



REIV THE STANDARD
FOR SUCCESS

SUBMISSION

CONSUMER PROPERTY ACTS
REVIEW ISSUES PAPER NO. 3
SALE OF LAND AND BUSINESS

May 2016



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.

Introduction

The REIV is the peak industry association for the real estate industry in Victoria, representing the majority of the state's licensed sales agents, auctioneers and owners' corporation managers.

With chapter committees dedicated to the sale of residential property, auctioneering and owners' corporation management, the REIV has undertaken extensive consultation with members in Melbourne as well as regional centres across the state.

Key areas of concern are regulating online auctions, cooling-off provisions and the small business statement (Section 52 of the Estate Agents Act).

Other areas of interest to members include the clarification of duplicate legislation and updating the Sale of Land Act to reflect modern practices.

SALE OF LAND & BUSINESS

Consumer Property Acts Review – Issues Paper No. 3

1. How could the current requirements for the disclosure of financial information before a contract of sale is signed be improved to take better account of property being sold 'off-the-plan'?

Feedback from REIV members indicates that preliminary owners' corporation fees are often available to potential buyers of property sold off-the-plan, as they are included in the Section 32 statement. At present, most developers begin initial consultation with owners' corporation managers as much as three years in advance to ensure these figures are as accurate as possible. While these figures are preliminary, the REIV believes this level of disclosure is appropriate given information available at the time of sale.

2. How could uncertainties about the location of water infrastructure under land for sale be resolved?

The REIV believes the current requirements surrounding disclosure of water infrastructure are sufficient. Potential buyers who are concerned about unregistered easements should conduct their own due diligence by contacting the planning authority. The REIV understands that water infrastructure, depending on its location, can be built over upon agreement with the authority.

3. What is your view on the approach or approaches required to deter misleading and deceptive conduct during the sale of land?

The REIV considers these provisions are essential and must be retained. Similar provisions in the Commonwealth ACL and the Victorian Consumer Law and Fair Trading Act apply when a company or individual is in trade or commerce, while the provisions in the Sale of Land Act are not so restricted in their operation. Additionally, Section 48A applies the ACL to the Sale of Land Act making remedies available under the ACL for breaches of these provisions.

4. In light of the Australian Consumer Law offences, is there still a need to retain specific offences relating to misleading and deceptive conduct under the Estate Agents Act?

The REIV believes they should be retained for the reasons mentioned in the answer to Question 3, above.

5. What is your view of the effectiveness of the due diligence checklist in increasing the awareness of buyers of the need to make their own enquiries before buying a property?

Feedback from REIV members indicates the due diligence checklist is ineffective and not currently utilised by potential buyers of property. Given proposed regulatory changes to Section 47A-47D of the Estate Agents Act, the REIV believes buyers will be given a significant amount of additional information at the point of purchase, which will further negate the need for a due diligence checklist. As such, the REIV suggests the due diligence checklist is no longer required.

6. Would there be advantages to having sellers obtain and provide potential buyers with building and pest inspection reports prior to selling their property? Please give reasons for your view.

The REIV does not believe vendors should be responsible for the provision of building and pest inspection reports. This provision would be a considerable additional expense to vendors –\$1000 or potentially more – and would create a myriad of legal issues if buyers relied upon these reports and defects were later found. The REIV believes most buyers of property would want an independent report, rather than rely on one which has been prepared on behalf of the vendor. Buyers must be accountable for any decisions (or purchases) and conduct their own due diligence. In any case, the common law and current legislation requires vendors to disclose known defects, where they will not be apparent

to a potential buyer inspecting a property.

7. What is your experience of the effectiveness of the rights of buyers to seek compensation at VCAT? Do they act as an incentive to seller and estate agents to conduct auctions fairly?

Since 2004 (following the implementation of new legislation relating to dummy bidding) there have been very few prosecutions at VCAT. In this way, there is less of a focus on VCAT in 2016 to resolve sales-related property cases and issues at present. With this in mind, the REIV believes VCAT and the provisions are serving their intended purpose.

8. What behaviours by auctioneers and estate agents would you identify as having a negative impact on a buyer's experience at auction?

The REIV deems existing legislation governing the conduct of estate agents and auctioneers to be appropriate and fair for all potential buyers. Most – if not all – agents and agencies are adapting to market trends to ensure buyers' experience is enhanced.

