SALE OF LAND AMENDMENT ACT 2019

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INTRODUCTION

1. This paper covers -
   A. The Parliamentary history and outline of the Sale of Land Amendment Act 2019.
   B. Amendments affecting sunset clauses.
   C. Amendments affecting terms contracts.
   D. Legislation concerning rent-to-buy arrangements.
   E. Legislation regulating money paid in respect of options to purchase land under land banking schemes.
   F. Amendment of legislation creating offences in relation to the sale of land.

A. The Parliamentary history and outline of the Sale of Land Amendment Act 2019.

2. On 22 August 2018 the Sale of Land Amendment Bill 2018 was read in the Legislative Assembly for the second time. The Bill was debated on 18 September and on 20 September 2018 passed the Legislative Assembly. However the Bill lapsed because Parliament rose for the election before the Legislative Council could consider it. (The Opposition was accused of being luke-warm about the Bill becoming law, ie of having "put their cue in the rack": Mr Richardson, Member for Mordialloc, Legislative Assembly, 18 September 2018, Hansard p. 3364).

3. The Sale of Land Amendment Bill 2019 was substantially the same as the 2018 Bill. The second reading speech in the Legislative Assembly was on 21 March 2019 and the Bill was subsequently enacted.

   This legislative history is relevant for two reasons. First, because the parliamentarians in 2019 frequently referred back to their 2018 speeches.

Secondly, because it explains the commencement dates of certain provisions, namely that some commence in 2018, some in 2019 and some in 2020.

4. The amendments fall into the following broad categories:

Amendments restricting the use of sunset clauses in sales off-the-plan.

- Section 4(1) of the 2019 legislation inserts into s. 2(1) of the Sale of Land Act 1962 (which it defines as "the Principal Act") definitions of *occupancy permit, off-the-plan contract, residential off-the-plan contract, sunset clause and sunset date*.
- Section 12(1) inserts a new ss. 10A – 10D.
- Section 12(2) inserts a new ss. 10E.
- Section 13 inserts a new s. 10F.
- Section 26 inserts a Division into Part 3 of the Principal Act headed "Division 2 – Sale of Land Amendment Act 2019" consisting of s. 53 headed "Definition" and s. 54(1) and (2) headed "Residential off-the-plan contracts and sunset clauses". These are transitional provisions.
- Section 27 also headed "Residential off-the-plan contracts and sunset clauses" inserts ss. 54(3) and 54(4). These are also transitional provisions.

Amendments affecting terms contracts.

- Section 4(1) inserts into s. 2(1) of the Principal Act definitions of *agricultural land* and *residential land.*
- Section 19 inserts s. 29AB which defines *prescribed amount* and *sale price*.
- Section 20 inserts ss 29EA, headed "Additional prohibited terms contracts", 29EB, headed "Offence to arrange, broker or induce certain terms contracts" and 29EC headed "Offence to advertise certain terms contracts".
- Section 21, headed "Purchaser may avoid prohibited terms contract", amends and supplements the existing s. 29F.
- Section 28 inserts s. 55 headed "Residential terms contracts". This is a transitional provision.

Legislation concerning rent-to-buy arrangements.

- Section 4(1) inserts into s. 2(1) of the Principal Act a definition of *rent-to-buy arrangement.*
- Section 16 inserts s. 17(2) which empowers the making of regulations concerning rent-to-buy arrangements.

- Section 22 inserts a Division headed "Division 5 - Rent-to-buy arrangements" (ss. 29WA – 29WG).
- Section 28 inserts s. 56 headed "Rent-to-buy arrangements". This is a transitional provision.

Legislation regulating money paid in respect of options to purchase land under land banking schemes.

- Section 4(1) inserts into s. 2(1) of the Principal Act a definition of *Australian financial services licence, financial product, land banking scheme* and *registered managed investment scheme*.
- Section 22 inserts a Division headed "Division 6 – Options to purchase" (ss. 29WH – 29WI).
- Section 28 inserts s. 57 headed "Options to purchase". This is a transitional provision.

Amendment of legislation creating offences in relation to the sale of land.

- Section 14 of the 2019 legislation, headed "Offences in relation to the sale of land", amends s. 12(d) of the Principal Act by substituting "knowingly" for "fraudulently" and increasing the penalty for breach of s. 12.
- Section 15 inserts a new s. 12A empowering the Director of Consumer Affairs Victoria to make guidelines assisting understanding of s. 12(d).

This paper concentrates on the foregoing categories. Other categories of amendments not discussed are:

amendments restricting auctions on Anzac Day.

amendments to the Estate Agents Act in respect of payments from the Victorian Property Fund.

textual amendments not altering the substance of the law.

5. The subject matter of the 2019 amendments is often dry but fortunately is enlivened by reference to Hansard. So, for example, Mr Pearson the Member for Essendon stated -

> "I am delighted to make a contribution on the Sale of Land Amendment Bill 2018. What has been described to me is that Australians' relationship to land ownership is a bit like the Americans' relationship to gun ownership: it is something that is near and dear to many of our hearts".

(Legislative Assembly, 18 September 2018, Hansard p. 3357). Section 35(b)(ii) of the Interpretation of Legislation Act 1984 provides that in the interpretation of

a provision of an Act consideration may be given to any matter or document that is relevant including but not limited to reports of proceedings in any House of the Parliament. However, in practice the courts are circumspect about taking Hansard into account. In *Stingel v Clark* (2006) 226 CLR 442 at 448 the High Court stated -

"The task of a court is to construe the language of the statute. Extrinsic materials may be useful as an aid to deciding the meaning of that language, but the subjective contemplation of the drafters as to the kind of case in which that language would be most likely to be applied is not determinative".

