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11 August 2016

Ms Amanda Baker  
SAI Global  
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680 George Street  
Sydney NSW 2000

By email only: amanda.baker@saiglobal.com

Dear Ms Baker

### **SAI Global Property Customer Service Agreement**

The Law Institute of Victoria (LIV) is the peak representative body for some 12,500 legal practitioners in Victoria, and many of our legal practitioner members (including me) use the services of SAI Global. The LIV is concerned that there are various provisions contained in the attached July 2015 SAI Global Property Customer Service Agreement (Agreement) which are onerous for persons using your service. While the LIV appreciates the intent of the Agreement, namely that proper processes are observed by persons using your services and that materials obtained via that service are not used for improper services, the LIV considers that certain provisions are excessive. Further details are set out below.

#### **Definitions and clause 2.11**

Service is defined in the Agreement as:

*the provision of requested Authority Information or any other service provided by SAI Global Property or its Agents to the User under this Agreement;*

Authority Information is defined in the Agreement as:

*information provided by an Authority, whether in electronic or hard copy format, that may be accessed by the User;*

Clause 2.11 provides as follows:

2.11 *The User warrants that, unless otherwise stated in this Agreement, it will:*

...

2.11.2 *not use the Service or Software Product other than for its own internal business purposes;*

2.11.3 *not allow unauthorised access to use, copying, publication or dissemination of the Service or Software Product and that its authorised users are made aware of the terms of this Agreement;*

...

2.11.5 *not on-sell, sub-licence, supply, permit to supply, repackage or otherwise make available Authority Information or Software Product in any form to any other person;*

The LIV notes that searches and certificates are usually obtained to process matters on behalf of clients and to ensure the effectiveness of the conveyancing process, and are not merely for the legal practitioner's own 'internal business purposes'.

In a sale transaction, the searches and certificates will commonly be provided to the vendor, the vendor's selling agents and the purchaser's representative by way of the vendor's section 32 statement. In a purchase transaction, the searches and certificates will commonly be provided to the purchaser, the purchaser's lender and the vendor's representative.

The LIV submits that clause 2.11 as it is currently worded appears to be in direct contradiction to ordinary conveyancing practice, particularly given the increased incidence of electronic communication in such matters (refer to clause 2.11.5 of the Agreement)). It also appears to contradict the statutory requirement for a vendor, pursuant to the *Sale of Land Act 1962*, to provide certain information to a purchaser prior to the parties entering into a contract.

## **Annexure A – additional provisions relating to accessing Authority Information**

### **Clause 4**

Clause 4 of Annexure A relates to confidential information. As a party's representative will only be obtaining the information at the request of the client, for proper purposes, the LIV is concerned that this clause may conflict with the duty of a legal practitioner towards his or her client, and/or the administration of justice. The LIV provides the following example:

A legal practitioner obtains an Aboriginal heritage certificate on the instructions of the purchaser client who is concerned that the property being purchased may be affected. These certificates typically contain many conditions. The Certificate reveals there are significant objects at the site and the legal practitioner is advised the information in the Certificate is confidential.

The LIV queries how the legal practitioner can:

- observe his or her duty to the client to advise that the property being purchased is affected; and/or
- if instructed by the client, take action to end the contract on the basis of material non-disclosure.

Further, these certificates often state that they can only be used for the 'authorised purpose'. The LIV has been provided with details of one matter where the legal practitioner manually amended the application prior to submission to state that the 'authorised purpose' was (a) to inform the purchaser client, and (b) to inform the vendor's representative if the certificate revealed there had been material non-disclosure. However, when applying for such certificates ordinarily, being via an online facility, the LIV is not aware of any way in which the user can state this purpose in the online application.

### **Clause 8.2**

Clause 8.2 of Annexure A provides:

8.2 *The Customer is prohibited from:*

8.2.1 *providing the Licensed Material by way of online connection to any other party;*

The LIV notes that the term 'online connection' is not defined. The LIV is concerned that this may inadvertently prohibit what is a common practice, namely a vendor's representative providing a vendor's statement, including searches and certificates, electronically to the vendor's selling agent and/or the vendor and, conversely, the purchaser's representative providing searches and certificates electronically to its own client and/or to the vendor's representative for rates adjustment verification.

