

Conveyancing Victoria

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CONVEYANCING VICTORIA

THE ULTIMATE GUIDE

2020–21

SIMON LIBBIS



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Preface to 2020–21 Edition

Welcome to your 2020–21 edition of *Conveyancing Victoria – The Ultimate Guide*. This is the seventh print version of the book, but in between the hard copies there have been updates to the electronic version. If you have not taken advantage of access to the online version you are missing out on this. So make sure you take it up. It costs nothing once you buy the book. To find out more about it go to the first page of the book.

There has been a lot going on in the world of conveyancing since the last edition. Electronic settlement and lodgment are now the norm. *The Sale of Land Act* is still being amended and interpreted by the Supreme Court. Practitioners have a greater responsibility for the calculation and collection of state and federal taxes. We have a new contract of sale. These are among the developments covered in this edition.

The pace of change shows no sign of letting up. It is more important than ever to keep up to date with legislation, cases and processes.

One of the great pleasures of authoring this book is the opportunity to continue working with my good friend Louis de Vries of Hybrid Publishers. I doubt that I could keep doing this without his encouragement, support and occasional gentle cajoling. Hopefully we will continue in this vein for years to come.

The Law Institute bookshop sells a lot of these books. I am always grateful for the feedback and advice provided by Owen Hyde, who manages the bookshop. He gets an “honourable mention”.

– Simon Libbis, February 2020

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1. What is Conveyancing?

Conveyancing is the transfer of interests or estates in land from one legal entity to another. The agreement to transfer the estate or interest is contained in a contractual document. This is the source document containing the agreement between the parties to the conveyancing transaction. The instructions to the Registrar of Titles to effect the relevant change in the Register are contained in approved forms.

Components

The usual conveyance has four basic components:

1. *Title and goods*

These are the subject of the conveyance, or what is being bought or sold. It includes the land with all its improvements, fixtures and fittings and the goods that are included in that sale. Fixtures are items which may once have been goods but have been so permanently attached to the land that they are regarded as part of it.

The title is at the heart of any conveyancing transaction. It gives you a full description of the land being dealt with and details of the registered proprietor and any registered encumbrances, restrictions and easements.

2. *Non-title restrictions and charges*

These are restrictions and charges not shown on the title but nonetheless affecting the title. For example:

- statutory restrictions such as those contained in section 42 of the *Transfer of Land Act* 1958;
- rates, taxes and other outgoings;
- water, sewerage and other service pipes laid on the property; and
- the zoning affecting the property and governing its use.

3. *Contractual documents*

Contractual documents include the contract of sale and the vendor statement (often referred to as the section 32 Statement or vendor's

disclosure statement). There are specific requirements relating to the drafting of these documents. The conditions contained in the contract must be adhered to and the relevant legislation complied with.

The form of contract used in most conveyancing is the one produced by the Law Institute of Victoria in conjunction with the Real Estate Institute of Victoria. This form of contract is widely used and accepted in the conveyancing industry.

4. *Title documents, settlement, stamping, lodging and registration*

The last element deals with documents or forms of direction to the Registrar. These flow from the contractual documents and enable a clear title to be delivered at settlement and the new proprietor to be registered on title.

Such forms as a withdrawal of caveat and discharge of mortgage will be handed over at settlement together with a transfer of land in exchange for funds.

Usually a deposit has been paid. Under certain circumstances, its early release can be obtained. The balance of the purchase money is due at settlement plus or minus an adjustment of outgoings. Such things as rates, taxes, registration fees on discharges and withdrawals and sometimes even stamp duty have to be adjusted between the vendor and the purchaser usually at the date of settlement.

The Participants

There are a number of players in a conveyancing transaction:

Vendor

In a conveyancing transaction a vendor is the party who is selling the land. The vendor is usually, but not always, also the registered proprietor on the title to the property. If not it will be necessary for the vendor to produce at settlement documentation to enable a transfer of the land from the registered proprietor to the purchaser.

The vendor:

- Puts the property up for sale, usually through an estate agent. An authority to sell is signed by the vendor and authorises the agent to sell the property on specified terms and conditions.
- Arranges for the preparation of the vendor statement. The details required to be disclosed are set out in section 32 of the *Sale of Land Act 1962*.