In *Secretary to the Department of Justice and Regulation v Century 21 Australia Pty Ltd* [2017] VSCA 205 at [48[these words were applied to s. 35(b).

6. To avoid tedium this paper attempts where possible to summarise the amendments, and generally if the Act is quoted exactly quotation marks are used.

B. Amendments affecting sunset clauses.

Background.

7. Section 9AE(2) of the Principal Act provides –

"(2) If the plan of subdivision is not registered within 18 months after the date of the prescribed contract of sale of a lot on that plan of subdivision, or, if the contract specifies another period, before the end of that specified period, the purchaser may, at any time after the expiration of that period but before the plan is so registered, rescind the contract".

In *Solid Investments Australia Pty Ltd v Clifford & Anor* [2010] VSCA 59 the contracts were expressed to be conditional upon registration of the plan of subdivision and in substance, within the meaning of s. 9AE(2), specified 30 months after the date of sale (instead of 18 months). The Court of Appeal held that the vendor could not also include a Special Condition giving it the right under certain circumstances to further extend the plan registration date "by such a period as the Vendor may reasonably determine from time to time".

This reasoning was applied in *Harofam Pty Ltd v Scherman* [2013] VSCA 104 to render nugatory a Special Condition which included the words -

"If the Plan of Subdivision is not registered within twenty-four (24) months of the Day of Sale or such further time, but such further time to not exceed 6 months, as the Vendor may by notice in writing to the Purchaser require in the event that delays occur as a result of any act, matter or thing beyond the reasonable control of the Vendor which directly or indirectly causes the registration of the Plan to be

delayed, either party may, at any time after the expiration of this period or such extended period, but before the Plan of Subdivision is registered, rescind the Contract ...

The Court of Appeal held that s. 9AE(2) required a specific period of time in which the plan of subdivision must be registered, at the time when the contract is made, and "specifies another period" did not encompass the identification of a period by reference to an ascertainable event, even when the occurrence of that event can be determined objectively.

The vendor is required to use its best endeavours to secure registration of the plan of subdivision in a timely fashion: *Joseph Street Pty Ltd v Tan* [2012] VSCA 113.

Hansard.

8. In the Second Reading Speech (Legislative Assembly, 21 March 2019, Hansard p. 1158) the Minister stated –

"Under the Act, a purchaser under an off-the-plan contract has the statutory right to rescind the contract if the plan of subdivision relevant to the lot they have bought is not registered within 18 months of the contract being entered, or another period specified in the contract.
This statutory right to end an off-the-plan contract if it is not completed within a certain time reflects the conditional nature of off-the-plan projects, which involve some risk to a purchaser that the project will not be completed or that completion will be delayed.
The Act does not expressly give vendors (including developers) a similar right to end off-the-plan contracts of sale in this event. However, it does not preclude contracts from including such a right, and it is very common for off-the-plan contracts to include a clause enabling the vendor to end the contract if the plan of subdivision has not been registered by a specified date.
Contractual clauses of this type are known as 'sunset clauses'.
The Government has become aware of a number of instances in which developers have used (or propose to use) sunset clauses to rescind residential off-the-plan contracts, apparently with the intention of re-selling the relevant lots at a higher price, and in circumstances where it is alleged that completion of the project was deliberately delayed.
….
The consequence for the purchaser in this scenario is that despite having paid a significant deposit and having waited a period of time for their property to be developed, upon rescission of the contract, they are denied the benefit of any increase in the value of the property, are repaid only their deposit (without interest) and must then find an alternative property to buy, which also may have significantly increased in price over that period of time. Some purchasers in this situation may have to continue to rent …"

9. Further elucidation came from the Member for Clarinda, Mr Tak (Legislative Assembly, 30 April 2019, Hansard p. 1308) -

"… One of those cases involving Green Village Property Development went all the way to the Supreme Court. On the face of it that case appeared to be quite a typical example of the misuse of sunset clauses. The developer was accused of unnecessarily delaying the development of a land-only estate, which culminated in the termination of at least four contracts. It was reported that among the first purchasers in the estate were the four plaintiffs, who had signed their contracts in 2015. In order to complete the estate and have the separate land titles registered, the developer needed to comply with several requirements, including arranging the water, sewerage, internet, power and road services. However, the project was extensively delayed, and the four plaintiffs in the estate had their contracts rescinded because the plan of subdivision had not been registered within 36 months. According to title documents, the developer then allegedly registered the plan of subdivision only months later…."

The legislation.

10. Unless stated otherwise the legislation referred to in this section of the paper is taken to have come into operation on 23 August 2018: 2019 Amendment Act s. 2(2).

11. The following new definitions inserted by s. 4(1) into s. 2(1) of the Principal Act are relevant –

occupancy permit has its typical legal meaning;

off-the-plan contract has its customary meaning, ie the plan may or may not be certified but it is not registered;

residential off-the-plan contract is such a contract where the lot is proposed to be used for residential purposes;

"*sunset clause* means a provision of a residential off-the-plan contract that provides for the contract to be rescinded if—

(a) the relevant plan of subdivision in respect of the lot has not been registered by the sunset date; or

(b) an occupancy permit has not been issued in respect of the lot by the sunset date;"

"*sunset date* means a date that is—

(a) specified in a residential off-the-plan contract as the latest date by which the relevant plan of subdivision must be registered or the occupancy permit must be issued; or

(b) an extension of the date referred to in paragraph (a) that is determined in accordance with the terms of the contract".