9. Should the rules that cover public auctions be extended to cover all auctions? Please give reasons for your view.

The REIV supports public auction rules being extended to cover all auctions. As auctions (including private and online auctions) are an unconditional sale, they should not be subject to cooling-off periods. The intent of an auction is to produce a sale with certainty; therefore all auctions should be conducted with the intent of a result that is binding and not subject to a cooling-off period.

10. Do the risks to buyers and sellers at an online auction differ from the potential harms experienced by buyers and sellers at a traditional physically based auction? If yes, please give reasons for your view?

The REIV believes buyers and sellers may be exposed to greater risks at online auctions than traditional location-based auctions because there is no physical presence required (particularly for buyers) for the conduct of an online auction. As such, both parties, especially vendors, need to be afforded greater protection, especially given the prevalence of identity theft and internet fraud. The REIV considers it crucial that all bidders be required to register and verify their identity - before the auction begins.

11. How should online auctions be regulated and what are the limitations of intervention?

Online auctions should be regulated by the Sale of Land Act. The REIV considers it important that online auctions be strictly regulated with only licensed estate agents permitted to conduct the auction. All bidders at online auctions should be required to be registered and the process needs to allow for any mechanical or technical issues that may arise during the auction. Online auctions are also limiting in the event that the auction ends and the reserve price hasn't been met. How does the post-auction negotiation process take place in an online environment? These scenarios need further consideration and the REIV (through its Sales Chapter and Auctioneers Chapter) can, if required, provide additional input to Consumer Affairs Victoria (CAV) on these issues and potential methods of updating legislation.

12. Should there be any barriers to entry for operators of online auctions or other people who host an online auction site such as a requirement to be licensed? Please give reasons for your view.

Yes. As outlined above, the REIV believes it is imperative that online auctions are conducted by licensed estate agents only. This will give buyers and sellers appropriate levels of protection, which is critical given the complexities of online auctions.

13. In what circumstances should the behaviour of people who are not participating directly in an auction be regulated?

At present, the Sale of Land Act only governs the behaviour of those intending to bid. The REIV would like to see the legislation amended to encompass all people at – or in the immediate vicinity of – the auction. The REIV will also support the implementation of suitable penalties for those who disrupt auctions, including allowing vendors, estate agents and potential purchasers to claim damages. These penalties should also apply to people who have attended the auction and bid but have no intention of purchasing the property.

14. Do you think that the holding of public auctions on ANZAC Day should be regulated? Please give reasons for your view.

While the REIV has previously advised members to avoid trading on ANZAC Day, the Institute believes amending the Shop Trading Act to include agents will ensure no real estate business is conducted before 1pm. If agents opt to undertake real estate business after this time they are in line with other businesses, including supermarkets and shopping centres.

15. Who should be responsible for ensuring the rules for conducting an auction are complied with? Please give reasons for your view.

Feedback from REIV members indicates the estate agency – not the auctioneer – should be responsible for ensuring auction rules are complied with as the auction is conducted by agreement between the vendor and agency. The REIV notes auctioneers frequently conduct multiple auctions at weekends, requiring them to move between auction sites. For this reason, it is unrealistic and impractical to impose on them the obligations of ensuring auction information is provided in accordance with the Sale of Land Act and regulations.

16. Should side deals be disclosed to all bidders before an auction commences? Please give reasons for your

view.

The REIV considers the current requirements under the Act are satisfactory in dealing with this issue.

17. In what circumstances should buyers be able to cool-off from a contract of sale?

The REIV believes buyers should be afforded the opportunity to cool-off from a contract of sale (within three business days) for properties sold by private sale only. The exception to this is when the property being sold by private treaty has been subject to a building or pest inspection or finance. In these instances, as the cooling-off period has been served (concurrently during the period the buyer obtains the report), the REIV does not believe a further cooling-off period should apply.

18. In your experience, are the current cooling-off provisions effective in 'undoing' an impulsive decision made by a buyer?

Feedback from REIV members indicates cooling-off provisions are extremely effective in offering buyers a sufficient period of time to seek legal advice from a lawyer or conveyancer.

The REIV is also aware of instances – particularly in regional areas – where a buyer may not sign a contract for up to four weeks. In these cases, particularly where the buyer has had ample time to gain specialist legal input, the REIV does not consider it appropriate for the contract to then be subject to a cooling-off period.

19. Do you think the standard form contract has merit, or is there a better way to set general conditions to which all sales are subject?

