct of legal practitioners are dealt with by the Victorian Legal Services Commissioner, who may take direct action against a practitioner if satisfied that the practitioner has engaged in 'unsatisfactory professional conduct', but where satisfied that a lawyer has committed professional misconduct, may take proceedings in VCAT.

The advantages of this approach are that it gives CAV as the regulator power to take low-level disciplinary action against licensees whose behaviour merits formal 'discipline', for example, breaches of the professional conduct rules. This action could be taken after administrative warnings, and before formal criminal proceedings. It may also reduce pressure on VCAT, by limiting VCAT's involvement in disciplinary proceedings to certain serious matters which relate to the fundamental question of whether a licensee should continue to hold a licence.

### Option 25B – CAV to take over VCAT disciplinary functions

An alternative to **option 25A** is for CAV to entirely take over VCAT's disciplinary role in relation to estate agents and conveyancers. This would be in addition to CAV's role monitoring and enforcing (by prosecuting offences in the courts) industry compliance with the Estate Agents Act and Conveyancers Act.

The BLA would be responsible – as is the case currently – for considering estate agents and conveyancers' licence and permission applications and placing conditions on such licences at the time they are granted.

VCAT's role would be to determine:

- appeals against licensing decisions made by the BLA, as well as appeals against disciplinary sanctions imposed by CAV, and
- damages claims arising under the ACLFTA.

As with **option 25A**, courts would continue to impose criminal sanctions (including fines and jail time) for offences against the Estate Agents Act and Conveyancers Act prosecuted by CAV.

This approach is similar to the approach taken in NSW in relation to licensed property industries, whereby the Commissioner of Fair Trading takes disciplinary action against licensees (and former licensees), including the following actions:

- cautions or reprimands
- directives (that is, instructions to take particular actions with a specified time)
- undertakings (where person agrees to operate in a certain manner)
- imposition of monetary penalty (in NSW this is capped at \$11,000 for an individual and \$22,000 for a corporation)
- licence conditions
- licence suspension
- licence cancellation, and
- licence disqualification.

This option would reduce industry confusion about the roles and responsibilities of the BLA, CAV and VCAT under the relevant legislation. The BLA would be responsible for licensing, CAV would be responsible for criminal enforcement and disciplinary action and VCAT would hear appeals from parties concerned with BLA and CAV decisions.

### Option 25C – A central licensing, regulatory and disciplinary body in CAV

Another alternative is for CAV to take over the BLA's licensing role and retain its role as the regulator. CAV would also be given limited disciplinary powers, as under **option 26A**.

VCAT's role would be to impose disciplinary sanctions on licensees in respect of serious misconduct, and review licensing and low-level disciplinary decisions on appeal, and courts would continue to impose criminal sanctions (including fines and jail time).

The advantage of this option is that it removes complexity from the licensing/regulatory/disciplinary process. Stakeholders would have only one regulatory body to deal with, with appeals of decisions of that regulatory body to lie with VCAT.

This model is similar to the models in place in Queensland, SA and Western Australia (WA), although in these jurisdictions disciplinary proceedings are instigated by the relevant licensing and regulatory body, and heard by a court or tribunal.

## 4.2 Penalties

### **Issue**

Penalties for offences against the Estate Agents Act are comparatively low.

### **Stand-alone option**

- **Option 26** – Undertake a full review of the penalties under the Estate Agents Act

## Background

The Issues Paper invited views on the general adequacy and appropriateness of current criminal penalties for offences against the Estate Agents and Conveyancers Acts. Stakeholders were also asked to provide feedback about the factors that should be considered as part of any review of penalties under the Estate Agents Act, many of which have not been adjusted in some time and are comparatively low.

## Stakeholder feedback

Feedback on the issue of penalties largely focussed on factors that should be considered when reviewing the penalties under the Estate Agents Act. Factors identified as being relevant to a review of penalties included:

- the conduct the penalties are intended to prevent and the potential financial benefit of engaging in that conduct
- the need for penalties to be proportionate to the impact, or significance, of the offence, and
- the desirability of consistency with comparable legislation.

There was also support for the indexation of penalties in accordance with the Consumer Price Index. Indexation is a feature of all Victorian penalties expressed in penalty units: the value of a penalty unit is adjusted each financial year by the Treasurer.

A specific suggestion was to establish a penalty that applies to estate agents who insert special conditions into a contract for the sale of land, for example, a fine up to the amount of their commission. Estate agents' amendment or insertion of special conditions in standard form contracts for the sale of land is addressed in the second options paper released as part of this review, *Sale of land and business: options for reform*, which is available online at the [Consumer Property Law Review section of the Consumer Affairs Victoria website](http://www.consumer.vic.gov.au/consumerpropertylawreview) <www.consumer.vic.gov.au/consumerpropertylawreview>.