12. Section 12(1) inserts ss. 10A – 10D into the Principal Act. Section 12(2), which came into operation on 5 June 2019, inserts s. 10E into the Principal Act. Section 13, which unless proclaimed otherwise comes into operation on 1 March 2020, inserts s. 10F into the Principal Act. Together they are -

"10A Residential off-the-plan contracts and sunset clauses

If a sunset clause in a residential off-the-plan contract purports to automatically rescind the contract on the part of the vendor, the sunset clause is taken to permit the contract to be rescinded on the part of the vendor on or after the sunset date, in accordance with this Division.

10B Power of vendor to rescind a residential off-the-plan contract under sunset clause

(1) A vendor must not rescind a residential off-the-plan contract under a sunset clause in that contract except as provided for in this Division.

(2) Subject to subsection (3), a vendor may rescind a residential off-the-plan contract under a sunset clause if—

(a) the relevant plan of subdivision has not been registered by the sunset date; or

(b) an occupancy permit has not been issued by the sunset date.

(3) Before rescinding a residential off-the-plan contract under a sunset clause, the vendor must obtain the written consent to each purchaser to the rescission after giving each purchaser, at least 28 days before the proposed rescission, written notice setting out –

(a) the reason why the vendor is proposing to rescind the contract; and

(b) the reason for the delay in the registration of the plan of subdivision or the issuing of the occupancy permit; and

(c) that the purchaser is not obliged to consent to the proposed rescission.

10C Inconsistent provision of no effect

A provision of a residential off-the-plan contract has no effect to the extent that it is inconsistent with sections 10A and 10B. (However, curiously, s. 12(3), which comes into operation on 5 June 2019, provides that in section 10C of the Principal Act, for "10A and 10B" substitute "10A, 10B and 10E". Presumably this enactment of s. 10C by one section in the 2019 legislation and its amendment by another section in the 2019 legislation is due to the Parliamentary history).

10D Purported rescission a breach of a residential off-the-plan contract

The purported rescission of a residential off-the-plan contract in contravention of this Division is taken to be a breach of that contract.

10E Vendor may obtain order of Supreme Court to rescind

(1) A vendor under a residential off-the-plan contract that contains a sunset clause may apply to the Supreme Court for an order permitting the vendor to rescind the contract under the sunset clause.

(2) On the application of a vendor under subsection (1), the Supreme Court may make an order permitting the vendor to rescind the residential off-the-plan contract if the Court is satisfied that making the order is just and equitable in all the circumstances.

(3) In determining whether to make an order under subsection (2), the Supreme Court must have regard to—

(a) the terms of the residential off-the-plan contract; and

(b) whether the vendor has acted unreasonably or in bad faith; and

(c) the reason for the delay in registering the relevant plan of subdivision or in an occupancy permit being issued; and

(d) the likely date on which the relevant plan of subdivision will be registered or the occupancy permit will be issued; and

(e) whether the lot that is the subject of the residential off-the-plan contract has increased in value; and

(f) the effect of the rescission on each purchaser; and

(g) any other matter that the Court considers to be relevant; and

(h) any other prescribed matter.

(4) If the Supreme Court makes an order under subsection (2), the Court may make any other order it considers just and equitable in all the circumstances, including an order for reasonable compensation of the purchaser.

(5) The vendor is liable to pay the costs of a purchaser in relation to the proceeding for an order under this section unless the vendor satisfies the Supreme Court that the purchaser unreasonably withheld consent to the rescission of the residential off-the-plan contract under the sunset clause.

10F Information to be included in sunset clause

(1) Subject to subsection (2), a sunset clause in a residential off-the-plan contract must include a statement that—

(a) the vendor is required to give notice of a proposed rescission of the contract under the sunset clause; and

(b) the purchaser has the right to consent to the proposed rescission of the contract but is not obliged to consent; and

(c) the vendor has the right to apply to the Supreme Court for an order permitting the vendor to rescind the contract; and

(d) the Supreme Court may make an order permitting the rescission of the contract if satisfied that making the order is just and equitable in all the circumstances.

Penalty: For a natural person, 240 penalty units;

For a body corporate, 1200 penalty units.

(2) Subsection (1) does not apply to a residential off-the-plan contract entered into before the date on which this section comes into operation.

13. So in summary, to return to Mr Tak (Hansard p. 1309) –

"In determining whether to make an order permitting a rescission the Supreme Court must consider a wide range of factors, including whether the vendor has acted unreasonably or in bad faith and the reason for the delay in registering the plan of subdivision. These reforms are very similar to those implemented in New South Wales some three years ago. It is interesting to note that since the passage of the New South Wales legislation the New South Wales Supreme Court has only considered three vendor applications for orders permitting the rescission of their contracts. This suggests to me that the legislation there is serving its purpose and is creating a strong incentive for developers to complete their projects as intended…."

The current New South Wales legislation is the Conveyancing Act 1919 s. 66ZS. Details of the three cases will be provided orally. **[see now addendum to this paper]**

Sunset clauses – transitional provisions.

