

30 May 2016

Mr Simon Cohen
Director
Consumer Affairs Victoria
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Via email: Simon.Cohen@justice.vic.gov.au

Dear Simon,

**Consumer Property Law Review – Sale of Land and Business Issues Paper No. 3 -
Tribunal Submission**

Thank you for the opportunity to respond to the Sale of Land and Business Issues
Paper No.3 (the Issues Paper).

I enclose *Tribunal Response – Sale of Land and Business Issues Paper No.3*
It addresses questions 3, 6-7, 20, 23, 42-44, 51-53, 57, 69-72 and 74 in the Issues
Paper, as these questions raised jurisdictional, procedural and/or substantive issues
affecting VCAT. VCAT does not ordinarily comment on policy matters more properly
the domain of Government or the Department.

Yours faithfully,



Justice Greg Garde AO RFD
President

Attachment: Tribunal Response – Sale of Land and Business Issues Paper No.3

Tribunal Response – Sale of Land and Business Issues Paper No.3

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

The Tribunal's jurisdiction under the *Sale of Land Act 1962* (SoL Act) is limited to s 44. Section 44 provides for a purchaser of land at a public auction to seek compensation for any loss or damage suffered resulting from a failure to comply with Division 4 – Public Auctions (other than s 47). Applications to VCAT under s 44 are very rare.

The *Australian Consumer Law (Victoria)* (ACLV) confers jurisdiction on the Tribunal to hear a matter involving a contravention of the SoL Act. Section 48A(1) of the SoL Act provides that Part 8.2 of the *Australian Consumer Law and Fair Trading Act 2012* (ACLFT Act) applies to the SoL Act as if any reference in Part 8.2 to 'this Act' were a reference to the SoL Act. The respective roles of s 48A(1) of the SoL Act and s 217 of the ACLFT Act are unclear, as is the relationship between s 217 and ss 236-237 and s 243 of the ACLV. Section 48A extends s 217 to include any breach of the SoL Act. Do ss 236-237 and s 243 of the ACLV override s 217 or does s 217 operate independently of those provisions? It is arguable that an action under s 217 for contravention of a provision of the SoL Act concerning a 'one-off' sale dispute (such as, a failure of the vendor's statement to comply with s 32) would not need to satisfy the requirement that the conduct occurred in trade or commerce. For clarity, the SoL Act needs amendment to include a stand alone provision that confers jurisdiction on the Tribunal to determine 'one-off' sale disputes.

With regard to misleading and deceptive conduct under s 18(1) of the ACLV, the conduct must have occurred 'in trade or commerce' for the Tribunal to have jurisdiction under s 224 of the ACLFT Act. It is settled law that private vendors who sell their home, do not act in trade or commerce: *O'Brien v Smolonogov*¹; *Argy v Blunts and Lane Cove Real Estate Pty Limited*².

Whether a dispute regarding a contract of sale is a 'consumer and trader dispute' under s 184 of the ACLFT Act and within the Tribunal's jurisdiction is subject to interpretation. Services are defined under s 2 of the ACLV to include rights in relation to, and interests in, real property that are provided, granted or conferred in trade or commerce. In the Court of Appeal case of *Mercier Rouse Street Pty Ltd v Burness*³ Santamaria JA expressed a view that neither party to a contract of sale of land supplies 'services' to the other, within the meaning of the ACLV. The question of whether the supply was in 'in trade or commerce' did not arise in the view of Neave JA and Warren CJ.⁴

The Tribunal has limited jurisdiction to deal with disputes concerning the sale of land under the ACLV and ACLFT Act. The preferable position is to amend the SoL Act to confer jurisdiction on the Tribunal to deal with contraventions of the SoL Act. These matters are often tied in with domestic building disputes, so it would be more effective if all related matters were heard and determined together. For example, in some cases it is not clear whether the purchaser has a claim against the vendor or alternatively, the

¹ [1983] FCA 305 (17 November 1983).