- Has a contract for the sale of the property prepared. This contract sets out details of the property and goods (if any) being sold, the terms and conditions under which the vendor will sell the property, and the consideration or purchase price the vendor is willing to accept.
- Accepts an offer to purchase the property.
- Usually, but not always requests an early release of the deposit paid.
- Arranges for the discharge or removal of any encumbrance or restriction shown on the title which the purchaser has not contracted to accept.
- Signs the transfer of land submitted by the purchaser.
- Usually signs a statement (or statements) required by the State Revenue Office in relation to goods.
- Participates in settlement arrangements.
- Ensures that title documentation is available to be handed over at settlement.
- Arranges for notices to be sent to statutory authorities advising them of the change in ownership.

A flow chart for the vendor appears in Appendix 1. A detailed checklist that could be useful when acting for a vendor is set out in Appendix 2. In Appendix 3 is a sample of a letter that could be sent to vendor making an initial enquiry about the conveyancing process.

Purchaser

The purchaser in a conveyancing transaction is the party who contracts to buy the property from the vendor. The purchaser is usually, but not always, the party who signs the contract of sale.

The purchaser:

- Inspects the property and any documents available. This could include the draft or proposed contract and vendor statement.
- Negotiates with the vendor either directly or through an agent or representative for the purchase of the property.
- Makes an offer for the purchase of the property and usually, but not always, pays a deposit. When that offer is accepted in writing by the vendor a contract is in place
- Has the vendor statement checked. At this stage a title search and statutory certificates should be obtained.

- Arranges for a caveat to be lodged on the title to the property to warn anyone searching the title that there is a contract in existence.
- Measures the land.
- If applicable, makes an application for finance to assist with the purchase of the property. If successful, the purchaser will sign mortgage and ancillary documents to secure the loan against the title of the property being purchased.
- Arranges for a transfer of land and notice of acquisition to be prepared and signed.
- Sometimes signs a statement (or statements) required by the State Revenue Office in relation to goods. This is usually provided by the vendor.
- Has a statement of adjustments of outgoings and a settlement statement prepared and ratified by the vendor.
- Participates in settlement arrangements.
- Inspects the property as close as possible to the settlement date.
- Arranges for a final or check search on the title to the property being purchased.
- Makes purchase funds available at settlement.
- Has title documents stamped and lodged for registration.
- Arranges for notices to be sent to statutory authorities advising them of change in ownership.

The aim is to ensure that the purchaser is registered as the proprietor on the title to the property, that the title is free from all encumbrances apart from those that the property is sold subject to and that the purchaser obtains possession of, or the income from, the property.

A flow chart for the purchaser appears in Appendix 4. A detailed checklist that could be useful when acting for a purchaser is set out in Appendix 5. In Appendix 6 is a sample of a letter that could be sent to purchaser making an initial enquiry about the conveyancing process.

Representatives

Parties to a conveyancing transaction can either handle it themselves or appoint a representative to act on their behalf. The representative will steer the client through the process and procedures involved. A representative acts on behalf of and in the best interests of the client.

It is necessary for the representative to take full and complete instructions as early as possible in the life of the transaction. This allows advice

to be given in accordance with the client's individual needs.

As a practical measure, the representative should organise check lists for taking instructions from clients. This will ensure that all the necessary information is obtained when initial instructions are taken.

If it is obvious that the client needs advice of a kind which is outside the knowledge and expertise of the representative, the client should either be referred to an appropriate source or advised to seek their own source of advice. For example, the representative may not be fully conversant with financial planning. Therefore, when an issue arises which requires advice in this area, the client should be advised to consult a financial planner.

It is important for the representative to ensure that:

- the client receives legal advice and that advice is delivered to the client in a manner to ensure, so far as possible, the client's understanding of that advice;
- the client is kept fully advised of the legal effects of the transaction;
- the client is at all times kept informed of developments;
- the client is given sufficient and accurate information so as to be able to make informed decisions;
- the representative acts upon the client's instructions;
- all necessary searches and enquiries on the title and property are conducted and the results are conveyed to the client;
- the client is satisfied with all aspects of the title and property;
- all necessary documents are prepared accurately and in a timely manner;
- all necessary correspondence and communications with all parties to the transaction are attended to promptly and diligently;
- all reasonable endeavours are made to ensure that the steps required are taken in a timely and efficient manner.

A good representative ensures that deadlines are met or an extension obtained and that their client is kept fully informed of the progress of the transaction.

Deadlines

There are a number of deadlines in conveyancing, and it is essential that you develop a checklist or reminder system. You could use a manual or electronic diary. If you use a conveyancing software package there is

usually an inbuilt diary system. The method is irrelevant so long as it suits your needs and you are comfortable with its use.

When you receive a new matter, you should enter in your tracking system pertinent dates such as the auction date, the date for loan approval and the settlement date. Then enter dates to remind you to check the progress of each of these events at an appropriate time prior to the event; for example, to check progress with your client a week before the date for loan approval.