The following stand-alone option is presented for feedback.

## Option 26 – Undertake a full review of the penalties under the Estate Agents Act

Under this option, the penalties for all Estate Agents Act offences (and regulations made under that Act) would be reviewed and amendments made to ensure that the penalties are aligned – where relevant and appropriate – with penalties for similar offences established in comparable legislation.

For example, penalties that apply to persons who – without reasonable excuse – refuse or fail to comply with an inspector's requirement, or who give false or misleading information to an inspector, would be increased in line with the penalties that apply to similar offences under the Conveyancers Act.

Consistent with stakeholder feedback, in adjusting penalties, consideration would also be given to the extent to which a penalty is effective at creating a disincentive to engaging in prohibited conduct. In determining whether a penalty is a sufficient deterrent to prohibited conduct, the following factors would be taken into account:

- the risks to consumers posed by the conduct
- the potential financial benefits a person may gain from engaging in the conduct, relative to the penalty, and
- the scale and impact (or significance) of the prohibited conduct.

## 5 Trust accounting

This chapter presents reform options in relation to certain trust accounting provisions relevant to conveyancers and estate agents.

### 5.1 Placing trust money in interest-bearing accounts

#### **Issue**

Conveyancers are currently unable to hold trust money in a controlled account accruing interest payable to their clients, unlike legal practitioners. This gives legal practitioners an unfair advantage, as potential clients may be more inclined to employ a legal practitioner over a conveyancer where the interest that could be earned on money to be held on trust is significant.

#### **Stand-alone option**

- **Option 27** – Enable conveyancers to deposit trust money in interest-bearing controlled money accounts

#### **Background**

Estate agents must have trust accounts for holding money they receive from and on behalf of clients including sales deposits, rent and advertising and maintenance fees paid in advance of work done. Trust money may also be received by conveyancers in advance from clients for fees and charges for conveyancing work which must be held in a general trust account. Conveyancers may also handle transit money and controlled money. All interest received from trust accounts kept by conveyancers and estate agents is currently paid into the VPF.

The Issues Paper invited stakeholder views as to:

- the overall effectiveness of the trust accounting requirements for estate agents and conveyancers
- the potential risks of providing estate agents and conveyancers with greater flexibility to deposit trust money in accounts that pay interest to the parties to the transaction (as is the case for legal practitioners), and
- whether it is important for conveyancers to continue to have the ability to handle transit money or controlled money accounts.

#### **Stakeholder feedback**

The general impression from stakeholders' feedback is that existing regulatory provisions are adequate, although it was suggested that auditing and reporting requirements could be strengthened and penalties for breaches should be lifted.

Stakeholders were generally not in favour of estate agents being able to deposit trust money in interest-bearing accounts. It was suggested that there would be no financial or other benefit for estate agencies in being able to do so, and that it would likely increase administrative burden, complicate accounting procedures and risk defalcations increasing.

There was, however, general support for allowing conveyancers to place trust moneys in an interest-bearing controlled account, on the basis that conveyancers' current inability to do this gives legal practitioners an unfair advantage, as a person may be more inclined to employ a legal practitioner over a conveyancer where the interest that could be earned on their trust money is significant.

Most stakeholders also considered it to be important for conveyancers to have the ability to handle transit money and controlled money accounts, for reasons of practicality (in the case of transit money accounts) and the promotion of a level playing field between conveyancers and legal practitioners (in the case of controlled money accounts).

Other suggestions were to make it compulsory for all estate agents and conveyancers to maintain trust accounts (currently only estate agents and conveyancers who receive trust moneys are required to maintain trust accounts); and to bring the trust accounting provisions' structure and wording into line with equivalent provisions in the Legal Profession Uniform Law (Victoria) – something that will be considered in modernising the legislation.

The stand-alone option below is presented for feedback.

### Option 27 – Enable conveyancers to deposit trust money in interest-bearing controlled money accounts

In line with stakeholder feedback, under this option, conveyancers would be authorised to maintain controlled money accounts that accrue interest payable to their clients.

This option does not propose to require estate agents or conveyancers to maintain trust accounts, as this would impose an unnecessary burden on individuals who can manage their businesses without accepting trust money.

**Option 28** in this chapter deals with other suggestions made by stakeholders to increase penalties for trust account offences.

## 5.2 Annual audit of trust accounts

### **Issue**

In general, there is a high degree of compliance by estate agents and conveyancers with the requirement to have their trust accounts audited within three months after 30 June each year. Those licensees who fail to comply with this requirement are subject to a range of enforcement actions by CAV, including warning letters, and possible disciplinary action and criminal proceedings. These sanctions appear to be effective.