14. Section 26(1) of the 2019 legislation inserts s. 54(1) and (2) into the Principal Act. It provides in substance that from 23 August 2018 the amendments made by s. 12(1) (ie the insertion of ss. 10A – 10D) apply to a residential off-the-plan contract entered into before 23 August 2018 and in force immediately before 23 August 2018 (s. 54(1)) but that such amendments do not apply to any proceeding concerning the effect or operation of a sunset clause in a residential off-the-plan contract which is commenced before 23 August 2018 (s. 54(2)).

15. Section 27 of the 2019 legislation, which came into operation on 5 June 2019, inserts s. 54(3) and (4) into the Principal Act. It provides in substance that from 5 June 2019 the amendments made by s. 12(2) and (3) (which respectively insert s. 10E – Vendor may obtain order of Supreme Court to rescind – and render s. 10C –

inconsistent provision of no effect – applicable to this) apply to a residential off-the-plan contract entered into before 5 June 2019 and in force immediately before 5 June 2019 (s. 54(3)) but that such amendments do not apply to any proceeding concerning the effect or operation of a sunset clause in a residential off-the-plan contract which is commenced before 5 June 2019 (s. 54(4)).

16. And finally (Ms Taylor, Member for Southern Metropolitan, Legislative Council, 28 May 2019, p. 1437) -

"I think when you look at this legislation holistically it is really fundamentally trying to mitigate the risk of purchasers being swindled on the one hand, as has been discussed—having that great Australian dream killed three years down the track when they put in that original downposit. Downposit? I do not think there is such a word as 'downposit'; I am going to say 'deposit'. There is no such word as 'downposit'.
A member: English is a very dynamic language.
Ms TAYLOR: Well, yes, but I think I am taking liberties there. …"

C. Amendments affecting concerning terms contracts.

17. These amendments fall into two categories. Unless stated otherwise they come into operation on 1 March 2020 unless otherwise proclaimed.

Amendments generally affected terms contracts.

18. The first category are those applicable to all terms contracts, namely –

Section 21(1) of the 2019 legislation amends s. 29F(1)(a) of the Principal Act as underlined –

"29F Purchaser may avoid prohibited terms contract

(1) Except where otherwise expressly provided, if a terms contract is entered into in contravention of this Act—

(a) the contract is voidable by the purchaser at any time before completion of the contract <u>by giving a signed written notice to the vendor</u>;"

Section 21(3) then amends s. 29F(3) of the Principal Act as shown by strikethrough and underlining –

"(3) Despite subsection (1), if a terms contract is entered into in contravention of this Act and is avoided by the purchaser before the completion of the contract, the purchaser is liable to pay ~~an occupation rent~~ <u>a fair market rent</u> for the period during which the purchaser was—

(a) in actual possession of the land; or

(b) entitled to the receipt of the rents and profits of the land".

Terms contracts prohibited if price under prescribed amount.

19. In the Second Reading Speech, Hansard p. 1159, the Minister stated –

"The bill also addresses predatory conduct in the alternative housing finance sector that has led to vulnerable consumers entering into unaffordable and high-risk 'terms contracts' … for the purchase of residential property.
The bill amends the Act to prohibit the use of terms contracts for residential land sales (other than sales of agricultural land) under a monetary threshold to be prescribed in regulations made under the Act.
…
During the review it was suggested that market changes over the last 50 years, in particular, the contemporary competitive mortgage market has meant that there is less of a need to use terms contracts as a way of purchasing a home, and that they are now used mainly to take advantage of vulnerable people who cannot access conventional mortgage finance to purchase a home.
Indeed, the review received evidence about an increasing trend for terms contracts for lower-value residential property sales to be brokered between financially stressed vendors and purchasers, often in regional or outer-metropolitan areas. Such arrangements are almost always unaffordable for the purchaser, and are of little benefit to the vendor. It was further noted that parties generally cannot afford to obtain independent legal and financial advice prior to entering such contracts, or (in the case of purchasers) use provisions existing in the Act designed to protect their interests.
The Government acknowledges, however, that terms contracts can be a useful and appropriate arrangement for the sale of commercial, high-value residential and agricultural property, where the parties are more likely to have equal bargaining power and have involved independent financial and legal advice. Accordingly, the amendments introduced by the bill will not impede the continued use of this form of contract in these circumstances".

20. Ms Taylor, the Member for Southern Metropolitan also stated (Legislative Council, 28 May 2019, p. 1437) -

"It has been discussed that there has been a shift from the original circumstances under which some of these terms contracts were used in the past. It is understood in an agricultural context that it has not necessarily been exploitative. In fact it has enabled farming families to pass down farmland from generation to generation in a controlled and measured way which did not have an adverse impact. So that aspect is still right and proper and can be allowed to continue. What we are talking about is the shift towards those persons in low-value housing, which generally speaking are tending to be caught in the metropolitan Melbourne area".

21. The following new definitions inserted by s. 4(2) into s. 2(1) of the Principal Act are relevant –

"***agricultural land*** means land used primarily for agricultural or pastoral purposes, regardless of whether the land is also used for commercial or residential purposes;

residential land means land that is used or intended to be used for residential purposes".

22. Section 19 inserts into the Principal Act –

"29AB Definitions

In this Subdivision [ie Subdivision 2 of Division 4, Certain terms contracts prohibited]

prescribed amount means the amount prescribed by the regulations for the purposes of this Subdivision;

sale price, in relation to a terms contract, means the price of the land that is specified in the contract, however expressed, less any discount or rebate that is specified in the contract, whether or not the discount or rebate is contingent".

No amount is yet prescribed, but it is expected to be $400,000: June 2019 LIJ p. 67 (Russell Cocks).