If you can't meet a deadline, for whatever reason, it is important that you take steps to minimise any repercussions. Don't just put the matter aside – it won't go away, and delays in conveyancing can be costly. Wherever possible, negotiate for an extension of time to meet the deadline and always keep your client fully informed of the situation.

Contact with the client

It is important that your client is at all times aware of the progress of their transaction. Communicate with your client clearly and concisely. Don't be ambiguous or verbose.

If you need your client to do something, give them instructions, timelines and, wherever possible, reasons. When they communicate their decision to you, take note of their instructions and act accordingly.

After you have written to or telephoned your client with a specific request remember to diarise an appropriate date to check on the progress of that request. For example, you may send your client a transfer of land to be signed and returned to you. Don't leave it at that. Diarise a date, say in seven days, to check if the transfer has been returned. Or you may telephone your client and ask them to confirm land measurements with you as soon as possible. Again, diarise a reminder to follow up on your request.

Keep records and maintain files

Keep records not only of the mail you send but also of the telephone conversations you have and emails and text communication. Always confirm significant telephone conversations in writing, giving the date and details of the call and the person with whom you spoke. Changes in staff or an employee failing to record the call on the appropriate file could cause problems at a later date.

Keep your filing system up to date. It is so easy when under pressure to put original and copy correspondence, file notes and records of

telephone calls to one side to be filed later. Unfortunately, it is all too easy to forget what is not in the file. You may refer to your file and give information and advice based on its contents. However, there may be a pertinent piece of information sitting in the filing basket which hasn't been taken into account.

Conveyancing can be undertaken by legal practitioners ("lawyers") and licensed conveyancers ("conveyancers").

Lawyers

Lawyers can give advice about all elements in a conveyancing transaction. They are governed by the *Legal Profession Uniform Law (Vic)* which sets out the standards of conduct applicable to lawyers in Victoria.

Lawyers must hold a current practising certificate. The practising certificate allows the lawyer to engage in legal practice in Victoria and states whether or not that lawyer is authorised to hold trust money.

If a lawyer is authorised to hold trust money, a trust bank account must be opened for that purpose. There are strict rules and audit requirements governing the operation of trust accounts. A Fidelity Fund compensates clients who suffer loss as a result of a lawyer's dishonesty. The Legal Services Board handles Fidelity Fund claims. This Board is also responsible for the registration of lawyers and the monitoring of their trust accounts.

Lawyers must also carry professional indemnity insurance as consumer protection against negligence. The Legal Practitioners Liability Committee handles professional indemnity insurance.

The Legal Services Board investigates complaints against solicitors. Where appropriate, these complaints can be referred to the Legal Profession Tribunal for a formal hearing.

Conveyancers

Conveyancers handle the processes and procedures involved in conveyancing. The *Conveyancers Act 2006* establishes a regulatory regime for conveyancers. They are required to have professional indemnity and are bound by stringent conditions imposed by the *Conveyancing Act* which is administered by Consumer Affairs Victoria.

There are many highly skilled, experienced conveyancers in the marketplace. Most adhere to an additional level of self-regulation, setting benchmarks for education, training and professional development.

Getting paid

Usually a client will ask a representative for a quotation for services prior to retaining the representative. In all circumstances it is prudent to confirm this quotation in writing. It is also important to qualify what services are included in the fee you have quoted and whether or not it includes disbursements and GST. This will avoid potential disputes at a later date.

As a general rule, a representative is paid on the settlement of a conveyancing transaction. There are exceptions to this rule. For example, you may have a regular client and the terms of your retainer may be that you render periodic accounts for payment.

Keep a running total on your file of the disbursements you pay on behalf of the client. Don't just guess when costing the file. Disbursements are not always standard. Different certificates are applicable to different areas, charging structures can vary with different statutory authorities, and the number of title searches and check searches you apply for can vary with circumstances and timelines.

A client is often asked to pay an amount on account of disbursements when retaining a representative. This amount is used to offset such expenses as certificate costs, search fees, and settlement agency and should be accounted for in detail when rendering your final bill.

When acting for the purchaser, it is usual to cost your file and draw up your bill of costs prior to settlement. Deduct any amount received on account of disbursements and clearly show the balance owing. Once the balance owing to the vendor and any mortgage loan advance has been calculated you will need to write to your client and explain in detail:

- The statement of adjustments. This is a statement showing how rates, charges and other outgoings are to be apportioned between your client and the vendor at settlement.
- The settlement statement. This is a statement showing how the amount owing to the vendor is calculated.
- The net mortgage advance and, if necessary, how this is calculated. You will need to include a copy of any disbursement authority showing the deductions made from the mortgage advance and the reason they were made.
- If there is also to be a second mortgage this process is repeated for the second mortgagee.
- Your bill of costs and a clear itemisation of the disbursements

and any GST charged.