While the REIV considers the current prescribed contract of sale form has considerable merit it may, however, have some shortcomings.

In the past, 'Table A' of the Transfer of Land Act and the Third Schedule of the Property Law Act were the source of general conditions applying to the sale of land.

Following the repeal of both these documents, the REIV considers a modernised, plain English equivalent of the former 'Table A' and the Third Schedule should be published. As there are now no general conditions applying to the sale of land in Victoria, these schedules, included within the Sale of Land Act, would restore general conditions for the sale of Victorian real estate. While some of this information currently appears in the contract of sale, this could be removed from the contract, which would considerably shorten this document.

20. What, if any, constraints should be placed around the adding of special conditions to a standard form contract of sale?

The REIV does not consider any constraints necessary; however, special conditions must be prepared by a conveyancer or lawyer. Feedback from REIV members indicates the wording of General Condition 14 – which relates to a property being sold subject to finance – is considered inadequate. This is because it does not provide sufficient detail in regards to what a buyer must provide to a seller when cancelling a contract, should a finance application to an institution be rejected. In addition, the REIV considers there should be penalties for buyers who make misleading representations to a vendor or a vendor's estate agent, conveyancer or legal practitioner in relation to their application for finance.

21. Is there a better way to regulate the conditions under which a sale of land takes place?

In answering, the REIV presumes this question relates to the conduct of auctions. In this regard, current regulations governing the conditions under which a sale of land takes place are adequate and appropriate.

22. Is there a need to regulate the conditions that are inserted into contracts for off-the-plan sales?

Feedback from REIV members suggests there is a need to regulate conditions for off-the-plan sales due to their complexity. Off-the-plan contracts of sale can be difficult for buyers to understand and special conditions are often prepared by solicitors representing the developer. The

REIV is aware that these lengthy contracts can contain some unreasonable terms, for example:

- Excessively long sunset clauses, therefore delaying the point at which a contract can be ended because of the vendor's failure to complete the project;
- Plans without dimensions that are part of the contract documentation, thereby making it difficult to argue that the finished product varies from the description in the contract;
- Vague descriptions of the fixtures and fittings;
- No building specifications, for example no detail of what a party wall will be constructed of.

23. Can you envisage any issues if the exemption for estate agents is removed? If yes, please give reasons for your view.

The REIV presumes this question relates to Section 53A of the Estate Agents Act. The Institute does not support these exemptions being removed. The REIV can foresee significant and serious issues arising for the conduct of estate agency work and for sellers and buyers of real estate, if the exemption in Section 53A is removed. The effect will be estate agents will no longer be able to 'fill up' contracts as, by doing so, they will, in all likelihood, commit an offence under the Conveyancers Act and the Legal Profession Uniform Law Application Act.

The potential ramifications include: unacceptable delay occurring in having the conveyancer or legal practitioner complete the contract (and the possibility of them seeking to re-negotiate the terms of the sale, as already agreed, because they consider they may be getting a better deal for their client); and a great deal of additional - and unnecessary - expense being incurred by sellers and buyers.

Ramifications for the seller include the possibility of a buyer withdrawing their offer before a contract is signed while buyers face the possibility of being 'gazumped' before a contract is signed.

24. Is there still a need to ensure that deposit moneys are preserved until settlement? Please give reasons for your answer.

Feedback from REIV members indicates that in instances where Section 27 conditions haven't been met, there is still a need for deposit monies to be preserved until settlement. The Sale of Land Act currently provides for this and, by doing so, protects the interests of consumers.

25. What remedies should be open to a seller in circumstances where a buyer does not meet his or her obligations to pay over the deposit? For example, should a seller be able to end the contract?

If the buyer hasn't provided a deposit within the time specified in the contract, the REIV believes vendors should be able to end the contract. In passing, the REIV notes a seller can do so at present under existing legislation.

26. What is your experience of the effectiveness, or otherwise, of the 'early release' provisions?

The REIV is aware that some solicitors and conveyancers acting for buyers routinely recommend buyers object to the release of the deposit money, even in instances where there is a small - or no - mortgage over the property. This practice creates a lot of uncertainty for vendors and agents, especially as vendors are often depending on the money in order to pay a deposit on another property.

27. What information is essential to assist a buyer in determining whether or not to release the deposit before settlement?

The REIV considers current requirements are adequate and appropriate.