Automatic suspension of a licence, in circumstances where a licensee has not complied with their audit requirements on time, does not appear to be desirable. Stakeholder feedback indicates that there may be valid reasons why an audit is not undertaken in the time required.

No reform option is proposed.

### **Background**

Within three months after 30 June each year, every person who carried on business as an estate agent during the previous financial year must have their trust accounts audited. A similar requirement applies to conveyancers.

In general, there is a high degree of compliance with these requirements, however, where a licensee fails to comply with their obligations, CAV takes action. In the first instance, a licensee will receive a formal warning. Continued failure to comply with auditing requirements will lead to the issuing of infringement notices, and possible disciplinary action and civil/criminal proceedings.

The Issues Paper invited stakeholders to provide their views about the appropriate sanction if an estate agent or conveyancer does not comply with annual auditing requirements.

### **Stakeholder feedback**

Stakeholders had differing views on the appropriate sanction where an estate agent or conveyancer fails to comply with annual auditing requirements.

There was some support for existing arrangements (the prospect of financial penalties, and disciplinary action at VCAT, possibly leading to a licence cancellation), subject to a broader review of penalties.

Stakeholders did not generally agree with the suggestion that non-compliance with audit requirements should constitute an automatic grounds for ineligibility to continue to hold a licence.

It was noted that there may be valid reasons (such as physical or mental illness) that prevent compliance, and in these circumstances, automatic cancellation – a potential option raised in the Issues Paper – would be an unfair and unworkable response (including for the relevant licensees' clients).

In light of this feedback, no reform option is proposed.

## 5.3 Offences relating to trust accounts

### **Issue**

Trust account offences in the Estate Agents Act (including penalties) require updating.

### **Stand-alone option**

- **Option 28** – Review and update trust account offences and penalties in the Estate Agents Act

### **Background**

The Estate Agents and Conveyancers Acts establish offences that prohibit estate agents and conveyancers from having deficiencies in their trust accounts and misappropriating trust moneys. These are important offences that underpin the integrity of the enforcement regime for protecting trust moneys and preventing dishonest behaviour by estate agents and conveyancers.

Estate Agents Act offences have not been reviewed in decades and require updating to reflect modern drafting terminology and improve their enforceability and operation. The penalties also need to be reviewed for consistency with the penalties for similar offences in the Conveyancers Act and Legal Profession Uniform Application Act.

The Issues Paper invited stakeholders to provide feedback on how offences relating to trust account deficiencies, misappropriation and deficient administration for estate agents and conveyancers should be framed.

### **Stakeholder feedback**

There was little specific feedback in relation to the question posed in the Issues Paper as to how offences relating to estate agents' and conveyancers' trust account deficiencies should be framed, other than that the offences should be aligned with those applicable to legal practitioners, and should capture any wrongful, deliberate, negligent or reckless deficiency in, or wrongful use of, trust moneys, or failure to deliver moneys to be held on trust.

Other specific comments were that:

- penalties should recognise the degree of a licensee's culpability, as well as the possibility that a trust account irregularity could take place entirely outside the control of the licensee, for example., where a bank clerk makes a depositing error. On this point it should be noted that section 64(16) the Estate Agents Act and Regulation 11 of the Estate Agents (General, Accounts and Audit) Regulations recognise inadvertent errors
- misappropriation of trust funds is the most serious offence, and should be prosecuted as a criminal act, and
- 'fraud' should not have to be proven where funds are transferred to an estate agent's personal account, for example.

The following option is presented for stakeholder feedback.

### **Option 28 – Review and update trust account offences and penalties in the Estate Agents Act**

Under this option, where relevant and appropriate, trust account offences and penalties in the Estate Agents Act and associated regulations would be reviewed and updated, to ensure consistency with offences in the Legal Profession Uniform Application Act and Conveyancers Act.

In particular:

- the penalties for the offences in sections 90 (trust account deficiencies) and 91 (wrongful conversion and false accounts) of the Estate Agents Act would be increased, in line with the equivalent offences in the Conveyancers Act, and
- the requirement to prove an element of fraud under section 91 of the Estate Agents Act would be removed.

It would be clarified that a defalcation includes a misuse of a Certificate of Title by a conveyancer or estate agent, or their employee.

The language and structure of the current trust accounting provisions would be modernised.

The Conveyancers Act offences, having been drafted much more recently, would not require these changes.

## 5.4 Ban on large cash deposits

### **Issue**

Cash is over-represented in trust account defalcations by estate agents.

### **Stand-alone option**

- **Option 29** – Prohibit estate agents from accepting large cash deposits for property sales

### **Background**

Following the publication of Issues Paper 1, CAV undertook an internal review of estate agent trust accounting processes.

As part of that review, recent trust account defalcations were analysed.

While there is no conclusive evidence regarding the materiality of the risks posed by cash in trust account defalcations, based on the evidence available, it is reasonable to conclude that cash transactions are over-represented in defalcations.