- Any equity funds payable by your client and the source of these funds.
- Any amount you require direct from your client, including your fees, and how you require these funds to be paid. For example, by bank cheque or cheques payable to one or more parties, personal cheques payable to utilities or a mixture of these.

Equity funds are the balance owing to the vendor less any amount being contributed by an incoming mortgagee or mortgagees. Equity funds can be obtained from a number of sources, including:

- Being directed from the proceeds of a prior transaction. Your client may be selling their present property and using the proceeds to partly fund their new purchase.
- Handed over with the mortgage advance. Some financial institutions will hand over the balance owing to the vendor at settlement. They will then debit the amount over and above the net mortgage advance to an account in your client's account. It is important that your client be made aware of the total amount, including equity funding, advanced by their mortgagee and how it is calculated.
- Directly from the purchasers from their own personal source of funding.

When acting for a vendor, your fees are usually paid at settlement, often as part of the settlement proceeds. However, a bill of costs should be prepared prior to settlement and sent to your client.

Prior to settlement you will have ascertained any amounts necessary to discharge or remove outstanding encumbrances. You will have conveyed these figures, together with any daily rate of interest to your client for confirmation. You will also have obtained instructions regarding the disbursement of any surplus funds owing to your client.

The purchaser will send you a statement of adjustments and settlement statement. You will be asked to provide a breakdown of the cheques you require at settlement. General condition of the standard form of contract of sale allows the vendor three bank cheques at the cost of the purchaser. You can request additional bank cheques at your own expense. Failing this, the balance of funds are usually tendered in trust account cheques. It is not unusual for cheques payable to utilities to be personal cheques, produced merely to be sighted. The purchaser

usually retains these cheques and sends them to the payee.

You should write to your client and explain in detail:

- the statement of adjustments;
- the settlement statement;
- the cheques you have requested at settlement and what these represent;
- your bill of costs and a clear itemisation of any disbursements and GST charged;
- specific cheques requested by the vendor either payable to the vendor or to third parties;
- the arrangements made for your client to collect any available funds.

Usually, your bill of costs will be paid from the settlement proceeds. If sufficient funds will not be available for this purpose, a cheque should be requested from the vendor. This cheque should be handed over prior to settlement.

Estate agents

Vendors can elect to sell their own property but usually appoint a real estate agent to sell on their behalf. The agent is responsible for finding a purchaser to buy the property on terms suitable to the vendor.

A form of sale authority is drawn up by the agent and signed by the agent and the vendor. This agreement formally appoints the agent to market the property and sets out the terms and conditions negotiated between the agent and the vendor. The *Estate Agents & Sale of Land Acts (Amendment) Act 2003* prohibits an estate agent from under-quoting or over-quoting the selling price of real estate and requires the agent to disclose in their sale authority details of any rebates, commission or discount they may receive in relation to expenses and disbursements. An agent can market a property without being formally appointed, but cannot take commission without the vendor's permission.

Estate agents must be licensed. The licensing body is Consumer Affairs Victoria. It regulates the activities of estate agents and their trust accounts, administers the Victorian Property Fund (this fund compensates clients who suffer loss as a result of dishonesty by agents or their staff) and investigates complaints.

The representative body of estate agents is the Real Estate Institute of Victoria. Most practising agents are members of this Institute.

Estate agents are governed by the *Estate Agents Act 1980*. The Estate

Agents Council has been established as an advisory body to the Minister for Consumer and Business Affairs. It makes recommendations to the Minister on policies relating to the *Estate Agents Act* and the industry in general.