² [1990] 94 FCA 51 (1 March 1990).

³ [2015] VSCA 8.

⁴ *Ibid* [183], [188] – [192]. Neave JA tentatively expressed the view that VCAT had jurisdiction to determine consumer and trader disputes arising out of contracts for the sale of land [8]. Warren CJ did not express a view.

builder engaged by the vendor. In the case of *Anderson v Economo*⁵ the vendor was joined as a party under s 60(1)(c) of the *Victorian Civil and Administrative Tribunal Act 1998* on the ground that 'for any other reason it is desirable that the person be joined as a party'. However, the Tribunal expressed reservations as to whether any cause of action between the purchaser and the vendor was justiciable before the Tribunal.

Question 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.

Imposing a mandatory obligation on a vendor to provide an inspection report is unlikely to be advantageous. Mandatory inspection reports have the potential to generate litigation. In the Tribunal's experience it is uncommon in building disputes for experts to reach a consensus regarding defective works. It is appropriate that purchasers satisfy themselves as to the condition of the property. Pre-purchase inspection reports have sufficient caveats in place to safeguard against claims and a purchaser with a claim, has a right of action against the inspector.

Consideration should be given to amending s 32 of the SoL Act, requiring a vendor to disclose the following:-

- Any current/unresolved claims against the builder for defective building works.
- The resolution of any prior building disputes/claims including details of:-
 - any claims against the builder for defective building works, including any settlement or judgement;
 - the existence of any releases and continuing rights against the builder;
 - any claims on the warranty insurance; and
 - whether the maximum amount for all claims on the warranty insurance have been reached and/or the balance remaining on the policy for future claims.

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

While s 44 of the SoL Act provides that an application for compensation must be lodged at VCAT, it does not expressly confer upon VCAT jurisdiction to hear and determine the application. Presumably a conferral of jurisdiction is to be implied. The Tribunal would welcome an amendment to s 44 to expressly confer jurisdiction upon VCAT.

As noted under question 3, VCAT has jurisdiction under the ACLV in relation to claims of misleading and deceptive conduct concerning the sale of land, provided the transaction occurs in trade or commerce. The case of *Keogh v Higgins*⁶ involved a claim against the private vendors and their estate agent who made misleading representations. The Tribunal dismissed the claim against the private vendors as the transaction had not occurred 'in trade or commerce'. In *Keogh v John Kennedy Real Estate Pty Ltd*⁷ the purchaser pursued its claim against the estate agent on the ground of misleading conduct. The key witnesses admitted in evidence that the purchaser did not rely upon the representations by the auctioneer. Though the Tribunal found that the estate agent did engage in misleading conduct, the Tribunal dismissed the claim as the conduct did not induce the purchaser to enter into the contract.

⁵ [2000] VCAT 434 [33] – [36].

⁶ [2014] VCAT 1256.

⁷ [2015] VCAT 1471.

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

There is no need to place any constraints around the addition of special conditions to a standard form contract. Parties have ample time to seek legal advice; read the draft special conditions sought to be included; and to negotiate for their modification or deletion.

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

There is no need for legislative change. The exemption under s 53A of the *Estate Agents Act 1980* (the EA Act) clearly states the position and minimises potential disputes concerning this issue.

Question 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?

Question 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.

Question 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?

Section 9AC(2) of the SoL Act allows a purchaser to rescind a contract of sale after being advised by the vendor of an amendment to the plan of subdivision which will materially affect the lot to which the contract relates. Changes to the design of the off-the-plan building work would fall outside the scope of s 9AC(2) and the ACLFT is of limited recourse as most off-the-plan sale contracts contain provisions which allow the developer/vendor to make changes to the proposed building work.

Section 43(3) of the *Domestic Building Contracts Act 1995* requires a builder (on whose behalf a display home is made available for inspection and who enters into a contract with a building owner for the construction of a similar home) to construct the home using the same plans and specifications and to at least the same standards of work quality and quality of materials as were used for the construction of the display home. Consideration should be given to amending the SoL Act to include a similar provision.