28. Should the buyer's right to end the contract be absolute if the seller misleads them about the details of mortgages and caveats over the land? Can you envisage any circumstances where a seller may make an honest and reasonable mistake?

In instances where a vendor has 'deliberately' misled a buyer, the REIV believes the buyer should have the right to end the contract, but not otherwise.

29. Should the uses of bank guarantees and deposit bonds in the sale of land process be regulated and, if yes, how?

The REIV supports the removal of bank guarantees and deposit bonds in relation to the sale of land on which there is an existing building or the land sold is used for primary production or is vacant land.

30. What risks do buyers face in relation to damage or destruction of the property they are buying in the period between the signing of the contract and settlement?

Feedback from REIV members suggests the current legislation is unclear as vendors are not legally required to hold insurance between the signing of the contract and settlement. However, the REIV is aware that existing legislation requires the vendor to hand over the property in the same condition upon settlement as it was at the point of purchase. 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 on the day of sale, except for fair wear and tear'.

31. Are the current protections still relevant or are there other risks that should be mitigated?

The REIV considers the current protections are appropriate.

32. What is your experience of buyers relying on the right to end the contract because of damage to a dwelling house? How do these rights work in practice?

Feedback from REIV members suggests that the damage would have to be significant to warrant the termination of a contract. It's important to note that buyers currently have recourse to compensation if one or more of the goods are not in the same condition at settlement as they were on the day of sale, with the exception of fair wear and tear.

33. What problems exist for sellers in setting a conservative purchase price for the purposes of calculating the deposit?

The REIV believes the contract of sale -rather than the Sale of Land Act - should clearly state the value of any rebates, fixtures and appliances for the purposes of calculating the deposit.

34. How could uncertainties about the true purchase price be addressed?

There should be no uncertainties surrounding the true purchase price of a property, as the value of any rebates, fixtures and appliances should be calculated and clearly detailed in the contract of sale.

35. What are your views of the current arrangements which do not allow a seller to access deposit moneys before the plan of subdivision is registered?

The REIV considers the current arrangements to be appropriate given the significant risks associated with purchasing property off-the-plan. Allowing sellers to access deposit moneys before the plan of subdivision is registered may result in buyers losing their deposit if the developer is forced to declare bankruptcy.

36. Do you think the current cap of 10% on deposit moneys is appropriate as a mechanism to protect buyers in an off-the-plan sale? Please give reasons for your view.

The REIV considers the 10 per cent deposit limit to be appropriate – even in light of off-the-plan sales presenting different risks to those associated with buying an established home.

37. Should progression payments be permitted, and if yes, what constraints should be placed around that permission?

The REIV does not support progression payments.

38. Is there a continuing rationale for treating deposit moneys for off-the-plan sales differently to other deposit moneys and not allowing those moneys to be transferred under any circumstances prior to registration of the plan?

As off-the-plan sales can involve a higher level of risk compared to the sale of established properties, the REIV considers it necessary to continue treating deposit monies differently. Any risks associated with the development should be borne by the seller, not the purchaser.

39. Does it seem appropriate that deposit moneys be treated differently once the plan of subdivision is registered and the level of protection for buyers lessened or should the deposit moneys be protected for the buyer until settlement? Please give reasons for your view.

The REIV does not consider it appropriate to treat deposit moneys differently once the plan of subdivision has been registered, as this offers no further consumer protection. Consumers are still exposed to considerable risks from the point of registration through to settlement.

40. What are your views on the current disclosure requirements in relation to works affecting a lot for sale?

The REIV considers current disclosure requirements are adequate and appropriate.

41. How can buyers be best made aware of the potential financial implications associated with changes to the environment resulting from earthworks and construction?

The REIV considers it appropriate that buyers be made aware and have full access to any changes affecting a lot, including the natural surface level.

42. Currently, the obligation sits with the buyer to determine what changes have occurred and whether

they are detrimental. Do you believe that this is appropriate or should there be some responsibility on the seller to specify the changes to assist the buyer?

In instances where there has been a significant material variation (potentially greater than five per cent), the REIV considers it appropriate that the seller specifies changes to the buyer. The REIV would also support allowing the buyer to terminate the contract of sale when the variation is greater than five per cent.

43. Do buyers have the correct amount of information to make informed decisions about whether changes to the plan have a material effect? Please give reasons or examples to illustrate your position.