23. Section 20 inserts ss. 29EA – EC into the Principal Act –

"29EA Additional prohibited terms contracts

A person must not knowingly sell any residential land (other than residential land that is agricultural land) under a terms contract where the sale price of the land is less than the prescribed amount.

Penalty: For a natural person, 240 penalty units or imprisonment for 2 years or both;

For a body corporate, 1200 penalty units".

Section 29EB creates the offence of knowingly arranging or brokering or knowingly inducing such a terms contract. Section 29EC creates the offence of knowingly advertising sale under such a terms contract.

24. Section 29F(2) of the Principal Act allows a court to relieve from voidability if satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention; and (b) the purchaser is substantially in as good a position as if all the relevant provisions of this Act had been complied with.

Section 21(2) of the 2019 legislation limits this by inserting into the the Principal Act -

"(2A) Subsection (2) does not apply if the land that is the subject of the contract is residential land (other than residential land that is agricultural land), the sale price of which is less than the prescribed amount".

Old residential terms contracts - transitional

25. Section 28 inserts 55 into the Principal Act. Section 55(1) provides that in s. 55 "***old residential terms contract*** means a terms contract for the sale of any residential land entered into before the commencement [ie 1 March 2020 unless otherwise proclaimed] of section 20 of the 2019 Act [which inserted ss. 29EA – EC into the Principal Act] and in force immediately before that commencement, that would, if it were entered into on or after that commencement, be a terms contract to which sections 29EA to 29EC apply".

Section 55(2) then provides that the amendments made by ss. 19, 20 and 21 of the 2019 Act do not apply to an old residential terms contract. However-

"(3) A purchaser under an old residential terms contract may apply to a court or to VCAT to terminate the contract.

(4) In any proceeding on an application under subsection (3), the court or VCAT may order that the contract is terminated.

(5) The court or VCAT must not make an order under subsection (4) unless the court or VCAT is satisfied that—

(a) at the time the contract was entered into, there was a reasonable prospect that the purchaser would not be able to—

(i) make or, at any time, continue to make the payments required under the contract; or

(ii) obtain, on reasonable terms, the finance necessary to complete the contract; or

(b) the purchaser no longer occupies the land purchased under the contract because the purchaser could not afford the payments required under the contract.

(6) In addition to subsection (5), the court or VCAT must not make an order under subsection (4) unless the court or VCAT is satisfied that it is just and equitable for the contract to be terminated.

(7) In addition to an order made under subsection (4), in any proceeding on an application under subsection (3), the court or VCAT may make an order providing for all or any of the following—

(a) that the purchaser is relieved of any liability under the contract, including any liability for breach of any term or condition of the contract;

(b) that the vendor must repay to the purchaser the whole or any part of the payments made by the purchaser under the contract, except for a sum that represents fair market rent for any period for which the purchaser was—

(i) in actual possession of the land; or

(ii) entitled to the receipt of rents and profits of the land.

(8) The court or VCAT must not make an order under subsection (7) if the court or VCAT is satisfied that the order—

(a) would result in undue financial hardship for the vendor; or

(b) would otherwise not be just and equitable taking into account—

(i) all the circumstances of the matter; and

(ii) the nature and extent of any other person's or body's interest in the land".

D. Legislation concerning rent-to-buy arrangements.

26. In the Second Reading Speech, Hansard p. 1159, the Minister stated –

"The bill will also amend the Act to prohibit the sale of land through rent-to-buy arrangements.

A rent-to-buy arrangement typically involves a residential tenancy agreement, allowing a person to occupy a residential property for a fee, and a sale option (or sale deed), which gives that person a right or option to buy the residential property at a specified–usually inflated–price, at a future point.

Rent-to-buy arrangements present significant risks to consumers. For example, if during the rental period, a person defaults on the residential tenancy agreement (for example, does not pay their rent for a month), the landlord can potentially exercise their rights under the *Residential Tenancies Act 1997* to terminate the lease, and as a result the rent-to-buy arrangement. Upon termination of the lease, the person will lose both their option to purchase and any fees paid under the sale option.

During the review no evidence was provided of the successful use of rent-to-buy arrangements as a means of achieving home ownership. Rather, the review received substantial feedback that this type of arrangement is of no discernible benefit to consumers and causes significant financial and personal distress.

However, the Government recognises that future models of rent-to-buy arrangements may be legitimate, and that these should not be prevented.

Therefore, the bill includes a number of exemptions from the general prohibition on rent-to-buy arrangements directed at arrangements which are likely to lead to home ownership, … "

27. Ms Connolly, the Member for Tarneit also stated (Legislative Assembly, 1 May 2019, Hansard p. 1400) -

> "There was a story about Nina, a single mum of six children, and her family that got caught up in a rent-to-buy scheme. Having newly arrived from East Africa in 2005 and having separated from her husband, she was living in government housing, but she had started a childcare business at home and she had a little bit of an income. She came into contact with a company promising to design and build her home in exchange for a deposit and weekly payments, and at a meeting lasting less than 20 minutes she was told it would take 34 weeks to build and that in 34 weeks she and her six children would move into this house. Nina paid a $40,000 deposit to this company, which was the equivalent of her lifetime savings. Six months down the track she realised this property was never going to be built. She asked for her money back and of course the phone calls were never returned. Nina lost $57,000 on this scheme".