The agent:

- inspects the vendor's property and gives a market appraisal;
- advises the vendor on the method of sale most suitable for the property type;
- discusses and/or negotiates with the vendor such things as—
 - settlement requirements and timelines
 - availability of vendor statement
 - details of the vendor's representative
 - goods to be included in the sale
 - any fixtures to be excluded from the sale
 - method of inspection for prospective purchasers
 - availability of keys for inspections
 - suitable timeslots and notice required in relation to inspections
 - advertising campaign best suited to the property
 - commission and expenses payable to the agent
 - the type of sale authority form to be used;
- draws up an appropriate sale authority and has it signed;
- advertises the property for sale;
- answers all inquiries arising from the advertising;
- arranges for the property to be inspected by prospective purchasers;
- requires the vendor to provide a vendor's disclosure statement and, if applicable, a formal contract of sale;
- conveys any offers made to the vendor;
- negotiates suitable terms of sale on behalf of the vendor;
- arranges for the vendor's acceptance of a suitable offer;
- conveys acceptance to the purchaser;
- obtains a deposit;
- ensures a copy of the contract is given to the party signing it;
- if the contract is subject a condition – for example, if it is subject to the purchaser's application for finance being approved – follows up with the purchaser or the purchaser's representative to ensure the condition has been satisfied;
- where appropriate—

- facilitates the early release of deposit money
- arranges for a final inspection to be carried out by the purchaser
- holds the keys in readiness for settlement
- confirms settlement prior to handing over the keys to the purchaser;
- accounts for the deposit money received at the appropriate time.

The aim of the estate agent is to successfully market the property, negotiate a successful sale and facilitate the formalisation of a binding unconditional contract.

Lenders

When a purchaser requires additional funds to complete the purchase of the property, it is usual for the purchaser to apply for a mortgage loan. This is a loan secured against the property the purchaser is buying. The entity lending the funds is known as a mortgagee. A mortgage has to be registered to enable the mortgagee to exercise the power of sale contained in section 77 of the *Transfer of Land Act* 1958. A mortgage that is not registered is known as an equitable mortgage.

There are a number of different sources, including:

- banks;
- building societies;
- credit unions;
- mortgage originators;
- private finance;
- finance companies;
- lawyers;
- brokers.

The ratio between the amount of the loan and the value of the property differs with lending sources. For example, some lawyers can lend only 60 per cent whereas banks, building societies and other commercial lenders can lend between 75 per cent and 100 per cent.

For loans over 80 per cent of valuation, most commercial institutions will require the borrower to take out mortgage insurance. This should not be confused with personal mortgage insurance. Personal mortgage insurance protects the borrower's ability to repay the mortgage while unemployed. Mortgage insurance protects the lender against any loss sustained if the borrower defaults and the net proceeds from the even-

tual sale of the property are not sufficient to repay the mortgage loan. The insurance company will pay the lender any shortfall and then look to the borrower for recompense.

The borrower is required to pay the one-off insurance premium at the time the mortgage loan is made. The premium is usually between 0.1 per cent and 0.4 per cent of the mortgage loan.

The Consumer Credit Code applies to a mortgage if:

- the credit is wholly or predominantly for personal household or domestic purposes; and
- a charge (interest or fees) is made for the provision of credit; and
- the borrower is a natural person or owners corporation created on a plan of subdivision; and
- the credit is provided in the course of the mortgagee's business.

The code does not apply where:

- the borrower is a company; or
- the loan is wholly for business purposes; or
- the mortgagee is not in the business of providing finance and it is not part of or incidental to the lender's business; or
- no charge is being made for credit.

The code will apply to a loan for the purchase of residential property to be used as a family home.

The documents to be prepared vary depending whether or not the code applies.

Each lender has its own form of loan agreement and ancillary documentation but they are required to complete an approved form of mortgage to enable registration of their interest on title.

The lender will:

- Make enquiries about the capacity of the borrower to repay the loan. A general rule of thumb is that the repayments do not exceed 30 per cent of the income of the borrower.
- Have a valuation done of the secured property. This is usually in the form of a sworn valuation.
- Arrange for credit checks to ensure that the borrower has a good credit rating.
- Send a letter of offer to the borrower.
- Arrange for searches and inquiries as to the title and the land. Usually a mortgagee will require a copy of the contract and vendor's disclosure statement as a starting point for inquiries.

- If a company is involved, arrange for a company search and where applicable check the company's trust deed.
- Confirm details of insurance and ensure the mortgagee's interest is noted on the policy of insurance.
- Have the necessary documents drawn and ensure they are correctly signed and completed by the borrower.
- Arrange for the service of notices and copy documentation on the borrower at the time the mortgage is signed.
- Calculate the amount to be advanced at settlement having regard for outgoings including stamp duty and registration fees.
- Participate in settlement arrangements.
- Arrange for the collection of title documentation at settlement.
- Have titles documents stamped and registered.

Methods of sale

Although anyone can sell their own property, most vendors employ an estate agent to act on their behalf. An estate agent is invariably used to conduct a formal auction. Properties are sold in many ways.

A private sale with no agent

This situation is the exception rather than the norm. The vendor advertises the property for sale, handles enquiries and shows prospective purchasers through the property.