As part of the contract of sale, vendors of off-the-plan property should be required to provide buyers with approved plans that show all relevant dimensions. In addition to room dimensions, the REIV would also like to see ceiling heights and floor area (as well as the method of calculation) included in these plans.

The REIV is aware that some vendors are supplying buyers with plans that have had the dimensions removed, which makes it difficult for a diligent buyer to be clear about whether the final product differs from the plan supplied at contract stage.

The Act refers to variations to the title boundary but this is not the only aspect of the property in which there may be an important variation as changes to the plan within the lot boundary are also significant.

44. In what circumstances, if any, would it be appropriate for a buyer to end a contract because of changes to design, specifications, fittings and finishes?

As outlined above, the REIV supports allowing a buyer to terminate a contract of sale when there have been material variations greater than five per cent.

45. What is your experience with the warning notice for off-the-plan sales? Is it effective in assisting buyers to

understand the potential risks of an off-the-plan sale or to negotiate the deposit price?

The REIV would like to see the existing warning notice for off-the-plan sales expanded to include that changes may be made to a lot between the point of purchase and settlement.

46. What are your thoughts on the current timeframes available to a buyer to end an off-the-plan sale? Are they appropriate?

The current timeframes for buyers of off-the-plan property to seek independent legal advice and terminate the sale, if necessary, are appropriate, in the REIV's view.

47. Is it common for plans of subdivision not to be registered by the date specified in the contract of sale? If yes, what are the benefits to both parties of enabling the date to be extended by mutual agreement?

The REIV is aware it is not uncommon for plans not to be registered by the date specified in the contract of sale. The REIV considers there should be flexibility to enable the date for approval to be extended by mutual agreement between the buyer and seller. One option where agreement is reached is for the seller and buyer to sign a form, approved by the Director of Consumer Affairs Victoria, to that effect within a time-frame specified by the Director.

48. What is your experience of the ending of off-the-plan sales contracts? What are the common areas and issues that trigger rights to end such contracts?

Feedback from REIV members suggests it can be difficult for a buyer who has terminated their contract of sale to retrieve their deposit. Therefore, consideration of this area within the review is timely.

49. Are you aware of sellers manipulating buyers into exercising their rights to end the contract to enable properties to be re-sold at higher prices?

The REIV queries whether there may be a need to re-consider the rights of developers to take advantage of the provisions that enable them to cancel off-the-plan contracts, especially in a rising market, if they may have deliberately delayed a project (to enable them to cancel existing contracts and potentially re-sell apartments at a higher price). The REIV suggests clarifying timeframes in the Sale of Land Act and the definition 'time is of the essence' may prevent this practice.

50. How does the obligation to obtain owners corporation insurance within the first six months of registration work in practice? Is this an obligation that is fulfilled by the initial developer or dealt with at the first meeting of the owners corporation?

Feedback from REIV members indicates the Registration of the Plan of Subdivision is usually held off so that settlements will take place within a few weeks of the registration. As such, the first meeting is usually held in the 14 days between registration of the Plan of Subdivision and settlement of individual lots. This allows the developer to pass rules whilst being the only owner and typically the developer pays the insurance and then recovers the cost from each unit as it settles a part of settlement. The other main option involves the developer arranging a cover note and expecting the Owners Corporation Manager to recover a sufficient sum of OC fees at settlement. This option is far from ideal as it assumes that enough lots will settle to have sufficient funds to pay the insurance.

51. What remedies should be available to buyers of property if an owners corporation is not meeting its responsibilities under the Owners Corporations Act, such as not having obtained the correct insurance?

Under the current Act, a lot owner may pay for increased cover and also has recourse to a court or tribunal. REIV members suggest litigation relating to insurance is rare.

52. What, if any, requirements under the Owners Corporations Act should an individual seller of property

within an owners corporation be responsible for ensuring are complied with at point of sale?

Individual sellers of property within an owners corporation should be responsible for ensuring contact details of lot owners (both old and new) are communicated to the owners corporation. The sellers should be responsible for ensuring that the information in the Owners Corporation Certificate is accurate and that the actions of their agent are appropriate and ethical.

53. Is it common for a buyer to take possession before a plan of subdivision is registered, and if yes, what arrangements are needed to protect the interests of buyers and sellers in such circumstances?

It is not common for a buyer to take possession before a plan of subdivision is registered. If it should occur, a licence agreement setting out the rights of the seller and buyer is essential.

