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15 October 2019

Mr Sam Jenkin
Consumer Affairs Victoria
Department of Justice and Community Safety
Level 17, 121 Exhibition Street
MELBOURNE VIC 3000

By email only: cav.consultation@justice.vic.gov.au

Dear Mr Jenkin

**Sale of Land Amendment Act 2019 – Implementation Consultation
Ref: CD/19/711069**

The Law Institute of Victoria ('LIV') thanks Consumer Affairs Victoria ('CAV') for the opportunity to provide feedback in response to your correspondence dated 16 September 2019, with regards to the implementation of the *Sale of Land Amendment Act 2019* ('the Amendment Act').

The LIV makes the following observations to the matters outlined in your correspondence:

1. Terms contracts – “prescribed amount”

The LIV is confident that terms contracts continue to perform a valuable function in the sale of residential land. This is particularly so for residential land in country and regional Victoria.

The LIV recognises terms contracts may be used to exploit vulnerable purchasers who are unable to access conventional mortgage financing options. However, the LIV remains concerned that the proposed restrictions to terms contracts in their current form, undeservedly discriminate against country and regional Victorians.

The LIV notes CAV has proposed two alternate approaches in identifying the 'prescribed amount' pursuant to sections 29EA, 29EB and 29EC of the *Sale of Land Act 1962* (Vic) ('the Act') being either:

- (i) a sale price of \$750,000; or
- (ii) the Melbourne median house price (currently approximately \$810,000).

The LIV considers the proposed thresholds fail to take into consideration residential land prices in country and regional Victoria.

By way of illustration, the 2018 median house price was \$500,000 in Castlemaine; \$275,000 in Shepparton; \$132,500 in Casterton, \$266,000 in Benalla, \$325,000 in Wangaratta, \$249,500 in Bairnsdale, and \$445,000 in Gippsland West .¹

For many Victorians living in regional and country Victoria, the availability of terms contracts facilitates the sale and purchase of residential land which mortgagors and financiers may otherwise be unwilling or reluctant to finance. This has become more prevalent now that lending restrictions have become rigorous post The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. In these instances, terms contracts play an important role in enabling the sale and purchase of property where this would otherwise not be possible. The inevitable result is a stymied property market in country and regional Victoria.

The LIV respectfully suggests CAV adopt one of the below exemptions to sections 29EA, 29EB and 29EC of the Act. The following proposed exemptions ensure that the implementation of the Amendment Act does not cause an unfair detriment on country and regional Victorians:

- (a) a principal place of residence; and
- (b) land and properties outside of metropolitan Melbourne;
- (c) alternatively to (b), the 'prescribed amount' pursuant to new sections 29EA, 29EB and 29EC either be determined by median price per dwelling for those municipalities outside Melbourne Metropolitan Area.

Additionally, the LIV recommends consideration be given to amending the *Sale of Land Act* to introduce a mechanism, whereby a vendor and purchaser may apply to CAV for an exemption to permit them to enter into a terms contract, in appropriate circumstances.

The LIV believes the above measures provide consumer protection for vulnerable and elderly purchasers, as well as those in regional and country Victoria which the Act usually seeks to safeguard.

The LIV also considers the penalty provisions of two (2) years imprisonment for breach of the terms contract provisions to be excessive and unnecessary.

2. Rent-to-buy arrangements – exemptions to prohibition

The LIV is concerned as to what the effect of Division 5 might have on social housing arrangements, retirement villages and/or aged care facilities, and on rent-to-buy arrangements where any excess payments over market rate are to be paid by the purchaser and held on trust by the vendor. The effect of this on vulnerable purchasers are obvious, that is, a loss of the payments already made and in some circumstances, the loss of the opportunity to purchase the property in future.

The LIV suggests CAV consider introducing exemptions to the proposed prohibition outlined in section 29WA when entering into rent-to-buy arrangements. Social housing, retirement villages, aged care facilities, family arrangements, domestic partners, or other legitimate circumstances should be exempt as either a prescribed person, or class of persons.

¹ Valuer-General Victoria, 'Houses by Suburbs 2008-2018', *Property and Land Titles – Property Prices* (Report, 3 September 2019) <https://www.propertyandlandtitles.vic.gov.au/data/assets/excel_doc/0019/427033/Houses-by-suburb-2008-2018.xls>.

The LIV supports the introduction of section 17(2) in the Act allowing compliant rent-to-buy arrangements to be exempt from the proposed prohibition.

3. “Material fact” guidelines

The LIV understands that CAV is currently in the process of drafting and settling a ‘material facts’ guideline referred to in section 12(d) of the Act. The LIV welcomes the opportunity to provide feedback specifically on the guidelines once they are released by the CAV for further consultation.

The LIV considers section 12(d) of the Act in its current form is adequately reinforced by the general prohibitions on misleading and deceptive conduct and the specific prohibitions in relation to the sale of land in Victoria’s Australian Consumer Law and Fair Trading and the complimentary provisions in the *Sale of Land Act*. The LIV submits that Vendors’ disclosure obligations are sufficiently set out in section 32 of the Act and that it would be more appropriate for any additional disclosure requirements be inserted into that section.

The LIV expresses some concerns that should the above provision be implemented, it will result in confusion and legislative ambiguity in the interpretation of what is considered a ‘material fact’ by estate agents, conveyancers and solicitors. Inevitably this may result in unnecessary litigation.

The LIV is concerned section 12(d), reverses disclosure under the expression ‘Caveat emptor’, otherwise known as, ‘let the buyer beware’. This will have the effect of placating a buyer into neglecting their responsibility of ensuring a property meets their requirements, before committing to buy it. For example, that it can be renovated, altered, or demolished and rebuilt as they wish.

The LIV expresses serious concerns in the proposed introduction of an excessive and disproportionate penalty provision of 12 months of imprisonment for a breach of this provision. The LIV respectfully suggests the Act be amended to remove the imprisonment provision and/or that the penalties be significantly reduced, or amended in concurrence with the penalties outlined in section 32 of the Act.

Should CAV pursue the implementation of this provision and introduce new guidelines, the LIV recommends the new guidelines be included and disclosed with the Due Diligence Checklist to prospective purchasers, as required by section 32 of the Act.

To address the concerns raised above, the LIV strongly recommends that CAV limit and/or narrow the circumstances in which a “material fact” may arise to matters that currently and directly affect, or possibly stigmatise a residential property. Moreover, the proposed guidelines need to be simple, specific and unambiguous given that it will be vitally important for vendors and their estate agents, solicitors and conveyancers to understand precisely the extent of their obligations.

We would welcome the opportunity to meet with you to discuss the above issues.

In the interim, please do not hesitate to contact me, or Senior Lawyer of the Property and Environmental Law Section, Paul Snow at PSnow@liv.asn.au and 9607 9314 if you wish to discuss this further.

Yours sincerely

A handwritten signature in blue ink that reads "Stuart Webb". The signature is written in a cursive style with a large initial 'S'.

Stuart Webb
President
Law Institute of Victoria