### **Clause 8.7**

Clause 8.7 of Annexure A provides:

*8.7 The Customer must maintain a record of all persons who are given access to the Licensed Material throughout the term of this Agreement and not less than 7 years from the date of termination or expiration of this Agreement.*

'Licensed Material' is defined in clause 8 of Annexure A and essentially comprises searches and certificates. 'Access' is not separately defined and could, therefore, on a broad interpretation, mean the ability to view the Licensed Material.

The LIV submits that this clause appears unduly onerous. The LIV is aware that at least one practitioner has ceased using SAI Global's services as a result of this clause.

Commonly, the persons given 'access' to the Licensed Material, in a 'typical' sale conveyancing matter, would be employees of the vendor's and purchaser's representatives, the vendor, the selling agents, all intending purchasers, the purchaser's representative, the Purchaser, and possibly the purchaser's incoming lender. It is therefore impossible to keep a record of all persons who are given access to the Licensed Material that is included in a vendor's statement. The LIV submits that this clause should be reworded to reflect conveyancing practice and the statutory requirement to provide a vendor statement to all prospective purchasers of land.

Clause 8.7 as worded would result in the following scenario, which may be unintended:

- A legal practitioner obtains searches and certificates for a vendor client X on 1 February 2016. The sale settles and the file is closed on 1 April 2016.  
  
The file will *not* record to whom the selling agents or purchaser's representative provided the Licensed Materials; although the file will record employees of the vendor's representative involved in the matter, the vendor, the selling agents, and the purchaser and the Representative03 acting on their behalf.
- On 1 April 2022 the vendor's legal practitioner ceases practice, and terminates the SAI Global Agreement.
- Under the *Legal Profession Uniform Law (Victoria)*, the vendor's legal practitioner must retain client X's file until at least 2 April 2023. However, under the SAI Global Agreement, the vendor's legal practitioner must retain certain parts of client X's file until at least 2 March 2029.

The LIV considers that extended retention period may also contradict clause 4.1.4 of Annexure A, which requires disposal of documents containing or relating to Confidential Information "immediately after those documents cease to be required for the User's internal business purposes". The LIV suggests that 7 years from the date a search or certificate is ordered would be an appropriate time frame, given that the legal practitioner will retain the file for 7 years.

### **Clause 8.8**

Clause 8.8 provides:

*The Customer or User may only use the data stored for the purposes of the Enquiry for which it was originally made.*

While the LIV appreciates that the current wording of clause 8.8 is preferable to the previous wording, the LIV suggests that the following scenario be considered regarding the current wording:

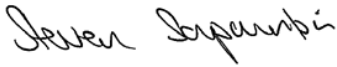
A legal practitioner obtains searches and certificates for vendor Y's sale. A title alert is also purchased. The client subsequently decides not to sell the property. The client does, however, request the legal practitioner to assist in the discharge of his existing mortgage over the property. Given the Registrar's requirements as to 'stand alone' discharges, the discharge would ordinarily

be registered via the outgoing lender; and the legal practitioner would be able to monitor this via the title alert.

In order to comply with clause 8.8 of Annexure A, the legal practitioner would not be entitled to use the title search and alert, obtained for the proposed sale, for the purposes of discharge of the mortgage for the same client over the same property.

The LIV requests that SAI Global consider the above issues and propose amendments to the Agreement to address the LIV's concerns. LIV members would also be happy to meet with you to discuss possible revised wording. If the Agreement has been updated since July 2015, the LIV would appreciate a copy of the revised Agreement, particularly if it addresses any of the above concerns. If you would like to discuss any of the matters raised in this letter, please contact me or Karen Cheng, LIV Property and Environmental Law Section Lawyer, on 03 9607 9522.

Yours sincerely

A handwritten signature in black ink that reads "Steven Sapountsis". The signature is written in a cursive, slightly slanted style.

Steven Sapountsis  
President  
Law Institute of Victoria