

11 May 2017

By email: consumerpropertylawreview@justice.vic.gov.au

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

Dear Sir/Madam

Estate agents and conveyancers: options for reform

Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to provide comment on the Consumer Property Law Review's Options Paper on estate agents and conveyancers (the **Options Paper**).

About Consumer Action

Consumer Action is an independent, not-for profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

Licensing of estate agents and conveyancers

Protecting the interests of consumers is a key objective of licensing estate agents and conveyancers. Particularly given real estate transactions are often high value and relatively rare for consumers, they are unlikely to have the knowledge and skills to make informed choices about agents and other professionals they engage. For this reason, we generally support Option 1 which proposes to widen the definition of 'real estate agent'.

However, the Options Paper does not propose to extend the operation of the legislation to regulating property investment advice. This is because real estate legislation is intended to regulate persons who act for others in the sale, purchase or leasing etc of real estate, and not persons who merely advise or recommend that their clients purchase a particular property. While this may have some logic, there is significant consumer risk associated with the property investment advice industry.ⁱ Our recent report, *Fringe Dwellings: The vendor finance and rent-to-buy housing black market*, recommended that a federal regulatory framework for property investment advice be established. This was also a recommendation of a 2016 Senate Inquiry that considered land-banking and property spruiking.ⁱⁱ In

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absence of federal action, Consumer Action believes that a licensing framework is required at the State level and should be considered as part of the Consumer Property Law Act Review.

The Options Paper also does not propose to extend the definition of 'estate agent' to property developers and retirement village operators selling their own property. The Options Paper suggests that extending the definition in this manner would be a 'significant departure from the status quo', and that there is an 'absence of clear evidence of problems that could not be resolved through, for example, an action for damages.' While in theory residents could bring an action for damages if they purchased property (or enter a loan-lease arrangement) based on misleading representations, in reality this is unlikely to occur. The barriers to residents, particularly elderly residents, accessing justice through court or tribunal proceedings are well established.ⁱⁱⁱ Consumer Action believes that ensuring in-house sales staff are adequately licensed and regulated is the preferable option for reducing instances of misconduct.

Case study

Phillip (name changed) and his wife moved into a 'temporary' unit in a new retirement village while waiting for the unit they purchased to be built. Phillip and his wife were also promised that a community centre would be built after they moved in. After months without any signs of progress, Phillip decided to make a complaint. He described it as a 'difficult and long process'. Phillip lodged a formal dispute with the management of the retirement village, but says he did not receive a proper response. Phillip and his wife have been in dispute with the retirement village for over 9 years about this issue. The unit they originally purchased and the promised community centre still have not been built. Phillip says people are 'dying waiting' for their units to be built. Phillip eventually sought legal representation, and his dispute continues.

The Options Paper does not propose to extend the definition of 'estate agent' to capture online sites that exist 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. This may well be short-sighted. Like other professions, the estate agent industry is likely to be further 'disrupted' in the coming years, particularly through new technologies. Given its important role in protecting consumers, it will be important for the scope of the real estate legislation to be adaptable to new and different business models. While new business models might require an alternative regulatory framework to existing laws (e.g. ride sharing), it is preferable that business models make the case for change to ensure that consumer and safety standards are maintained.

In relation to conveyancing, we support amending the legislation to provide that anyone who undertakes conveyancing work on behalf of another person is required to be licensed. This appears to be a wide definition and appropriate to capture the full extent of conveyancing work.

Training, work experience, continuing professional development and PI insurance

There is a great need to enhance training and work experience standards in the real estate sector. It has been suggested that relevant qualifications for real estate agents can be obtained in 5 days.^{iv} Given this, Option 4's proposal to introduce new licence categories is broadly supported. The categories of estate agent (employee) and estate agent (licensee in charge) makes sense.

For this change to deliver substantially enhanced training standards, it should be implemented in conjunction with Option 4C (abolishing agents' representatives). This would align with the community expectation that anyone who performs the function of an estate agent is required to be qualified and licensed as an estate agent. Option 5 which proposes increased training standards and strengthened work experience requirements is similarly supported.

Mandatory continuing professional development is appropriate for all professions and exists in most if not all including lawyers, accountants and medical professionals. For this reason, Option 6A is appropriate. Ensuring a professional's knowledge is up to date and that their skills are appropriately maintained can support consumer protection. We also generally support licensees being required to hold professional indemnity insurance in order to be licensed.