28. Unless stated otherwise the provisions referred to in this part of the paper come into operation on 1 March 2020.

29. The following definition, inserted by s. 4(2) into s. 2(1) of the Principal Act is relevant –

"*rent-to-buy arrangement* means an arrangement that involves a person entering into one or more contracts that provide for—

(a) a right of, or obligation on, that person to purchase residential land; and

(b) payment of rent or any other amount by that person in respect of a period of occupation of the residential land for more than 6 months before the right to purchase that land may be exercised or the purchase of the land completed;"

30. Section 22 inserts into Part 1 of the Principal Act **Division 5—Rent-to-buy arrangements.** Section 29WA first exempts from the Division a rent-to-buy arrangement involving a contract entered into by the Director of Housing, a registered housing association, a prescribed person or class of person, or that complies with the requirements prescribed under section 17(2). Section 17(2), inserted by s. 16 of the 2019 legislation into the Principal Act, empowers the making of regulations for the purposes of section 29WA(b) for or with respect to requirements for rent-to-buy arrangements. No regulations appear to have been made yet.

31. Section 22 continues –

"29WB Definitions

In this Division—

purchaser includes a person to whom a right is conferred, or on whom an obligation is imposed, to purchase residential land under a rent-to-buy arrangement;

vendor includes a person on whom an obligation is imposed to sell, or who offers to sell, residential land under a rent-to-buy arrangement.

into on or after that commencement, be a rent-to-buy arrangement to which Division 5 of Part 1 applies".

29WC Prohibition on rent-to-buy arrangements

A person must not knowingly sell any residential land under a rent-to-buy arrangement.

Penalty: For a natural person, 240 penalty units or imprisonment for 2 years or both;

For a body corporate, 1200 penalty units".

Section 29WD creates the offence of knowingly arranging or brokering or knowingly inducing a rent-to-buy arrangement. Section 29WE creates the offence of knowingly advertising sale under such an arrangement.

32. Section 22 continues -

"29WF Avoidance of certain rent-to-buy arrangements

(1) A purchaser of residential land under a rent-to-buy arrangement may avoid a contract that is part of the arrangement by giving notice to the vendor.

(2) A notice under subsection (1)—

(a) may be given at any time before completion of the contract; and

(b) must be in writing and signed by the purchaser.

(3) If a rent-to-buy arrangement involves 2 or more contracts and a purchaser avoids a contract that is part of the arrangement, all of the contracts that are part of the arrangement are void.

29WG Return of money paid under contract to purchaser

If a contract has been avoided by the purchaser under section 29WF, the purchaser is entitled to the return of all money paid by the purchaser under that contract and under any other contract in the rent-to-buy arrangement, except for a sum which represents a fair market rent for any period for which the purchaser occupied the land".

Transitional.

33. Section 28, already encountered above under old residential terms contracts, also inserts s. 56 into the Principal Act. Section 56(1) provides that in s. 56 "***old rent-to-buy arrangement*** means an arrangement entered into before the commencement [ie 1 March 2020 unless otherwise proclaimed] of section 22 of the 2019 Act [which inserted the rent-to-buy provisions into the Principal Act] and in force immediately before that commencement, that would, if it were entered Section 56(2) then provides that despite the commencement of s. 22 of the 2019 Act Division 5 of Part 1 as inserted by that section does not apply to an old rent-to-buy arrangement. However it then provides that a purchaser under an old rent-to-buy arrangement may apply to a court or VCAT to terminate any contract that is part of that arrangement and thereafter enacts identical provisions to those applicable to termination of old residential terms contracts.

E. Legislation regulating money paid in respect of options to purchase land under land banking schemes.

34. In the Second Reading Speech, Hansard p. 1159, the Minister stated –

> "The bill also closes a regulatory gap that has enabled developers associated with unregulated and problematic land banking schemes to spend the money they have raised selling options to unsophisticated investors without regard to their interests.
> 'Land banking' is a type of speculative real estate investment where property developers buy large blocks of undeveloped land with a view to dividing it into smaller lots.
> Before any formal subdivision or development has occurred, small-scale domestic investors are offered the opportunity to either buy a lot 'off-the-plan' or pay money to purchase an option to buy a lot at some point in the future. The value of the option is tied to the likelihood of the land being approved for development by the relevant council, enabling the investor to purchase the land at a profit.
> While monies paid by purchasers under off-the-plan contracts are protected under the Act, purchasers of an option to buy land are at considerable financial risk, because the land which is the subject of the option may be unsuitable for re-zoning or development, and moneys paid for the option are not required to be held trust and are therefore at risk of being dissipated.
> Previous land banking schemes that have involved the sale of options have collapsed, with investors unable to recover their option fees. Such investors have typically been persons with limited funds and limited investment experience.
> The bill puts in place similar protections for persons who pay money for options to purchase land in a land banking schemes as are in place for purchasers under off-the-plan contracts by requiring option moneys to be held on trust by a legal practitioner, conveyancer or licensed estate agent acting for the vendor of the option until a plan of subdivision has been registered, or until the time by which the option must be exercised has expired. If the option expires, moneys paid for the option must be returned to the purchaser.

