

# SUBMISSION

## CONSUMER PROPERTY ACTS REVIEW

Sale of Land & Business - Options Paper

April 2017

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# ABOUT REIV

The Real Estate Institute of Victoria has been the peak professional association for the Victorian real estate industry since 1936.

Over 2,000 real estate agencies in Victoria are members of the REIV. These members are located in city, rural and regional areas.

The businesses employ more than 10,000 people in Victoria in a market which handles over \$100 billion of transactions totalling 30 per cent of GSP.

Members specialise in all facets of real estate, including: residential sales, commercial and industrial sales, auctions, business broking, buyers agency, property management, owners' corporations management and valuations.

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## Introduction

The REIV is the peak industry association for the real estate industry in Victoria, representing a significant number of the state's licensed sales agents, agent's representatives, auctioneers and business brokers.

This options paper – encompassing the Sale of Land Act 1962 and associated legislation – is of significant importance to our members as it impacts directly on their business practices.

With chapter committees dedicated to the sale of residential property, auctioneering and business brokerage, the REIV has consulted with members in forming our response.

The REIV has also sought input from its broader membership on dated legislation and how it could be best updated to reflect modern practices.

Key areas of concern for the REIV include proposed changes to Section 27, removal of terms contracts for residential property sales and increasing the deposit cap to 20 per cent for investors purchasing property off-the-plan.

The early release of deposits is crucial to the sale of land process and allows vendors to purchase a new home prior to settlement of their current home without the significant costs associated with bridging finance.



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# REIV Response

The following outcomes were gained from the member consultation process.

## Pre-sale disclosure

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

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

Feedback from REIV members indicates preliminary owners' corporation fees are often available to potential buyers of property being sold off-the-plan, and are included in the Section 32 when available. However, it is imperative that buyers understand that while the financial liabilities are based on current estimates, they are preliminary figures only and are subject to change for a multitude of reasons. It is not feasible for sellers to provide buyers with exact financial liabilities, particularly when dealing with lots that have not yet been registered. As such, the REIV does not anticipate significant obstacles in providing estimates, so long as agents are not unreasonably held accountable for any future changes to these estimates. The REIV considers it would be acceptable for the seller to state 'reasonable fees including OC, water and rates should not exceed XXX dollars' in the Section 32 Statement. Furthermore, requiring agents to disclose material facts about a property is predicated on the basis that agents and vendors are aware of previous incidents at a property. Given how frequently some homes change hands this is not always feasible. There would be many instances when neither the agent nor the seller is aware of the property's history, particularly if an incident occurred decades earlier.

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

As outlined above, the REIV does not support compensation for buyers if the estimates provided at the point of purchase were based on current estimates and the information available to sellers at that time. Substantial changes to lots can occur after the subdivision

is registered, and this can significantly affect liabilities. The REIV considers it crucial that buyers are required to undertake their own due diligence prior to entering a contract of sale. However, if the seller has engaged in deceptive and misleading conduct in providing financial liabilities estimates and underestimated the fees by more than 20 per cent then the buyer should have the right to rescind the contract within 28 days. In addition, the agent should be penalised in accordance with existing penalties.

## Misleading & deceptive statements about land for sale

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

## Auctions

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

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

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

The REIV supports public auction rules being amended to cover all auctions, including online auctions. In this way, online auctions could only be conducted by licensed estate agents and produce unconditional sales that are not subject to a cooling-off period.

The REIV considers it imperative all bidders at an online auction are required to register and verify their identity before the auction begins, including the provision of 100 points of identification. This would afford greater protection to both parties, especially given the prevalence of identity theft and internet fraud.

In the event that the auction ends and the reserve price is not met, additional guidelines will be required to outline how the post-auction negotiating process takes place in an online environment. In addition, the REIV considers it crucial that any online property auctions are in keeping

with current Victorian practice with a 30 minute to one hour timeframe.

### Contract for sale

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

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

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

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

The REIV's preferred option in relation to standard contracts of sale is Option 5B – repeal provisions for the prescribed standard form contract of sale, and clarify what constitutes ‘filling up’ a contract by estate agents.

While the prescribed standard form has considerable merit it is no longer essential as the REIV/LIV contract is widely used throughout the industry. However, the REIV would welcome a modernised, plain English equivalent of the former ‘Table A’ of the Transfer of Land Act and the Third Schedule of the Property Law Act. These repealed documents were previously an accepted source of general conditions applying to the sale of land and their reinstatement into schedules to the Sale of Land Act will be of benefit to the public and could considerably shorten the contract of sale.

In addition, the REIV supports the retention of Section 53A and clarification of what constitutes ‘filling up’ a contract. The Institute considers it crucial that while agents may ‘fill up’ a contract, any special conditions to be added be prepared by a conveyancer or lawyer and ‘filling up’ include the inclusion of solicitor or conveyancer prepared special conditions.