Question 51 – What remedies should be available to buyers of property if an owners corporation is not meeting its responsibilities under the *Owners Corporations Act 2006*, such as not having obtained the correct insurance?

A lot owner may apply to VCAT under s 163 of the *Owners Corporations Act* (the OC Act) for an order under s 165(1)(b) that the owners corporation comply with the OC Act.

Difficulties concerning the failure to obtain insurance usually arise in the context of small subdivisions. For example, one of three lot owners is aware of the requirement for insurance and requests that the other lot owners contribute to the cost. The other lot owners refuse or are apathetic. The practical remedy is for the single lot owner to take out the insurance cover and apply to VCAT to recover the other lot owners' shares.

Question 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?

Regulation 11 of the *Owners Corporations Regulations 2007* prescribes the information that must be contained in an owners corporation certificate under sub-s 151(4)(a) of the OC Act. A vendor is required under s 32F(1) of the SoL Act (unless the owners corporation is inactive) to specify in the vendor's statement the information prescribed for the purposes of sub-s 151(4)(a) of the OC Act; or attach a copy of the owners corporation certificate; and provide a copy of the documents required to accompany an owners corporation certificate. The contents of the owners corporation certificate should be sufficient to put a prospective purchaser on notice of any non-compliance by the owners corporation of its obligations.

If the owners corporation certificate contains inaccurate or misleading information and the purchaser suffers a loss, it gives rise to an 'owners corporation dispute' and the purchaser (who has become a lot owner) may apply to VCAT under the OC Act for an order against the owners corporation. The owners corporation may have a claim against its manager if the manager has prepared the certificate.

No legislative amendment is required.

Question 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?

The comments made on page 29 appear to suggest a purported conflict between occupation fees under the SoL Act and the provisions of the *Residential Tenancies Act 1997* (the RT Act), which require clarification. There is no conflict. Section 13 of the RT Act provides that the RT Act does not apply to any tenancy agreement created or arising between the parties to a contract of sale in accordance with the terms of the contract.

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

Rent-to-buy contracts come before VCAT when there is a dispute and the parties are dissatisfied. In the Tribunal's experience, these contracts highlight the disadvantages and risks for buyers and sellers and what is often the unfair treatment of both parties by third party intermediaries.

Rent-to-buy contracts appeal to purchasers who are unable to obtain finance in the normal way, and compel the purchaser to pay rent plus an option fee (which might comprise an upfront payment plus periodic payments with the rent). Purchasers are often vulnerable to exploitation. Vendors often seek to maintain ownership of the property in the short term. By giving the purchaser an option to buy at a set price, the vendor loses the potential capital gain on the property from the date of the agreement. The vendor is locked into selling the property to the purchaser at a future date, in the unlikely event that the 'purchaser' can obtain finance when that date arrives.

Consideration should be given as to whether rent-to-buy contracts should be prohibited. At a minimum there is a need for legislation and regulation in this area, to promote and protect the interests of vendors and purchasers.

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

I refer to the comments on page 40 of the issues paper concerning the provisions of the SoL Act relating to arbitrators which ‘...have largely been untouched...meaning that they do not necessarily take into account modern developments such as VCAT, which may be a better avenue for adjudicating minor sale of land disputes.’ As highlighted in the Tribunal’s response under question 3, VCAT presently has limited jurisdiction under the SoL Act, ACLV and ACLFT Act.

Many applicants with claims arising out of a contract of sale express their disappointment to the Tribunal when informed that VCAT cannot address their grievance and that they will need to make application to a court.