54. What is your experience with buying or selling property under a terms contract? Do you agree that there is a continuing place for such contracts in today's market?

Feedback from REIV members indicates there is a continuing place for terms contracts, particularly given metropolitan Melbourne's current median house price of \$713,000. While terms contracts are predominately used in the sale of commercial property and rural land, they also offer residential buyers with an alternative method of getting a foothold on the property ladder. The REIV considers existing legislation in relation to terms contracts to be appropriate.

55. Should the current restrictions on sellers under terms contracts be expanded to encompass debt that is not linked to the property but which may impact on the seller's capacity to pass title to the buyer? If yes, what sources of debt should be included?

The REIV would support the current restrictions being expanded to include debt that is not linked to the

property, which would offer buyers further protections in the event of vendor bankruptcy.

56. Should there be greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries? If yes, what would you favour:

- **Offences and remedies directed at intermediaries?**
- **Requirements on intermediaries to have contracts of sale independently audited for financial soundness before proceeding?**
- **Other approaches? Please provide your ideas**

The REIV considers there should be greater levels of scrutiny applied to terms contracts 'brokered' by intermediaries. The REIV suggests consideration might be given to treating these contracts as financial products which require prior approval by the ASIC and requiring the 'brokers' of them to hold an Australian financial services licence.

57. What are your experiences of rent-to-buy contracts? Can you provide examples where a buyer has successfully purchased a property using the rent-to-buy method?

The REIV does not support rent-to-buy contracts as the method exposes buyers to significant financial risks. Feedback from REIV members indicates this method of sale is used to sell real estate to people whose financial circumstances may not allow them to fully purchase a property. Inevitably these buyers default and lose their money, thereby placing them under great financial distress.

58. Should there be additional protections provided to buyers who purchase property under land banking schemes? If yes, where do you think the risks lie and how can they be mitigated?

The REIV has insufficient knowledge of the issues surrounding land banking to be able to respond to this question.

59. What are your experiences with selling and buying property privately online?

The REIV has no direct involvement in selling or buying real estate online. It is aware, however, this will inevitably occur in the future. The REIV considers any impediments in the Sale of Land Act which do, or may, adversely affect this mode of sale -whether by private treaty or by auction - need to be identified and either amended or repealed.

60. What is your experience with the small business statement? Is it still required? Please give reasons for your view.

The REIV has received extensive feedback in regard to Section 52 (statement to be given on sale of a small business) of the Estate Agents Act 1980. Specifically, REIV members have provided feedback in relation to the Statement by a Vendor of a Small Business (Form 2) - which is a key component of Section 52.

Section D of this form 'Vendor's Business Operating Report' is seen as inadequate. The REIV strongly supports significant amendments to the statement to ensure it provides buyers with appropriate information to make informed decisions. Amendments include the addition of year-to-date trading figures. This will provide buyers with a clearer overview of the business' financial position. The REIV has also received further feedback on the current Section D, which will provide buyers with more information to enable them to assess the financial viability of a business. The REIV has compiled an alternative, proposed statement to replace the existing Section D. This is attached for the consideration of CAV (Appendix 1).

The Statement by a Vendor of a Small Business also needs to be revised to clarify that the total price of \$350,000 or less **excludes licensed premises**. While the current \$350,000 cap should remain, the REIV notes that future

consideration of the cap may be required.

61. Do estate agents and auctioneers commonly assist buyers in obtaining finance or has this practice declined over the years as bank finance became more readily available?

While feedback from REIV member suggests this practice has declined markedly over the years, there may be some agents who refer clients to finance companies.

62. Is it common practice for builders and developers of land to recommend financial products or finance providers to prospective buyers and, if yes, have there been any problems for buyers with this approach?

The REIV has opted to not provide a response at this time as this question relates to builders and developers, rather than real estate agents.

63. What should the purposes of the Sale of Land Act include?

The REIV suggests the purposes of the Sale of Land Act include –

- The regulation of the sale and purchase of real estate
- The provision of pre-sale information to purchasers;
- Cooling-off rights of purchasers;
- Regulation of off-the-plan and terms contracts;
- The conduct of auctions;
- Facilitate the sale and purchase of real estate by electronic means; and
- The provision of penalties and civil remedies for breaches of the Act.