If the prescribed standard form is repealed, the REIV does not expect this will result in any substantial increases in the cost of contracts of sale prepared and endorsed by

industry bodies such as the REIV/LIV. While the REIV does not consider it necessary to place constraints around special conditions – other than that they must be prepared by a solicitor or conveyancer – Option 5C is problematic as it is likely to add significant complexities and confusion to the sale process. The establishment of mandated general conditions would further encumber the industry and the sale of land process.

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

As outlined above, the REIV does not support Option 5C as it is problematic and confusing for the general public. If any general conditions were to be included without modification then they should be based on the conditions that currently appear in the estate agents contract regulations.

### Deposit moneys

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

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

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

The REIV strongly opposes repealing the process for early release of deposits, as set out under Section 27. Feedback from REIV members indicates the early release of deposits is vital to the sale of land process and allows vendors to purchase a new home before settlement of their current home. Repealing these important provisions would significantly impact on the ease of property transactions, reducing the fluidity of the sale of land in this state. In this way, the REIV urges Government to disregard this option which will significantly increase vendor costs through the necessity of bridging finance.

**7. In relation to option 6B:**

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

The REIV would support amending existing legislation to make it an offence for agents/vendors to request

purchasers sign the Section 27 Statement at the time of signing the contract of sale, as it removes the buyer's ability to seek independent legal advice. The Institute would also support increasing the penalty for purchasers who fail to pay over the deposit within seven days of signing a contract.

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

The REIV strongly opposes this proposal as the negative impact of limiting the early release of deposits far outweighs any positives. Feedback from REIV members indicates the proposal to preclude any property with a caveat over it from early release of the deposit would be damaging to the sale of land process, restricting many vendors from purchasing a new home prior to settlement of their current home. While a property may have a caveat over it for a variety of reasons, the vendor is required to provide clear title at settlement. Any caveat over the property should be disclosed in the Section 27 Statement. It's crucial that buyers and vendors be able to buy and sell land with ease and without significant additional costs, and the early release of deposits is essential to this process. In the event where a vendor has deliberately misled a buyer, the REIV would support that buyer being able to terminate the contract.

## Off-the-plan sales

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

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

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

The REIV considers 21 days to be sufficient time for a buyer to end an off-the-plan sale following a change to the plan of subdivision. In instances where there has been a significant material variation, the REIV considers it crucial that the seller outlines the changes to the buyer.

9. In relation to option 7B:

**(a) Can you identify any impacts of increasing the deposit cap to 20 per cent for investors on owner-occupiers**

### buying off-the-plan property?

The REIV considers it imperative that the deposit be capped at 10 per cent for all buyers of off-the-plan property. In this way, the REIV does not support increasing the deposit cap to 20 per cent for investors, as it further discourages property investment in Victoria – which is crucial to a sustainable rental market. Requiring a greater deposit for investors increases risk – and reduces consumer protection – for these buyers. In addition, developers may opt to discriminate against owner-occupiers, choosing to sell solely to investors as it increases their ability to raise finance for the project. Furthermore, the REIV has concerns with how sellers will ascertain if the buyer is an owner-occupier or an investor.

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

Feedback from REIV members suggests owner-occupiers should have the right to terminate the contract at any point up to settlement, if the developer has accepted a deposit of more than 10 per cent.

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

As outlined above, the REIV does not support increasing the deposit cap for investors as it will create an unacceptable level of risk for these buyers. The REIV considers a 10 per cent deposit cap to be appropriate given the risks associated with buying property off-the-plan. Consumer protection must be paramount to the concerns of developers.

## Terms contracts and rent-to-buy arrangements

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

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

The REIV supports prohibiting all rent-to-buy arrangements as the method exposes low income buyers to significant financial risks. However, terms contracts are a legitimate form of sale which provides an alternative option for first homebuyers to enter the property market. Feedback from REIV members indicates there is a continuing place for terms contracts in residential property sales, particularly given the metropolitan Melbourne median house price is currently

\$826,000. The REIV encourages Government to retain terms contracts for residential property sales. In addition, the Institute would also support greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries with brokers required to hold an Australian financial services licence.

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

Feedback from REIV members indicates commercial property sales should not be exempt from terms contracts provisions.

### Land banking

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

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

Option 9 provides adequate protections to buyers of property under land banking schemes, particularly in relation to moneys held in trust.

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

The REIV considers reasonable time limits on the duration of an option agreement should be dependent on whether the land is for residential or other use. If no timeframe is specified in the contract, the REIV would support a default timeframe of 12 months for residential land. A default timeframe of five years is appropriate for all other land banking schemes, if a time limit is not specified.