Arbitrations can be more expensive when compared with proceedings in superior courts. Arbitration under the SoL Act is not subject to the provisions of the *Commercial Arbitration Act 2011*. Section 21(1) of the SoL Act provides for the jurisdiction and powers of arbitrators, but the provision is too broad and vague to provide any effective guidance as to the arbitrator’s powers or as to the procedural matters governing the conduct of an arbitration. Further, there is no justification for the absence of a right of appeal under s 21(1). There is little benefit in having arbitration for a narrow band of disputes under the SoL Act. It would be more practical and efficient to vest jurisdiction in a Court or in VCAT.

The Tribunal supports the position that VCAT is the more preferable jurisdiction for the adjudication of minor sale of land disputes. For these disputes to come to VCAT, there will need to be amending legislation to confer jurisdiction upon the Tribunal, including resources to support the expanded jurisdiction. A suggestion is to amend s 182(1) of the ACLFT Act to include any rights, benefits, privileges or facilities that are, or are to be, provided granted or conferred under a contract for the sale or other disposition of real property. The effect would be that a dispute arising out of a contract of sale would fall within a ‘consumer and trader dispute’ under s 182 and within the Tribunal’s jurisdiction.

The SoL Act does not address the modern day reality of off-the-plan sales of high rise apartments, so any amending or new legislation to expand the Tribunal’s jurisdiction should include provisions to deal with the sale of off-the-plan sales apartments.

Question 70 – Should there be opportunities for mediation and/or conciliation of disputes arising under the sale of land and Estate Agents Acts? If yes, what typical areas of dispute would benefit?

If VCAT’s jurisdiction over contracts for the sale of land were to be widened, existing mediation and alternative dispute resolution (ADR) could be utilised to resolve disputes. It is unnecessary for mediation and dispute resolution mechanisms to be introduced into the SoL and the EA Act. Division 5 of Part 4 to the VCAT Act contains provisions in relation to mediation and compulsory conferencing. Compulsory conferencing is effectively a form of conciliation. Mediation and ADR allow the Tribunal member to take a proactive role which tends to facilitate the resolution of disputes. The Tribunal is less formal than the courts and less expensive for the parties.

Question 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?

As noted under questions 3 and 69, many disputes cannot escalate to VCAT because of VCAT’s limited jurisdiction.

Mandatory conciliation would be counter-productive. All courts and tribunals use mediations before trials and hearings. Conciliation carried out before the commencement of legal proceedings operates in a legal vacuum. A mediation or compulsory conference at VCAT occurs under the VCAT Act. Mediations

and compulsory conferences at VCAT occur at an early stage in the proceeding and are conducted on a without prejudice and (in effect) confidential basis, by persons appropriately trained and registered under the National Mediation Standards.

If mandatory conciliation prior to the commencement of any legal proceedings was introduced, it should not apply to a person electing to terminate a contract because the time taken to schedule the conciliation could affect the right of termination. If there was no requirement to attend conciliation prior to the issue of proceedings and the relevant Court or Tribunal had the power to order mediation or a compulsory conference, a dispute over termination (that is, after a contract is terminated and a dispute arises over whether it was validly terminated) would be suitable for that form of dispute resolution.

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

The definition of ‘rescission’ in s 30 of the SoL Act should not be confined to Part II. The definitions in s 2 should be amended to include ‘rescission’, so that it applies across the whole SoL Act.

Question 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?

This question appears to reflect a misconception that Part 8.2 makes ‘consumer law remedies’ available. It does not. The remedies under Part 8.2 are predominantly injunctions upon the application of the Director of Consumer Affairs Victoria or the Minister. It is the ACLV, not the ACLFT Act under which ‘consumer law remedies’ are available.

See the comments under question 3 regarding the interplay between s 217 of the ACLFT Act and ss 236-237 and 243 of the ACLV. It is arguable that the only utility of ss 216 and 217 is in a case where another Act provides that a contravention of a provision of that Act is tantamount to a breach of a provision of the ACLFT Act, thus making available the cause of action under s 217. Section 48A(1) of the SoL Act; s 507A(2) of the RT Act; and s 93A(1) of the EA Act are examples of such a provision.