Ineligibility and disqualification criteria

Given that holding a licence should be a privilege rather than a right, it is important to have robust ineligibility and disqualification criteria for both real estate and conveyancer licenses. Option 7 which proposes strengthening the ineligibility and disqualification criteria is strongly supported, but needs to be substantially enhanced to ensure inappropriate people are kept out of these professions.

Under Option 7, persons who will be ineligible to obtain a licence include persons who have been convicted of unlicensed trading offences, persons who have breached the *Corporations Act 2001* (Cth) and persons who have failed to pay fines under the *Estate Agents Act* and the *Conveyancers Act*. However, it would appear that a person could have committed offences under other consumer or commercial laws, including the Australian Consumer Law, and still be eligible for a licence. While breaching these or other laws may go to whether the applicant or licensee is of good character and a fit or proper person, we contend that specifically excluding persons who have committed offences above a certain threshold (e.g. indictable offences) from being eligible for a licence would make the licensing regime stronger and more certain.

Such persons should also be restricted from the permission application process for a period following conviction (e.g. 5 or 10 years). A similar rule should be imposed for those that have been convicted of unlicensed trading. This would involve a stronger standard than proposed by Option 8 of the Options Paper. It is nevertheless appropriate to ensure a high standard of conduct for licensees and effective consumer protection.

A decision to deny permission can be appealed to the Victorian Civil and Administrative Tribunal (**VCAT**), as can certain licensing decisions made by the Business Licensing Authority (**BLA**). While merits review is appropriate for these sorts of administrative decisions, it is important that

considerations of consumer protection and public interest are incorporated into the decision-making of the tribunal. We strongly recommend that legislation governing merits review processes impose a mandatory requirement on the tribunal to consider and prioritise these issues.

Further, the legislation should specifically state that past conduct is an indicator of future conduct—persons should not be able to merely claim that they have reformed or have been rehabilitated in order to obtain a licence. It is important that the tribunal consider the purpose of the licensing schemes (consumer protection and protecting the public interest) over considerations of the livelihood of the particular applicant or licensee. This will ensure the licensing scheme aligns with community expectations.

Conduct of real estate agents

Property managers are often young and inexperienced. Given this, it is important that they have clear conduct standards to ensure that prospective and current tenants are treated professionally and appropriately. We support Option 14 to include specific conduct rules relating to property management. These should be modelled on the equivalent rules under the *Property, Stock and Business Agents Regulations 2014* (NSW).

Some consumers can sign sales authorities in situations when they don't fully understand what they have signed.

Case study

Susan is visually impaired and uses a guide dog. She engaged a real estate agent to sell her property. Susan was asked to sign an agreement despite not being able to read it. Her boyfriend was the only other person present and he is also vision impaired, with slight better vision than Susan. Susan asked specifically about advertising costs and was told that advertising, as well as sales commission, would only be payable if, and when, the property sold. Three months later, Susan decided to take the property off the market. She was then presented with a bill of \$6,548 for advertising which was unaffordable and caused her stress.

Neither Option 15 or Option 16 of the Options Paper would effectively deal with the above scenario, however it demonstrates the vulnerable position that some people can be in with respect to sales agents. Despite this, Options 15 (cooling-off period) and 16 (prescribed fact sheet) would go some way to address the imbalance between consumer and supplier. We suggest that the fact sheet be consumer tested and include warnings about the consequences of signing a sales authority. It would need to state very clearly the availability of a cooling-off period for that option to have any import at all.

A three-day cooling-off period is a relatively short period, and we would suggest a seven or ten-day period instead. This would provide more time for a vulnerable seller to reconsider any agreement, including through the obtaining of advice. Further, should the fact sheet not be provided or be sub-

standard, the cooling-off should be extended (in a similar way to section 82(3)(c) of the Australian Consumer Law with respect to unsolicited sales agreements).

Conflicts of interest: agent obtaining a beneficial interest

Option 21 which proposes removing the ban on commissions under section 55 of the Estates Agent Act, subject to some additional protections for purchasers, is strongly opposed. Consumer Action has consistently raised concerns about proposals to weaken regulations relating to estate agents (or their employee or relative) purchasing property where they have also been engaged to sell the property. The proposed additional protections do not ameliorate our concerns.

Vendors can be vulnerable when it comes to real estate transactions, and they rely on the advice of their agent—this can include some level of assurance that a fair market value is obtained for the sale of the property. An agent that receives a commission generally has an incentive to achieve a price that benefits the vendor, as their interests are aligned. Where that agent proposes to purchase the property, or where the property is sold to an agent's employee or relative, however, the vendor's vulnerability is increased substantially. In this instance, there is a conflict of interest for the agent—between acting in the interests of the vendor, and acting in their own interests. Vendors that are in financial distress are likely to be more vulnerable in these circumstances, as they are often seeking a 'quick' sale to avoid foreclosure. The risk is that an agent will arrange a sale at a price significantly below market value.