In Victoria, there have been two major recent defalcations involving large cash deposits, and of seven defalcation data points in Victoria, five of these involved cash transactions (including withdrawals and deposits). Cash was also a factor in a recent major interstate defalcation event.

The following option addresses this issue.

### **Option 29 – Prohibit estate agents from accepting large cash deposits for property sales**

Under this option, the Estate Agents Act would be amended to prohibit estate agents from accepting large cash deposits from purchasers under a contract for the sale of land or business. A large cash deposit could be defined to be \$10 000 or over.

It should be noted this option will not prohibit consumers from using cash in estate agent transactions. However, consumers would need to convert cash for a deposit on a property into a bank cheque, or deposit the cash into their account, and transfer the amount of the deposit into an estate agent's trust account.

## 5.5 Auditor requirements

### **Issue**

There is substantial variance in the rigour of audits undertaken for estate agents' trust accounts, and quality of reporting of the results of those audits to CAV.

### **Stand-alone option**

- **Option 30** – Amend the Estate Agents Act to enable government to introduce tighter controls on audits and auditors, if necessary

### **Background**

Auditors and audit reports are a key control in the regulatory framework for estate agents, and an important source of intelligence for CAV about the health of an estate agency's trust account.

CAV's internal review of estate agent trust accounting processes has revealed that auditors employed by estate agents exhibit substantial differences in their auditing behaviour. There is evidence to suggest that many auditors who conduct low numbers of trust account audits are not accumulating sufficient experience and expertise to conduct rigorous audits.

At this stage, it is not considered necessary to implement any specific legislative reforms to improve the quality and consistency of audit reports prepared by auditors. Nonetheless, it is considered prudent to amend the Estate Agents

Act to enable the government to introduce tighter controls on auditors and the reports they prepare in the future, should this be necessary.

An option for reform is presented for feedback.

### **Option 30 – Amend the Estate Agents Act to enable the government to introduce tighter controls on audits and auditors, if necessary**

Under this option, the Estate Agents Act would be amended to enable government to require (for example, through regulations) estate agent audits to be performed in accordance with additional requirements to those currently set out in the Act. An example of such a requirement may be the introduction of a specific mandatory audit scope, and auditor accreditation.

## 6 Administration and institutional arrangements

This chapter sets out stakeholder feedback, and presents options, on the following issues:

- obligations to keep track of conveyancing records after the closure or sale of a business
- the public registers of conveyancers and estate agents and agents' representatives
- clarifying the roles and functions of the BLA and the Director of CAV
- revising the role of and objectives for the EAC, and
- reforming the provisions in the Estate Agents Act that establish the VPF.

### 6.1 Keeping track of conveyancing records post closure or sale

#### **Issue**

Consumers (and conveyancers who act for them) have difficulties when they are unable to access their records, where a conveyancing business is either closed or is sold.

#### **Stand-alone option**

- **Option 31** – Establish stronger obligations for document retention post business closure or sale

#### **Background**

Records relating to the conveyancing work of the business (but not trust records) must be stored for seven years. Additionally, if in the previous three years the licensee has ceased operating, all documents and records of the business must be made available for inspection by an inspector at a place where they can be readily inspected.

The Issues Paper invited stakeholders to provide their views on how long records should be required to be retained once a conveyancing business closes, and with whom this responsibility should lie.

#### **Stakeholder feedback**

Stakeholders strongly supported establishing mechanisms to enable consumers to access their records, where a conveyancing business is either closed or is sold.

The general view appeared to be that the obligation for records relating to a conveyancing business to be stored for seven years should stay in place for a conveyancer who closes their business, or be assumed by the person who buys the business. There was also support for the proposal that a conveyancer who closes or sells their business should be required to notify the BLA of that fact, and advise where their records will be stored in the future. It was also suggested that a conveyancer who closes or sells their business should be required to return all paper Certificates of Title to their clients.

A stand-alone option to address this issue is presented below, for feedback.

#### **Option 31 – Establish stronger obligations for document retention post business closure or sale**

Under this option, the Conveyancers Act would be amended to:

- specify that, where a conveyancing business is closed or sold, the requirement to retain documents relating to the conveyancing work of the business remains intact for the owner of the business (if the business is closed) and passes to the new owner (if the business is sold), and
- require a licensee who closes or sells their business to notify CAV where documents relating to the conveyancing work of the business will be stored for the relevant period (that is, seven years).

Failing to retain documents as required after the closure, or purchase, of a conveyancing business would be a criminal offence, which CAV could prosecute.

**Question**

21 Should there be an obligation on conveyancers to return paper certificates of title to their clients, in the event that they close their business?