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

Input from REIV members suggests excessive restrictions on timeframes for exercising a land banking option may have a detrimental effect on vendors and purchasers by reducing the attractiveness of the option.

### Sale of land & business protections within the Estate Agents Act

**Option 10 – Relocate small business statement provisions to the Sale of Land Act, and review to ensure information**

**in the statement is relevant and meaningful**

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

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

The REIV supports Option 10 on the proviso that the Sale of Land Act incorporates a definition of a business with the Act changed to the Sale of Land & Business Act. In addition, the REIV recommends significant changes to the Statement by a Vendor of Small Business (Form 2).

At present Section D of this form – Vendor's Business Operating Report – is inadequate in providing a clear overview of a business' financial position. The REIV considers the addition of year-to-date trading figures to be essential. The Institute also considers it necessary that the Statement by a Vendor of a Small Business be revised to clarify that the total price of \$350,000 or less excludes licensed premises. Furthermore, the REIV has attached an alternative proposed Statement to replace the existing Section D (Appendix 1). The alternative would ensure buyers are provided with appropriate information to make informed decisions.

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

Feedback from REIV members indicates support for increasing the threshold to \$500,000.

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

The REIV does not consider there to be any unintended consequences associated with relocating provisions for the small business statement into the Sale of Land Act. However, it is important that the regulations governing the Statement of a Small Business are moved from the Estate Agents General Account & Audits Regulations to the Sale of Land Act Regulations to ensure consistency with the Act.



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

Under existing legislation, agents are not permitted to make representations about finance. Feedback from REIV members suggests there may be some members who refer clients to finance companies, however this practice has declined markedly over the years and is not common. As such, the REIV supports Option 11.

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

The REIV does not consider there to be any unintended risks associated with relocating these provisions into the Sale of Land Act.

**Modernisation of the Sale of Land Act**

**Option 12 – Amend the Sale of Land Act to require that moneys paid to buy an ‘option’ to purchase land in the future be held in trust and the right to exercise the option be limited as to time**

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

In its response to Issues Paper No. 3, Sale of Land and Business, the REIV identified, in its response to question 67, eight opportunities to modernise the Act. We note only one of these has been addressed, an amendment to the Act that permits a purchaser to give a cooling-off notice to a vendor’s estate agent. We consider the remaining opportunities to be of importance in modernising the Act and that they should be pursued. These include the following:

- REIV members have indicated that in practice the due diligence checklist is of no interest to potential buyers of residential real estate. The reality is Division 2A of the Sale of Land Act has created red tape for no discernible benefit. Nonetheless, the Sale of Land Act imposes severe penalties on vendors and estate agents who fail to make it available. As the checklist is not utilised, Division 2A of Part II of the Sale of Land Act should be repealed. If the Government is of the view that the checklist should remain, the REIV recommends that it be significantly revised as a single, A4 page checklist to form part of the vendor Section 32 Statement. Either of these outcomes – removal or

amendment of the checklist – would require either a repeal or an update to Division 2A of the Sale of Land Act.

- With a view to encouraging electronic commerce in relation to the sale of land appropriate amendments are required to facilitate online auctions and there also needs to be appropriate cross-referencing throughout the Sale of Land Act, refer to applicable provisions in the Electronic Transactions (Victoria) Act 2000.

- REIV members have advised the legitimate interests of sellers and buyers of residential real estate can, at times, be stymied by the mandatory nature of the Section 31 cooling-off provisions.

- The REIV recommends a buyer of residential real estate be given the option to waive their cooling-off rights if they have been advised by a vendor or estate agent to seek independent advice and have signed a form, approved by the Director of Consumer Affairs Victoria, before doing so. To protect buyers, consideration could be given to introducing an offence of requiring a buyer to waive their cooling-off right.

- The REIV recommends the \$100 referred to in Section 31 (4) be repealed and the 0.2 per cent of the purchase price (which the vendor may retain) be increased to 0.5 per cent. The REIV considers this a reasonable increase, given the current percentage has not been revised since Section 31 was included in the Sale of Land Act and that expenses of a vendor in marketing and selling a residential property have increased markedly in that time. While the Act specifies there is a penalty for cooling-off, under existing legislation buyers are not currently required to pay an initial deposit. As such, the REIV would like the Act amended to require buyers to pay in cleared funds an amount of at least 0.5 per cent of the purchase price on the signing of the contract.

- The Institute’s preference is to see the Section 53A of the Estate Agents Act extended to include filling up prescribed residential tenancy lease forms and any other prescribed contracts of sale. In addition to this, Section 53A needs to be amended to define ‘contract’, as used in the section, to include a residential tenancy agreement or a lease or licence of real estate and renewals and assignments of them. The REIV considers there is a need for the amendment because estate agency work has continued to evolve and the preparation of a residential tenancy agreement by an estate agent could be considered as engaging in legal practice or doing conveyancing work.