In relation to retirement villages, there have been significant concerns raised by residents and their families about in-house sales staff earning commissions, particularly where a retirement village is transitioning from strata title to loan-lease arrangements. Similarly, in this instance there is a conflict of interest for the retirement village operator—between acting in the interests of the outgoing resident, and acting in their own interests. It is usually residents' family members who are responsible for negotiating with retirement village operators in these circumstances. Often they are dealing with the death or serious ill health of a loved one during the sale process. Family members have said they feel ill-equipped to deal with disputes about exit fees (including sales commissions), and are reluctant to appoint external real estate agents due to their perceived lack of expertise in the retirement village sector.

The proposed additional protections are inadequate for the following reasons:

- 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 (not available for auctions): It is our experience that cooling-off periods can be a weak form of consumer protection, because people fail to act on them for a number of reasons. These include behavioural biases that mean once a person has signed an agreement, they can be unlikely to reverse their decision due to factors like the status quo bias and consistency theory.^v These biases are likely to be particularly strong in large transactions, where consumers are likely to have an emotional investment in the transaction. Moreover, where someone has sold property and is due to receive the proceeds, they may have already committed these funds for some other purpose, making withdrawal through a cooling-off arrangement unlikely.

- 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: The concern with this proposal is that it operates 'after the fact', and would likely require a vendor to obtain expensive legal assistance to bring the action. If a person was particularly vulnerable and did not obtain legal guidance about this aspect of the transaction (putting aside the conveyancing work), then they would not exercise rights that may accrue to them.

Recognising that estate agents have a right to be paid for the work they do and that there can be problems with the current law in smaller regional communities, Consumer Action would support the removal of the restriction on a commission being payable in these transactions should this be twinned with some meaningful protection for a vulnerable vendor. As opposed to Option 21, this protection should be designed to:

- slow the transaction down so as to give the vendor time to consider the deal; and
- provide for a hurdle for agents, making transactions less attractive and making it easier for vendors to prove that an agent acted wrongfully.

As noted above, our concern is that under the current law a vendor in financial distress could lose a large amount of money should a dishonest agent facilitate a quick transaction.

We are supportive of the previous system where the Director of Consumer Affairs Victoria (**CAV**) was required to provide approval before an estate agent could facilitate such a transaction. This approval could be subject to conditions to prevent predatory conduct—for example, a requirement that CAV is notified of a re-sale within 6 months. This could be helpful in detecting inappropriate conduct.

Further, a requirement that the Director of CAV approve such transactions would enable CAV to obtain meaningful data about these transactions for monitoring and compliance purposes. At the moment these transactions are largely invisible.

We are aware that CAV holds concerns about it being responsible for approving transactions. While we believe that it is appropriate for CAV to have this function, consideration could be given to some other independent person or body. For example, an independent valuer might play this role. We are also aware professionals may be hesitant to play any oversight role, given the risks to them. If this remains the case, we believe this provides further impetus for CAV to play the oversight role.

Conflicts of interest: rebates and incentives

Rebates, incentives and soft-dollar benefits that are paid to real estate agents can mean that agents act in accordance with the interests of those that provide the rebates etc, rather than their clients (let alone purchasers of property).

Rebates appear to be a particular problem with respect to the publishing industry, with some claiming that real estate agents are turning into brokers of advertising.^{vi} The benefit agents obtain in relation to

advertising can lead them to purchase more advertising than the client requires. Agents can also receive benefits from utility connection services, which can mean that consumers get placed on energy contracts that may be disadvantageous.

For these reasons, Option 22A is supported—the prohibition on agents receiving benefits should be retained and strengthened. This option also proposes to enhance disclosure of certain rebates and benefits. While transparency is necessary, disclosure is unlikely to adequately inform an estate agent's client of the arrangement.

Conflicts of interest: referral payments

A conflict of interest can arise where professionals have a relationship with a party from which they receive regular client referrals. This has been a particularly under-rated risk in the legal profession.^{vii} Regulators and those responsible for conduct standards for conveyancers and estate agents should be alive to this risk of conflict of interest.

Conveyancers being asked to pay a commission for referral of a client is a particularly noxious kind of referral conflict and we support the proposal to better regulate this issue. Option 23A is supported. This option does not extend to dealing with referral conflict generally—we encourage CAV to consult with stakeholders about the impact of such conflicts in its regulated industries and take action to address risks of consumer detriment.