The vendor prepares a vendor statement and form of contract, either personally or through a representative.

Once terms are negotiated, the vendor and purchaser make arrangements to formalise these terms.

A private sale through an agent

This is the most common way properties are sold. A vendor negotiates terms of engagement with an agent and signs either a general or exclusive sale authority. The vendor provides the agent with a vendor statement usually prepared by the vendor's representative. Sometimes, the representative also prepares either a contract or a set of special conditions to be attached to any contract prepared by the agent.

The agent arranges to advertise the property for sale, handles enquiries, and makes appointments with prospective purchasers to inspect the property. The agent negotiates the terms of sale with prospective purchasers on behalf of the vendor. If necessary the agent will

draw up a contract that must be accompanied by a vendor statement.

Usually, prospective purchasers make an offer by signing a contract, paying a deposit and delivering the offer to the vendor through the agent. The prospective purchaser can also stipulate a time limit for acceptance or refusal of their offer. If the offer is refused, the deposit is returned. The vendor accepts an offer by countersigning and dating the contract. The agent then delivers a copy of the completed contract to the purchaser.

Sale by auction

Real estate auctions are popular in Victoria. There are advantages in selling at auction. These include:

- a possible escalation of the purchase price due to competition;
- a time limit placed on negotiations; and
- the sale is definite as it is not subject to finance, nor is any cooling-off period applicable.

As a general rule, properties with no particular or peculiar attraction are not well suited to auctions unless they are in an exclusive area or high demand price bracket.

Sometimes the vendor has a strong reason for requiring a sale by auction. The vendor may be an executor or mortgagee, or the sale may be necessary as a result of proceedings in the Family Court. In these circumstances it is important to establish the best price possible for the property has been obtained. A sale by auction, preceded by a well-organised marketing campaign, is the traditional way.

Market demand should also be considered as in quieter times a significant number of properties may be passed in on the auction day.

If a sale by auction is chosen, the vendor appoints an agent and signs an exclusive auction authority. In the majority of cases, the vendor instructs a representative to complete a vendor disclosure statement and prepare an auction contract. These documents are usually prepared in quadruplicate and all copies signed by the vendor prior to the auction. It is desirable for documents to be available for inspection by prospective purchasers as soon as possible, preferably at the start of an auction campaign.

Prospective bidders will require a copy of the contract and vendor statement prior to the auction. Most bidders will want see the conditions under which the property is offered for sale and check the house,

boundaries and title before bidding. A prospective purchaser can make an offer to the agent to buy the property before auction. The agent will communicate that offer to the vendor. If the vendor accepts the offer the auction will be cancelled.

The conduct of an auction is governed by various Acts and Regulations, including the *Sale of Land Act* 1962, the *Sale of Land Act Regulations* 2005 and the *Estate Agents (Professional Conduct) Regulations* 2008. The *Sale of Land Act* prohibits a vendor from bidding at auction (a “dummy bid”) but allows the auctioneer to bid on the vendor’s behalf. This is known as a “vendor bid”. Vendor bids are subject to certain requirements, including that:

- the auction conditions permit vendor bids to be made; and
- the auctioneer orally confirms, prior to commencement of bidding, that the auction conditions permit such bids; and
- the auctioneer clearly states, immediately before making a vendor bid that he or she is about to make a bid on behalf of the vendor.

The *Sale of Land Act Regulations* require certain rules and information to be displayed at the auction site. These auction rules and information are prescribed in Schedules 1 to 5. They also allow co-owners, who otherwise would have been prohibited from bidding at an auction, to do so in certain circumstances. The *Estate Agents (Professional Conduct) Regulations* prohibit an estate agent from accepting a bid after the property has been “knocked down”.

A purchaser adversely affected by non-compliance with these provisions has recourse to compensation but is not entitled to avoid the contract. Applications for compensation must be made to the Victorian Civil and Administrative Tribunal (VCAT) before the second anniversary of the auction.

Tender

This is a marketing strategy used by agents mainly to sell industrial, commercial or special interest properties. It can be loosely described as a “blind auction” because each offer is made confidentially and usually sealed. No bidder or tenderer is aware of the content of any other offer made.

The agent will require the vendor to sign a tender authority which enables the agent to act exclusively in marketing a property for sale in this manner.

Special documentation, including a vendor statement, a contract and a document setting out the rules of tender, are drawn up.

Copies are given to prospective tenderers who can then make an offer (submit a tender), and pay a deposit (tender fees). The most suitable offer acceptable to the vendor buys the property.