## 6.2 Public registers

**Issue**

The Estate Agents Act establishes a public register of estate agents and agents' representatives. Significant information is held on these registers.

No reform option has been proposed in respect of this issue.

### Background

The Registrar of the BLA is required to keep a register of estate agents and agents' representatives open for public inspection. The Registrar is also required to maintain a register of licensed conveyancers.

The Issues Paper sought stakeholders' views as to the usefulness and relevance of the extensive information currently required in relation to licensed estate agents and those declared to be ineligible to be agents' representatives. Stakeholders were also asked whether they access the public registers and, if so, for what purposes.

### Stakeholder feedback

Stakeholders confirmed that they access the registers of licensed estate agents and conveyancers regularly, generally as part of their 'due diligence' activities in relation to prospective employees or other persons in the real estate or conveyancing industries with whom they deal.

A number of suggestions were made about *additional* information that should be recorded on the registers, including:

- information about estate agents and conveyancers who maintain trust accounts
- whether a conveyancer has been subject to disciplinary proceedings (consistent with information available about legal practitioners), and
- details of a prospective real estate employee's employment history, and enforcement action taken by CAV.

There was no feedback about irrelevant or redundant information on the register of estate agents and agents' representatives which could be removed.

It is appropriate for details of VCAT orders to remain publicly available on the public registers, however, it is not proposed to include additional information on either registers, in light of the limited feedback on this issue.

## 6.3 Display of licence

**Issue**

Consumers are unlikely to receive any benefit from the requirement that estate agents and conveyancers display physical copies of their licences at their places of business.

**Stand-alone option**

- **Option 32** – Remove the requirement for physical display of a licence by an estate agent or conveyancer

## Background

Estate agents and conveyancers are required to display a copy of their licence at each place of business that they undertake work. The Issues Paper sought feedback from stakeholders about the continuing relevance of requiring licensees to physically display their licence, given that consumers can increasingly access information about a business online, including via public registers.

## Stakeholder feedback

The general consensus amongst stakeholders who commented on this issue was that this requirement is unlikely to assist consumers. It was noted that many transactions are conducted outside estate agents' and conveyancers' offices and, even where a transaction is within an office, consumers are unlikely to inspect licence information. It was also noted that there is nothing to stop a person fraudulently creating a 'physical licence'.

However, there was a contrary view that this obligation is worthwhile: it was suggested, for example, that physical display of a licence provides reassurance to consumers that a person is operating legally.

## Option 32 – Remove the requirement for physical display of a licence by an estate agent or conveyancer

Under this option, the requirement for estate agents and conveyancers to display a copy of their licence at each place of business would be removed. A licensee may continue to display a copy of their licence, but would no longer be required to do so.

## 6.4 Roles and functions of the BLA and the Director of CAV

### **Issue**

The different roles of the BLA and CAV under the Estate Agents Act and Conveyancers Act are not clear to some members of industry and the general public.

### **Stand-alone option**

- **Option 33** – Develop educational material explaining the roles and functions of the BLA and CAV

## Background

The BLA is an independent entity established by the *Business Licensing Authority Act 1998* (the Business Licensing Authority Act) responsible for licensing and registering various occupations.

Section 7 of the Estate Agents Act provides that the BLA is responsible for administering the licensing provisions of that Act. In contrast, the Conveyancers Act does not have a stand-alone provision that sets out the responsibilities of the BLA. However, it is clear from the Act's provisions that the BLA performs similar functions in relation to conveyancers as it does for estate agents.

CAV is Victoria's consumer affairs regulator. The Director of CAV, supported by CAV staff, is responsible for enforcing compliance with specified Consumer Acts, including the Estate Agents Act and Conveyancers Act.

Section 109 of the ACLFTA sets out detailed functions for the Director of CAV in relation to that Act and other Consumer Acts. Some the Director's core functions are to receive and deal with complaints, monitor industry compliance with Consumer Acts, investigate and prosecute breaches, and educate and advise people on their rights and fair trading issues generally. The Director is responsible for taking disciplinary action against estate agents, agents' representatives and conveyancers, along with participants in other regulated industries.

The Issues Paper sought stakeholder views on whether the functions of the BLA are clear in relation to estate agents and conveyancers (and, if not, how its role could be clarified in the legislation), and whether the Director of CAV's role and functions are clear and sufficiently articulated and the powers given to the Director and inspectors under the Estate Agents Act and Conveyancers Act are sufficient.

## Stakeholder feedback

Feedback from stakeholders relating to the functions of the BLA and the Director of CAV was mixed. Some thought the BLA's and Director's respective roles and functions are clear. However, there was other feedback suggesting that the general public and some industry participants are unlikely to be unaware of the BLA's regulatory functions, and the Director's enforcement role, under the Estate Agents Act and the Conveyancers Act. Concern was expressed that the BLA does not publish an annual report.