Costs disclosure

Option 24 proposes to improve disclosure obligations for conveyancers. This is supported as standardised disclosure will better enable consumers to compare conveyancers' costs. To improve effectiveness, costs disclosure should be consumer tested. For conveyancers' costs disclosure, there may be opportunity to do this to jointly with lawyers' costs disclosure, to enable comparison between conveyancers and lawyers.

Compliance measures and penalties

To provide effective consumer protection, a licensing framework should be relatively flexible and administered by a regulator with a consumer protection focus. Given that, in practice, the BLA and CAV operate as the one unit, Option 25C appears appropriate. This would bring licensing and regulatory responsibilities to the one body, simplify administrative arrangements, and enhance community understanding and expectations for regulator accountability.

We are not convinced that it is appropriate for VCAT to be the agency responsible for licence suspension or revocation. While expert in dispute resolution and administrative review, it is not a consumer-focused regulator. VCAT's role, under the model proposed by Option 25, would be one of administrative review of regulator decisions, or as the forum where CAV seeks civil penalties for serious misconduct (in addition to the courts).

As stated above, there is a need, under this model, to give legislative direction to VCAT about its merits review role. Consumer protection needs to be the clear objective of the licensing framework and be applied as such, not only by the regulator but by VCAT in relation to review arrangements.

Penalties also need to be substantially increased under both legislative schemes. As such, Option 26 is supported. This should be done in light of the recent recommendation from the Review of the Australian Consumer Law (**ACL**) to increase financial penalties under the ACL.^{viii} Contraventions of both estate agent and conveyancing legislation should be aligned with the ACL.

Administrative and institutional arrangements

We do not have any comments about this section of the Options Paper, including in relation to the operation of the Estate Agents' Council and the Victorian Property Fund.

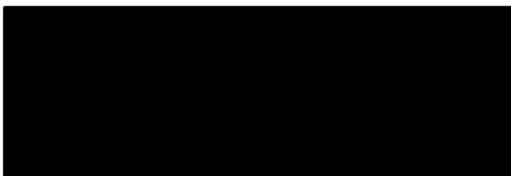
Modernisation of legislation

We strongly support modernisation of the legislation, including inserting an objects clause into the Estate Agents Act. We support a clear consumer protection objective, and the purpose proposed by the Options Paper (protecting 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). Such an objects clause is important not only for the regulator's administration of the legislation, but for when there are court and tribunal decisions, including administrative decisions about licensing.

Should you have any queries about this submission, please contact us at info@consumeraction.org.au or on [REDACTED]

Yours sincerely

CONSUMER ACTION LAW CENTRE



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ⁱ Senate Economics References Committee, *Scrutiny of Financial Advice: Part 1 – Land banking: a ticking time bomb*, February 2016, p 67,
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Scrutiny_of_Financial_Advice/Report.

ⁱⁱ *Ibid.*

ⁱⁱⁱ Department of Justice and Regulation, dkirchlinde@codecompliance.org.au, August 2016, pp 79-80 & 222-224, available at: https://engage.vic.gov.au/application/files/3314/8601/7221/Access_to_Justice_Review_-_Report_and_recommendations_Volume_1.PDF

^{iv} Bianca Hartge-Hazelman, “It takes just five days to become a qualified real estate agent in NSW, Victoria” [news.com.au](http://www.news.com.au), 19 May 2016, available at: <http://www.news.com.au/finance/real-estate/selling/it-takes-just-five-days-to-become-a-qualified-real-estate-agent-in-nsw-victoria/news-story/162d5b6d5d42a0a0c8f692031e671a6a>.

^v Paul Harrison, “Cooling-off periods for consumers don’t work: study”, *The Conversation*, 28 November 2016, available at: <https://theconversation.com/cooling-off-periods-for-consumers-dont-work-study-69473>.

^{vi} Michael Bleby, “Rebates ‘turning estate agents into advertising brokers’”, *The Australian Financial Review*, 12 February 2013, available at: <http://www.afr.com/business/rebates-turning-estate-agents-into-advertising-brokers-20130212-jyfy5>.

^{vii} Gerard Brody and Denis Nelthorpe, “Lawyers’ referral conflict: an under-rated risk”, 30 May 2016, available at: <http://consumeraction.org.au/lawyers-referrer-conflict-underrated-risk/>

^{viii} It is proposed to align ACL penalties with the penalty regime under the competition provisions of the *Competition and Consumer Act 2010*, see: https://cdn.tspace.gov.au/uploads/sites/86/2017/04/ACL_Review_Final_Report.pdf