- The REIV suggests Section 36 of the Sale of Land Act be amended to replicate the wording of Section 24.2 in the contract of sale, ‘The vendor must deliver the property to the purchaser at settlement in the same condition it was in

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on the day of sale, except for fair wear and tear’.

### Dispute Resolution

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

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

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

In relation to dispute resolution, retention of arbitration is the REIV’s preferred option as it provides a private forum for stakeholders to resolve issues. While the REIV acknowledges that arbitration can be as expensive as litigating through the courts, it is often much quicker, and provides the disputants with alternative dispute resolution choices – in line with the Commercial Arbitration Act. Feedback from members indicates greater access to VCAT for minor disputes is also welcomed.

##### 22. What might constitute a ‘minor dispute’ under the Sale of Land Act capable of being resolved by VCAT?

Feedback from REIV members suggests claims with a monetary value below \$15,000 should be classed as a minor dispute under the Sale of Land Act.

### Offences & remedies

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

#### Option 15 – Retain offences and review penalties

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

The REIV is of the view that a seller should be able to argue honest and reasonable mistake. If this option is adopted it will have the benefit of creating a degree of uniformity between the two areas of legislation.

## Summary

The REIV thanks Consumer Affairs Victoria (CAV) for the opportunity to provide input to the Sale of Land & Business Options Paper.

In our submission, the REIV has outlined a range of aspects of the Sale of Land Act that require amendment or modernising. Should these require clarification, the REIV would be pleased to assist.

In addition, the REIV strongly urges Government to retain Section 27 provisions as these are vital to the sale of land process. The removal of Section 27 would significantly increase vendor costs through the necessity of bridging finance.

## APPENDIX 1:

### SECTION D – VENDOR'S BUSINESS OPERATING REPORT

The figures in this Statement relate to the business being sold and are prepared on an \*accrual/\* cost Basis accounting basis.

**Note:** Accrual accounting is the method whereby revenue and expenses are recorded in the period in which the entitlement to income and costs are incurred, even though they may not have been received or paid.

Cash accounting means that revenue and expenses are recorded in the period in which the money was receipted and paid.

#### 1. BUSINESS OPERATING REPORT

	<i>Accounting Period A</i>	<i>Accounting Period B</i>	<i>Turnover – Year-to-Date</i>
(The figures for the most recent period should be in column B)	From  To	From  To	From  To
Number of weeks of operation.	52	52	
<b>1. TOTAL GROSS INCOME OF BUSINESS (EXCLUDING GST IF APPLICABLE)</b>			
Average per week			
<b>2. COST OF GOODS SOLD</b>			
(a) Opening Stock			
(b) Plus purchases in period			
(c) Less closing stock			
TOTAL COST OF GOODS			
<b>3. GROSS PROFIT OF BUSINESS</b>			
Gross Profit as a % of Gross Profit			
<b>4. TOTAL OPERATING EXPENSES</b>			
(a) Accounting charges			
(b) Advertising			
(c) Bad debts written off			
(d) Bank and transactions charges			
(e) Depreciation & amortisation			
(f) Cartage and freight			
(g) Cleaning, laundry, protective clothing			
(h) Electricity, fuel, gas			
(i) Equipment rental/hire (not hire purchase)			
(j) Insurances (excluding motor vehicle)			
(k) Interest			
(l) Licences, registration, trade subscriptions			
(m) Motor vehicle running costs business related			
(n) Packaging and wrappings			
(o) Postage, printing, stationery			
(p) Rates and outgoings			
(q) Rent of business premises			
(r) Repairs and maintenance			
(s) Staff amenities			
(t) Superannuation employee benefits (exclude associated persons) <sup>1</sup>			
(u) Telephone & Internet			

<sup>1</sup> Associated persons are defined as any family members working in the business or any and all directors or shareholders of a company (corporation) that owns the business<sup>1</sup>

(v) Travel & accommodation (w) Wages paid to employees (exclude associated persons) (x) Workcover premiums (y) Other sundry business expenses (z) Other expenses unique to business		
<b>5. NET PROFIT FOR THE BUSINESS</b>		
<b>6. VENDOR'S PERSONAL EXPENSES ADDBACKS</b> (a) Depreciation and Amortisation (b) Financing & Interest costs (c) Vendor's personal expenses (d) Vendor's other sundry expenses (e) Wages paid to associated persons (f) Superannuation paid to associated persons  <i>(Add others if applicable)</i>		
<b>7. ADJUSTED NET PROFIT to owners of the business</b>		



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