In addition, the bill provides for the expiry of options to purchase land as part of a land banking scheme after five years so that investors can regain access to their money (which will have been held on trust) should the development not have progressed within this time period.
The bill specifically exempts options sold in respect of land banking schemes that are registered managed investment schemes under the *Corporations Act 2001*, and options that are financial products issued by the holder of an Australian Financial Services Licence ('AFS'), from the amendments to be made to the Act. This recognises that registered managed investment schemes and AFSL holders are already subject to Commonwealth oversight. …"

35. Mr Richardson, the Member for Mordialloc also stated (18 September 2018, Hansard, Legislative Assembly, p. 3364) -

"… the discouraging of unregulated land banking schemes. This on the green wedges, and also in precinct structure plans (PSPs), is also very critical. We hear locally about particular land parcels where there is no prospect to develop. I know of one particular part just outside my electorate where you could never develop this land due to Melbourne Water requirements and overlays. It will flood in a 1-in-100-year event completely, and that parcel of land is set aside—this unused land—for the very purpose of flood mitigation. It will never be developed, yet we have heard stories of syndicates owning this land and trading on the notion of the urban growth boundary moving, and then people purchasing and buying and trading between each other with the land value going up. That land is worth nothing. It has got water weeds through it, …
These syndicates are like a pyramid in their scheme, …"

36. Unless stated otherwise the provisions referred to under this part of the paper come into operation on 1 March 2020.

37. The following definitions inserted by s. 4(2) into s. 2(1) of the Principal Act are relevant –

"*land banking scheme* means a scheme for the proposed development of land by the subdivision of that land, under which—

(a) members contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme, whether the rights are actual, prospective or contingent, and regardless of whether the rights are enforceable; and

(b) members (other than the scheme's proponent) do not have day-to-day control or oversight of the operation of the scheme, regardless of whether they have the right to be consulted or to give directions; and

(c) members (other than the scheme's proponent) do not have a proprietary interest in a material part of, or all of, the land that is the subject of the proposed development—

but does not include the development of land under an off-the-plan contract;"

Australian financial services licence and ***financial product*** are as defined in Chapter 7 of the Corporations Act; and ***registered managed investment scheme*** means a scheme registered by ASIC under section 601EB of the Corporations Act.

38. Section 22 inserts into Part 1 of the Principal Act **Division 6—Options to purchase.** It provides -

"29WH Options to purchase

(1) A person (the ***vendor***) must not sell to another person (the ***purchaser***) an option to purchase land under a land banking scheme, except as provided for in this section.

(2) Subsection (1) does not apply to—

(a) an option to purchase land under a land banking scheme that is a registered managed investment scheme; or

(b) an option to purchase land under a land banking scheme where the option is a financial product issued by the holder of an Australian financial services licence.

(3) The money payable by the purchaser for the option must be paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor, to be held on trust for the purchaser until the earlier of—

(a) the registration of a plan of subdivision in respect of the land or the lot; or

(b) the expiry of the date by which the option must be exercised.

(4) The agreement between the vendor and the purchaser in respect of an option to purchase land under a land banking scheme must provide that the money paid by the purchaser for the option is to be held on trust in accordance with subsection (3).

(5) The agreement in respect of the option to purchase may be rescinded by the purchaser if subsection (3) or (4) is not complied with.

(6) The vendor must notify the purchaser of the registration of a plan of subdivision in respect of the land under a land banking scheme.

(7) Despite anything to the contrary in the agreement in respect of the option to purchase, the agreement expires if the event triggering the purchaser's right to exercise the option does not occur within 5 years of the entering into of the agreement.

(8) The purchaser is entitled to the immediate return of any money paid under the agreement in respect of the option to purchase if—

(a) the purchaser rescinds the agreement under subsection (5) or otherwise; or

(b) the agreement has expired under subsection (7) or otherwise; or

(c) the event triggering the purchaser's right to exercise the option does not otherwise occur.

29WI Offence to fail to transfer money

A vendor must not fail to transfer any money paid by a purchaser for an option to purchase land under a land banking scheme to a legal practitioner, conveyancer or licensed estate agent in accordance with section 29WH(3).

Penalty: For a natural person, 240 penalty units or imprisonment for 2 years or both;

For a body corporate, 1200 penalty units."

Transitional.

39. Section 28 inserts s. 57 into the Principal Act, which provides that Division 6 of Part I as inserted by s. 22 does not apply to any money paid in respect of an option to purchase land under a land banking scheme entered into before that commencement.

F. Amendment of legislation creating offences in relation to the sale of land.

40. Section 12 of the Sale of Land Act, headed "Offences in relation to the sale of land" has existed for a long time but prosecutions are thought to be uncommon. Parliament has made two amendments, the width of the second of which is most uncertain. The simpler amendment is created by s. 14(2) of the 2019 legislation, which comes into operation on a day or days to be proclaimed failing which it come into operation on 1 March 2020, which increases the fine for breach of s. 12 of the Principal Act from 50 penalty units to 120 penalty units. A penalty unit is currently $165.22.

The other amendment, by s. 14(1) of the 2019 legislation, which comes into operation on the same day as that stated in the previous paragraph, amends s. 12(d) as indicated by strikethrough and underlining –

"Any person who, with the intention of inducing any person to buy any land—

…

(d) makes or publishes any statement promise or forecast which he knows to be misleading or deceptive or ~~fraudulently~~ knowingly conceals any material facts or recklessly makes any statement or forecast which is misleading or deceptive;"

Section 15, which comes into operation on the same day, inserts s. 12A which provides –

"12A Guidelines

(1) The Director of Consumer Affairs Victoria may make guidelines to assist vendors of land and their agents to understand what a material fact is likely to be for the purposes of section 12(d).

(2) A court may have regard to any guidelines made under subsection (1)".