In general, stakeholders considered the powers available to the Director and inspectors under the relevant Acts to be sufficient, although there was a perception that they are rarely used.

A stand-alone option addressing the issues above is presented for feedback.

## Option 33 – Develop educational material explaining the roles and functions of the BLA and CAV

Under this option, CAV would produce educational material to explain the different roles of the BLA, CAV and VCAT under the Estate Agents Act and Conveyancers Act. This material would be made available on the CAV website, and could be disseminated by industry bodies to their members. Information could also be made available about the BLA's yearly activities, for example, the number of licences issued for particular industries.

## 6.5 Role of and objectives for the EAC

### **Issue**

The EAC's ongoing role and function should be reconsidered, in light of changes in the property industry since it was established.

### **Alternative options**

- **Option 34A** – Retain the EAC, with amendments to refine its role and objectives
- **Option 34B** – Abolish the EAC
- **Option 34C** – Replace the EAC with a broader property industry advisory or reference group

## Background

The EAC is a statutory advisory body established under the Estate Agents Act.

The objectives of the EAC include the promotion of appropriate standards of conduct and competency for industry participants, the protection of the interests of users of real estate services and the development of effective dispute resolution procedures, all of which the EAC is required to further, in conjunction with relevant real estate industry associations. Additionally, the Act confers a wide range of specific functions, or roles, on the EAC, including to:

- monitor the operation of the Act and regulations made under the Act
- assess the efficiency and effectiveness of regulation of the real estate industry under the Act, and the need for further regulation
- monitor the provision of estate agency services and developments in the industry, and
- provide advice and make recommendations to the Minister in respect of various matters, including in respect of applications for grants for funding from the VPF.

The Issues Paper sought stakeholder views on the current role of, and objectives for, the EAC, noting that these have not changed since the establishment of the EAC in 1995.

## Stakeholder feedback

Stakeholders' comments on the role and objectives of the EAC varied. Although some support was expressed for the continuation of the EAC (and a possible expansion of its membership and functions to cover the conveyancing industry) other comments suggested that it could be abolished.

Three alternative options are presented for feedback.

### Option 34A – Retain the EAC, with amendments to refine its role and objectives

The current statutory functions and objectives of the EAC are wide-ranging, and are difficult to effectively fulfil. For example, ensuring access to effective dispute resolution procedures is beyond the power of a statutory advisory body.

Accordingly, one option is to refine the EAC's functions and objectives to concentrate its activities in areas of identified need, thereby maximising its impact. For example, its objectives could include the promotion of appropriate standards of conduct in the real estate industry, and the protection of real estate service users' interests, and its functions focussed on providing advice to government about these matters, taking into consideration industry developments.

### Option 34B – Abolish the EAC

Under this option, the EAC would be abolished.

This option recognises that the Victorian property industry is a mature and well developed sector, represented by a wide range of sophisticated professional bodies (including the REIV, the AIC (Vic), the Australian Property and Livestock Association, the Shopping Centre Council of Australia and the Tenants Union of Victoria). These bodies are experienced in engaging with government about developments in the real estate industry, as well as advocating for changes in regulatory policy, and government consults with them regarding possible policy or legislative change. Accordingly, there is no longer a need for a dedicated statutory body to be constituted under the Act, in order to advise government about the operation of the legislation or developments in the Victorian real estate industry.

### Option 34C – Replace the EAC with a broader property industry advisory or reference group

Another alternative is to replace the EAC with a broader property industry advisory (or reference) group, the purpose of which would be to provide the Minister with advice about the broader Victorian property sector, including issues relating to estate agents, agents' representatives, conveyancers and owners corporation managers.

This option acknowledges that, although there are sophisticated property industry stakeholders who are capable of advocating for their members' interests and who are often called upon by government for feedback on regulatory proposals, there may still be some need for the Minister to access advice from outside the public service about developments in the property services sector – including the real estate, conveyancing and owners corporation industries.

The group could comprise industry, consumer and legal representatives, as well as other representatives considered appropriate.

## 6.6 Victorian Property Fund

### **Issues**

- 1 The Estate Agents Act provisions establishing a person's right to claim on the VPF use outdated language, and may need to be reviewed to ensure that the right to claim compensation is not misused.
- 2 VPF provisions are also too narrow to allow excess funds to be put toward the education and training of conveyancers and owners corporation managers.

### **Stand-alone option**

- **Option 35** – Modernise and clarify the basis for VPF claims and extend the purposes to which excess funds can be applied

## Background

The VPF is a statutory trust fund established under the Estate Agents Act. Income for the VPF comes from licence fees paid by estate agents and conveyancers, any fines and penalties payable under the Estate Agents Act and Conveyancers Act, as well as interest earned on moneys held in estate agents' and conveyancers' trust accounts and investment income. A court can order a convicted unlicensed estate agent to pay any amount received as commission or other consideration to the VPF.