64. What are the key terms that should be defined in the Sale of Land Act?

The REIV is currently of the view –

- All definitions should be located at the front of the Act in the existing definitions section. Those that are scattered throughout the Act should be transferred to this section.
- The term ‘conveyancer’ should be defined by incorporating the definition of ‘licensee’ as appears in Section 3 of the Conveyancers Act 2006.
- The term ‘estate agent’ should be defined by incorporating the definition of “estate agent or agent” as appears in Section 4 of the Estate Agents Act 1980.
- The phrase ‘conditions under which the auction is to be conducted’ needs to be defined so it is clear. The REIV recommends a definition include: the Rules for the Conduct of Public Auctions, the Information Concerning the Conduct of Public Auctions of Land, Section 32 vendors’ statement, contract of sale of land and any other terms under which an intending bidder may make bids, as agreed to by the vendor, vendor’s estate agent or auctioneer before the start of an auction.
- Clarifying references to the word ‘writing’: what is included needs to be made plain and a reference to the definition in 38AA of the Interpretation of Legislation Act 1984 should be incorporated. This definition is especially important in connection with adapting the Sale of Land Act to cater for electronic commerce.

65. How can the current definitions be improved? Where have you experienced areas of inconsistency or confusion?

The REIV is currently of the view –

- The definition of ‘mortgage’ can be improved by separating it into sub-paragraphs.
- The definition of ‘sale’ can be improved by including ‘put options’ ie where an owner of land can require a person to purchase it; and by including a ‘right of

first-refusal'. This will require the wording 'an option to purchase' to be amended to 'an option to purchase or to sell'.

- Division 4 of the Act should not be tied to the concept of a public auction. It needs to apply to all auctions. By way of example, the REIV Rules of Practice 2006 currently require members to conduct private (ie invitation only) auctions on the same basis as public auctions under the Act. The REIV believes the definition could be amended to read: "'auction' means a sale of land at which bids in any form are made to determine the purchaser, but does not include a sale by tender." The REIV considers this definition is well suited for conducting traditional and online auctions and amply caters for a variety of forms of bidding. It also ensures engaging in a tender process cannot be interpreted as making a bid.
- In Division 4 there are various sections requiring an auctioneer to announce certain information. For example, Sections 38 and 41. In order to facilitate electronic commerce, announcements need to be able to be made by methods other than word-of-mouth.

66. Is there still a need for the Sale of Land Act to regulate the apportionment of mortgage moneys at subdivision?

The REIV is currently of the view that the need to regulate the apportionment of mortgage moneys at subdivision remains.

67. What other opportunities can you identify to modernise the Sale of Land Act?

The REIV believes there are a number of opportunities to modernise the Act. These include the following:

- As outlined earlier, REIV members have indicated the due diligence checklist is of no interest to potential buyers and as such is irrelevant. Nonetheless, the Sale

of Land Act imposes severe penalties on vendors and estate agents who fail to make it available. The reality is Division 2A of the Sale of Land Act has created red-tape for no discernible benefit to potential buyers of residential real estate. 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, there 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.
- Section 31 requires amendment, and retrospectively, to permit a purchaser to give a cooling-off notice to a vendor or to a vendor's estate agent, whether or not the estate agent is authorised by a vendor to receive it on their behalf. This amendment is necessary as a result of the Victorian Supreme Court's 11th March, 2016 decision in [Tan v. Russell](#).¹
- 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

¹ Tan v Russell [2016] VSC 93

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

68. Do you have any personal experience of using the arbitration system under the Sale of Land Act? If yes, how did you find the process?

The REIV has no experience of using the system. Anecdotal evidence provided by REIV members indicates they have no, or little, experience in using it either.

69. What types of disputes would benefit from arbitration and what body should undertake this role?

The REIV is aware that using arbitration to resolve disputes can be as expensive and time-consuming as litigating via the courts. With this in mind, the REIV queries the benefits of arbitration, apart from permitting disputes to be resolved using a private forum.

70. Should there be opportunities for mediation and/or conciliation of disputes arising under the Sale of Land and Estate Agents Act? If yes, what typical areas of dispute would benefit?

The REIV is of the view that adequate opportunities are already available for the mediation and conciliation of disputes under these Acts, the courts and at the Victorian Civil and Administrative Tribunal (VCAT).

71. Should there be mandatory conciliation before a dispute can escalate to VCAT or a court? Are there areas where conciliation should not apply – for example, if a person is electing to exercise their rights to end a contract?