Tender fees are held in trust for the tenderer. All unsuccessful tenderers are refunded their tender fees. The tender fee paid by the successful bidder will become a part deposit.

Tender documents must be carefully drafted. They should be drawn in such a manner that, once a tender is submitted, it is irrevocable and needs only the vendor's acceptance for an enforceable contract to exist.

Option to purchase

An option to purchase is regarded as a document creating an interest in land. It must be evidenced in writing to be enforceable. Although it is intended that a future document may bring a contract of sale into existence, the option itself is not a contract of sale. It is best to attach a copy of the proposed contract of sale to the option agreement. This ensures certainty of the terms being offered and avoids potential disputes at a future date.

Section 2 of the *Sale of Land Act* defines "sale" as including "an agreement for sale an offer to sell and the giving of an option to purchase". It is, therefore, good conveyancing practice to attach a vendor's disclosure statement. This statement should be current at the date the option agreement was signed and can be updated if and when the option is exercised.

A notice of intention to exercise the option should also be attached to the option agreement. This can be completed and served if the option is to be exercised.

The option agreement usually sets out the details of the vendor (grantor) and the purchaser (grantee) and grants the grantee an option to purchase the land upon certain terms and conditions. Usually these terms and conditions are contained in the proposed contract of sale attached to the agreement. The agreement, amongst other things, stipulates the date before which the option must be exercised, the manner in which the option should be exercised, the procedure to be adopted if the option is exercised, and events which could lead to termination.

Once the notice of intention to exercise the option is served it is irrevocable. The notice should to allow sufficient time to update the

vendor statement, if necessary, prior to the contract being deemed to have been signed by the grantee.

Right of first refusal

A right of first refusal may be included in a lease, usually in favour of the lessee (the tenant). Except under special circumstances, this right can be exercised only if the tenant is not in breach of the lease.

This right of first refusal is regarded as different from an option to purchase. It is purely contractual, gives the lessee no additional interest in the leased property and is not protected by section 42 of the *Transfer of Land Act*.

The lessee is usually given the right to refuse to purchase the leased property, upon stipulated terms and conditions, prior to the land being offered for sale on the open market. The circumstances terminating these rights should be clearly stated. This will avoid continual referral to the lessee prior to offering the property to each prospective purchaser once it has been listed for sale.

2. The Land Title

Most land in Victoria comes under the Torrens system of title. It is, therefore, intended to deal primarily with conveyancing so far as it relates to this type of title. The system is governed by the *Transfer of Land Act* 1958. It is a system of title by registration and is intended to be conclusive upon registration by the Registrar of Titles in the Register Book located at Land Registry

The Torrens system

There are three basic elements of the Torrens system. They are:

- 1 Interests in land are conveyed by registration of a deed.
- 2 Indefeasibility of title.
- 3 Ownership is evidenced by registration on the folio of the Register.

Interests in land are conveyed by registration of deed

The Torrens system provides for guaranteed estates in land by virtue of registration. Title is evidenced not by the execution of deeds, as it was under the old law system, but by their registration. Registration gives ownership or what is called proprietorship.

Dealings with land will not result in legal interest until the registration of that dealing by the Registrar. Registration is all-important – it vests and divests title.

Section 40 of the *Transfer of Land Act* clearly states that interests in land must be registered to become effective. This means that any instrument or instruments purporting to convey an estate in land from, say, the registered proprietor to a purchaser will have no effect until registered by the Registrar.

Although a deed must be registered to convey an interest in land, section 40(2) bestows the characteristics of a deed on an instrument or document once it has been registered. Section 121(1) gives the Registrar the power to approve the forms acceptable for registration.

Before an instrument can be registered it must be lodged at Land Registry for examination and subsequent registration. Section 34 estab-

lishes priority for registration according to the date of lodgment. When an instrument is lodged for registration at Land Registry it is allocated a unique identifier – a dealing number. This dealing number determines priority over other interests in the same title.

The concept of priority is significant as it establishes the order in which interests in land are registered on title. It is, therefore, important to lodge instruments as soon as possible after settlement to establish your client's priority for registration. A later interest (in time) can still achieve priority over an earlier interest (in time) through early lodgment and registration.

Indefeasibility of title

The principle of indefeasibility ensures that any party registered as the proprietor of an estate or interest in the Register, will continue in that capacity, even though the registration of their estate or interest may have occurred through mistake, error or another's fraud.