Individuals and corporations who suffer a pecuniary or monetary loss as a result of a licensed estate agent or conveyancer misusing or misappropriating trust money or property in the course of their work are entitled to claim compensation from the VPF. Claims made in respect of defalcations committed by conveyancers must be made within 10 years, however there is no limitation on the bringing of a claim in respect of an estate agent.

Excess money in the VPF can be applied by the Minister for a specified purposes, including the training of estate agents and agents' representatives.

The Issues Paper sought views on the current basis for compensation claims against the VPF, as well whether VPF funds should be put towards education and training for conveyancers and possibly owners corporation ("OC") managers, as well as estate agents. Stakeholders were also invited to comment on whether commissions on sales received by unlicensed estate agents should be returned to the client, rather than forfeited to the VPF.

## Stakeholder feedback

### Basis for claims against the VPF

There was little feedback on the basis for VPF claims. Suggestions were to align the VPF compensation system with the system applying to legal practitioners (which enables people who have lost money or property due to dishonest or fraudulent behaviour of a lawyer, employee of a law practice or an approved clerk to receive compensation) and enable fraud compensation claims against the VPF in respect of defalcations by owners corporation managers.

There was some opposition to placing any time limit on the bringing of a claim against the VPF in respect of an estate agent's defalcations, on the grounds that it may take some time for a defalcation to come to light in a property management scenario.

Finally, it was suggested that, consistent with the position for Australian legal practitioners, it should be clarified that misuse of a Certificate of Title or the control of an electronic Certificate of Title constitutes a defalcation. This issue is dealt with in chapter 5 (see **option 28**).

### Applying excess VPF money to educate and train estate agents, conveyancers and owners corporation managers

There was significant support for excess moneys in the VPF being put towards education and training of estate agents, conveyancers and OC managers, on the basis that it could reduce mistakes by industry participants, improve overall compliance and promote higher standards.

### Commissions received by unlicensed estate agents

The question of whether commissions received by unlicensed estate agents should be returned to the vendor rather than the VPF received a mixed response.

There was some support for commissions being returned to vendors, with the option of a fine to be paid into the VPF. However, it was also noted that this may result in unfair windfalls for sellers where there has been no disadvantage, and further may encourage some sellers to use unlicensed traders.

Other options put forward were to give courts the discretion to order repayment of a commission to a vendor (as an alternative to forfeiture of the commission to the VPF), or to require a vendor who wants to reclaim a commission paid to an unlicensed estate agent to prove any disadvantaged suffered in order to be so compensated.

The following stand-alone option addressing some of the issues raised above is presented for feedback.

### **Option 35 – Modernise and clarify the basis for VPF claims and extend purposes to which excess funds can be applied**

Under this option, the basis for VPF claims would remain largely intact, subject to any necessary changes to replace outdated terms (including ‘defalcation’) with modern, updated terminology, and to address any possible misuse of the VPF.

The scope of VPF would not be broadened to cover general losses incurred by persons as a result of fraudulent or dishonest conduct of an estate agent or their representative or employee, as is the case for legal practitioners. The legal practitioners’ compensation system reflects the breadth of a legal practitioner’s advisory role and the wide-ranging impacts that a practitioner’s poor professional conduct can have on their clients. The role of a conveyancer is narrower (and the role of an estate agent narrower still), and the key risk to their clients is the loss of money to be held on trust pending the completion of a land transaction. The VPF’s scope reflects this risk, and provides for a speedy recovery of trust money to affected parties.

The Estate Agents Act would also be amended to enable excess moneys in the VPF to be applied, through the grants program, to the education and training of conveyancers and owners corporation managers, along with estate agents and agents’ representatives, on the basis that excess funds – the result of interest earned on consumers of property services’ money – should be available to be applied for training that improves the broader property services industry and therefore promotes higher standards across the sector.

This option does not propose amendments to enable commissions of unlicensed traders to be returned to sellers, as it could create an incentive for sellers to use unlicensed traders. Where sellers suffer ‘damage’ as a result of unlicensed trading, they are able to make an application to VCAT for damages.

## 7 Modernisation of the legislation

This chapter sets out stakeholder feedback on ways to modernise the Estate Agents Act and Conveyancers Act, and proposes options for reform in the following areas:

- the inclusion of a purposes provision in the Estate Agents Act, and
- the removal of redundant and duplicative provisions in the Conveyancers Act and Estate Agents Act, and general modernisation of the Estate Agents Act.

### Issues

- 1 Unlike most modern Acts, the Estate Agents Act has no ‘purpose’ provision to assist in its interpretation.
- 2 The Estate Agents Act is not user-friendly, and needs to be re-structured and modernised. The Conveyancers Act requires minor updates to reflect modern conveyancing practice and remove redundant provisions.