The REIV queries whether, in framing this question, the distinction between mediation and conciliation has been overlooked and the question really applies to mandatory mediation?

There is a clear distinction between these forms of dispute resolution. A conciliator has the power to impose a decision on disputants if they cannot reach one themselves, a mediator does not.

The REIV does not support mandatory conciliation. If disputants are unable to settle their differences, they should be able to proceed to VCAT or a court without having to engage in mandatory conciliation.

If the question relates to mandatory mediation, the REIV notes mediation is now commonly used at VCAT and in the court system. With this in mind, the REIV sees

little benefit in the introduction of mandatory mediation elsewhere.

In this regard, the REIV does not support the idea that a party to a contract should be required to engage in mandatory conciliation or mediation before exercising their right to end a contract.

72. Are the current remedies under the Sale of Land Act meaningful for buyers and sellers? Are there opportunities for reform?

The REIV considers current remedies are meaningful, especially as they relate to the provision of defective Section 32 statements.

The REIV notes the offences created by Section 12 may, in a sense, duplicate offences under the Australian Consumer Law or the Australian Consumer Law and Fair Trading Act. However, the ACL and ACLFTA offences apply to a company or an individual carrying out prohibited actions in the course of trade or commerce.

The Section 12 offences are not tied to situations arising in trade or commerce and, as a result, have a much wider application. The section applies to any "person". The Interpretation of Legislation Act 1984 defines "person" in very wide terms to include an individual and a company.

For this reason, the REIV considers the Section 12 offences should remain but with the omission of the reference to "intention", to align them with sections 18 and 30 of the ACL.

The REIV notes Section 12 offences are complimented by civil remedies, of the nature provided under the ACL by virtue of Section 48A.

73. Should sellers have the opportunity to argue honest and reasonable mistake? Are there any circumstances where a seller should not be able to put this case? Please give reasons for your view.

The REIV is presently of the view a seller should be able to present such an argument in circumstances akin to those applicable to defending allegations of

conduct contravening Sections 18 and 30 of the ACL. If this suggestion were adopted it will have the benefit of creating some degree of uniformity between the two areas of legislation.

74. How often are remedies under Part 8.2 of the Australian Consumer Law and Fair Trading Act used in a sale of land matter? Are there any advantages to specific remedies available under the Sale of Land Act?

The REIV understands, on the basis of anecdotal evidence, they are frequently used. The REIV notes the remedies are available under the Sale of Land Act by virtue of Section 48A.

75. Do rights to end contracts of sale work as an effective deterrent to poor behaviour by sellers or is there a need to prosecute some offenders? Please give reasons for your views.

The REIV considers the rights to end a contract of sale to be an effective deterrent to poor behaviour. Nonetheless, circumstances may arise where an 'offender' should be prosecuted.

76. What are your views on the current offences and penalties applying under the Sale of Land Act?

The REIV considers the current offences and penalties to be adequate with the exception of buyers who wilfully fail to pay a deposit in accordance with the terms of the contract. In this instance, the REIV would like to see this included in the Act as an offence, with a significant fine of up to 30 penalty units, as a deterrent for buyers. As outlined earlier, it should also be an offence to attend a sale - especially auctions - with the aim of bidding on a property without a serious intent to purchase.

Summary

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.

The REIV also thanks CAV and the Victorian Government for the opportunity to provide input to this important Act of Parliament, that has significant relevance to our members.

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 received and paid.

1. BUSINESS OPERATING REPORT

	Accounting Period A	Accounting Period B	Turnover – Year-to-Date
(The figures for the most recent period should be in column B)	From	From	From
	To	To	To
Number of weeks of operation.	52	52	
1. TOTAL GROSS INCOME OF BUSINESS (EXCLUDING GST IF APPLICABLE)			
Average per week			
2. COST OF GOODS SOLD			
(a) Opening Stock			
(b) Plus purchases in period			
(c) Less closing stock			
TOTAL COST OF GOODS			
3. GROSS PROFIT OF BUSINESS			
Gross Profit as a % of Gross Profit			
4. TOTAL OPERATING EXPENSES			
(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) ¹			
(u) Telephone & Internet			

¹ 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 business¹

(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		
5. NET PROFIT FOR THE BUSINESS		
6. VENDOR'S PERSONAL EXPENSES ADDBACKS (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>		
7. ADJUSTED NET PROFIT to owners of the business		

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