While indefeasibility of title is guaranteed, there are instances where innocent parties suffer loss because of fraud. Where it is not possible to reinstate the party so defrauded on the folio of the Register there is recourse to the Assurance Fund created by section 110 of the *Transfer of Land Act*. This is usually referred to as the State Guarantee. The State Guarantee underpins Victoria's land registration system and operates to ensure that the Torrens system does not disadvantage any member of the community. It ensures that where registration occurs and a party suffers loss as a result of that registration, the State through the Registrar will indemnify the person suffering such loss.

Section 41 guarantees the accuracy of the Register. Any anomalies existing prior to registration will not defeat the estate of the registered proprietor.

The statutory provisions on fraud are contained in section 44. Basically, they state that fraudulent transactions are void except in the case of a bona fide purchaser for value.

Ownership is evidenced by registration on the folio of the Register

The accuracy of the Register is guaranteed by section 41. If a proprietor is registered as the holder of an estate or interest there is no need to look behind the Register for further confirmation of ownership.

Section 43 enables parties dealing with the registered proprietor

to not only rely on the accuracy of the Register to evidence proprietorship but frees them from the necessity of investigating the details surrounding the registration of proprietorship. Further, parties dealing with the registered proprietor are not affected by actual or constructive notice (except in the case of fraud) and knowledge of an unregistered interest does not in itself constitute a fraud.

Section 42(1) confirms that the registered proprietor holds a conclusive title subject to any encumbrances recorded on the folio or set out in section 42(2). This title is paramount except in the case of fraud.

Unregistered or equitable interests

All interests in land are initially equitable. Unregistered dealings are equitable interests until they are registered on title. For example, a transfer of land lodged for registration gives the purchaser (transferee) named in that transfer an equitable interest in the subject land pending registration of the transfer. Some equitable interests are incapable of being registered on title. The appropriate approved form may not have been used or it could be a personal right or obligation against the registered proprietor quite unrelated to title.

Unregistered dealings

Until they are registered, dealings lodged at Land Registry are unregistered interests. For example, when the vendor contracts to sell land, it may be encumbered by a mortgage or other interest. The purchaser is entitled to expect a clear title. In order to achieve this, a vendor will usually need to register a prior dealing. This could be a discharge of a mortgage registered on the property, a withdrawal of a caveat or even a transfer of the land into the vendor's name.

Sometimes, these documents are lodged at Land Registry by the vendor prior to settlement. A search of the title will reveal the status of these dealings – whether they are awaiting examination or have been registered. If dealings are unregistered, it is necessary to obtain a copy of the actual document and check its validity. If a prior dealing contains a defect, it will be “stopped” by an examining officer at Land Registry while a requisition to amend the dealing are sent to the lodging party.

In this event, registration of any follower dealing, including dealings lodged on behalf of the purchaser after settlement, cannot proceed until the prior dealing has been amended. If the prior dealing is not amended, or is incapable of being satisfactorily amended, the Registrar

can refuse to proceed with registration. This could jeopardise registration of a purchaser's interest contained in a follower dealing.

At other times the documents and an allowance for any stamp duty and registration fees are handed over at settlement. If documents are to be handed over at settlement, a copy should be obtained prior to settlement so that validity can be checked and the correct duty and fees need to be allowed to enable registration.

Equitable interests

Some interests are incapable of being registered. They may not be in an appropriate format approved by the Registrar. An example could be a loan agreement incorporating a charge over the borrower's land. This agreement is incapable of being registered. However, the lender has, by virtue of the charge contained in the loan agreement, an equitable interest in the land.

The only form of protection available to the lender is to lodge a caveat under section 89 of the *Transfer of Land Act*. A caveat has two purposes. First, it is a warning to anyone searching the Register that a party claims an interest in the land. Secondly, it acts as a statutory injunction restraining the Registrar from registering a dealing with the land by the registered proprietor pending determination by a court of the caveator's claim.

By registering a caveat, the lender can indirectly control the disposition of land, as a purchaser will not settle with a registered proprietor until the caveat is removed.

There may be a claim pursuant to a personal right or obligation against the registered proprietor quite unrelated to title. The proprietor may owe money to a creditor for a number of personal reasons. This is unrelated to title and does not entitle a creditor to claim an interest in the land.

The creditor does, however, have the option of instituting court proceedings against the registered proprietor and ultimately having a warrant of seizure and sale recorded on title under section 52(2) of the *Transfer of Land Act*. This recording does not give the creditor an interest in the land. It merely creates the ability to have the land sold to satisfy the judgment debt.

Where a warrant of seizure and sale is recorded on title a satisfaction piece, together with supporting statutory declarations, pursuant to section 52(6) would be required at settlement unless the warrant had lapsed.