### Stand-alone option

- **Option 36** – Re-enact the Estate Agents Act and make minor amendments to the Conveyancers Act to reflect modern conveyancing practice

### Background

The Estate Agents Act was introduced in 1980 and, unlike most modern Acts, does not contain a section stating its purposes. Having clearly stated purposes assists in understanding and interpreting the Act and can provide a reference point for measuring its effectiveness. The first issues paper asked for stakeholders’ views on what the ‘purposes’ of the Act should include.

Stakeholders were also asked whether there are opportunities to modernise the Estate Agents Act and Conveyancers Act, and to remove redundant or duplicative provisions.

### Stakeholder feedback

Stakeholders suggested that the purpose of the Estate Agents Act could be to:

- help estate agents act in the best interest of consumers, and protect members of the public
- promote competent and ethical performance by agents
- control and regulate the real estate industry and all operators who work in the industry, and
- regulate those acting for others in the sale, purchase or leasing of land.

There was feedback that the Estate Agents Act should be amended to reflect developments in the real estate industry, in particular technological developments, such as online communication, marketing and sales, and use of digital devices. Specific suggestions included:

- removing the requirement that estate agents display a copy of their licence at every premises where they carry on business [see **option 32** in chapter 6], and
- enabling certain documents the Act requires to be provided to a person to be sent electronically.

A stakeholder pointed out that the current reference to ‘sub-agents’ in the Estate Agent Act’s long title is confusing and should be replaced with ‘agent’s representative’, and that the reference to ‘clerks, cashiers and accountants’ in the definition of ‘agent’s representative’ is outdated. Another suggested that the Act should refer to all laws that are applicable to estate agents.

There was not significant feedback about redundant or duplicative provisions, although it was noted that any obvious duplications of ACL provisions should be removed. It should be noted that this issue is dealt with in the second options paper released as part of this review, *Sale of land and business: options for reform*.

There was advice that if references in the Act to a person who holds an ‘auctioneer’s certificate’ are removed, section 79(2) of the *Transfer of Land Act 1958* may require amendment<sup>6</sup>.

Stakeholders identified few opportunities to modernise the Conveyancers Act, suggesting that the Act remains current and user-friendly. The only specific suggestion was to amend the Act to recognise the move to e-conveyancing and PEXA. It was also noted that references to ‘provisional licensees’ can be removed.

The following option has been developed to take into account stakeholders’ feedback, as well as to address other, specific, issues flagged in Issues Paper 1.

### **Option 36 – Re-enact the Estate Agents Act and make minor amendments to the Conveyancers Act to reflect modern conveyancing practice**

Under this option, the Estate Agents Act would be re-enacted.

As part of the re-enactment, amendments would be made to improve the Act’s overall readability by:

- restructuring and modernising its sections, divisions and parts
- replacing antiquated expressions (for example, the term ‘defalcation’) with more current terminology, and
- removing references to repealed provisions.

A purpose provision would be inserted, to assist in the interpretation of the Act. It is proposed that the Act’s purpose would be to protect the interests of consumers of estate agents’ services, by regulating agents and those who work for them, and to promote ethical standards of conduct in the real estate industry.

If necessary, amendments would be made to clarify the application of the *Electronic Transactions (Victoria) Act 2009* to documents to be provided to a person under the Act.

Redundant provisions would be repealed. For example, section 13B(2)(c) of the Act, which exempts holders of an ‘accredited auctioneer’s certificate’ from the need to be a licensed in order to legally conduct an auction, would be removed, provided that there are no longer any non-licensed ‘accredited auctioneers’ who conduct auctions.

Where possible, red tape would be eliminated. For example, section 19(1)(c)(iii) and section 19(1)(d)(iii) of the Act, which require private corporations that apply for an estate agent’s licence to include certain information about interests in the company as part of the application, would be repealed, as it is unclear what relevance this information has. Similarly, sections 8 and 10 of the Act, which enable the BLA and the Director of CAV to enter into agreements with ‘approved industry associations’ to enable the association to undertake a function of the BLA or Director, would be repealed on the basis that these provisions have never been used.

The Conveyancers Act would be amended to remove references to provisional licences, and to reflect developments in modern conveyancing practice (such as the implementation of e-conveyancing).

<sup>6</sup> Section 79(2) requires a mortgagee seeking foreclosure on a property to provide the Registrar of Titles with ‘a certificate’ provided by the auctioneer engaged to sell the property (presumably to provide proof that the property could not be sold for a price to cover the mortgage and associated auction costs). References to ‘accredited auctioneers’ certificates’ under the Estate Agents Act are to certificates held by a particular category of auctioneers.