41. In the Second Reading Speech, Hansard p. 1160, the Minister stated –

"The bill also includes amendments to address some issues which, while infrequent, are of concern to the community when they arise.
One such issue relates to the disclosure of certain facts regarding a property for sale, for example, its history as the site of a homicide, or its past use as a site on which illicit drugs were manufactured.
The bill will amend the Act to strengthen an existing requirement not to fraudulently conceal 'material facts' about a property, with the intention of inducing another to buy that property. Additionally, amendments will be made to enable the Director of Consumer Affairs Victoria to publish guidelines designed to assist vendors and estate agents to understand what is meant by the term 'material fact'".

A digression into civil law.

42. If the reader is wondering about the scope of this legislation a study of Hansard reveals that you are not alone. Before turning to Hansard the following summary of the civil law is helpful as a background –

- A foundational case in Victoria is *Kadissi v Jankovic* [1987] VR 255 in which Crockett J approved the following statement from a text –

  "… in the absence of fraudulent concealment or of misrepresentation or of an express agreement, a vendor of real estate is not liable to a purchaser for defects in a building or land rendering it dangerous or unfit for occupation, even if the vendor has created the defects himself or is aware of their existence. As to such matters the maxim caveat emptor is applicable. It follows that a purchaser will not be entitled to rescind a contract on the ground of non-disclosure by the vendor of matters relating to the physical condition of the property."

  See also: *Walker v Masillamani* [2007] VSC 172; *Eighth SRJ Pty Ltd v Merity,* unreported, SCNSW, Young J, 25 March 1997, BC9701110 at 10-11; *Gunnerson v Henwood* [2011] VSC 440; *Sutherland & MacKinnon v Di Paolo* [2015] VSC 590;

- As regards statutory misleading or deceptive conduct, which requires conduct in trade or commerce, the foundational case on silence is *Demagogue Pty Ltd v Ramensky* [1992] FCA 557; (1992) 39 FCR 31, which upheld a decision of a trial judge that a vendor of land had engaged in misleading or deceptive

conduct by creating an erroneous impression in the purchasers that there was nothing unusual concerning access to the land and, in particular, had been silent that access depended on grant of a licence by a statutory authority. Black CJ stated (at 32) that silence was to be assessed as a circumstance like any other, the question is simply whether, having regard to all the relevant circumstances, there has been conduct that is misleading or deceptive or that is likely to mislead or deceive. Gummow J stated at 41, however –

"unless the circumstances are such as to give rise to the reasonable expectation that if some relevant fact exists it would be disclosed, it is difficult to see how mere silence could support the inference that the fact does not exist".

On the sale of a private house the owner is not acting in trade or commerce: *Argy v Blunts & Lane Cove Real Estate Pty Ltd* [1990] FCA 51 at [54], [55].

- In *Charles Lloyd Property Group Pty Ltd v Buchanan* [2013] VSC 148 a vendor of land did not disclose to the purchaser that someone had committed suicide on the land two years earlier. The purchaser failed for various reasons. Mukhtar AsJ stated -

  "39 … This is a case of mere non disclosure. It is not a case of misleading impression or half truth. It is arguable that it matters not that the vendor's son, Mr Buchanan did not intend to stay silent about the suicide or did not intend to deceive anyone. The vendor was under a statutory duty to act in a way which does not mislead or deceive. The question is whether the plaintiff was led into error. As a working test, one may ask were the circumstances such as to give a reasonable expectation that if some relevant fact existed it would be disclosed."

  The purchaser failed because the suicide was not material and also it did not show that, had there been disclosure of the fact of the suicide, it would have acted differently.

The scope of concealment of material facts - Hansard.

43. The following possibilities were mentioned in Hansard, some of which would make conveyancing a minefield. Beginning with the more cautious and moving to the less cautious, Mr Angus, the Member for Forest Hill stated (Legislative Assembly, 30 April 2019, 1299) –

"… I think this is going to be quite interesting to see how it plays out as a matter of fact. There is going to be some public consultation held in relation to that because the whole issue here is events, material and facts such as 'Was the property that is being sold a former drug lab?' and 'Was it the site of certain events, perhaps a homicide or some other tragic event?'. What is the requirement

for that to then be disclosed? As I said, we had this discussion in the briefing and I received some subsequent material from the government, …
… even in my own electorate of Forest Hill I can think of two properties where I know there have been double murders. The question is: what is the obligation then in relation to the vendor and the agent regarding those properties? What happens if the vendor does not tell the agent? … What happens if the agent knows and does not tell the potential purchasers? What happens if the agent unofficially sort of hears from around the traps? There could have been other buyers, other owners of the property tucked in between there. It might have gone for years and there have been two or three purchasers but all of a sudden somebody in the local area, for example, says to the agent, 'Well, we know this site was a drug lab or a place where a homicide or homicides took place'. How is that going to play out and what are going to be the consequences of that?
I think, as I said, there is going to be some public consultation to be held in relation to the guidelines, but there will probably be quite a significant amount of interest in the broader community because there are so many properties. Indeed the way things are going here in Victoria, with law and order running the way it is, there is an increasing number of properties where there have been very significant events. Is a home invasion where people get bashed to within an inch of their life in the property a disclosable event? What about other traumatic events that have taken place, like crimes against the person, …"

44. *Drugs.* The Member for Cranbourne, Ms Richards, stated (Legislative Assembly, 1 May 2019, p. 1405) –

"…There have been publicised cases of people buying properties that have previously been used as meth laboratories. Home buyers are entitled to know and actually avoid a personal housing crisis that could come about from purchasing a home that could eventually even cause housing stress if it meant that they had to rectify the house. …
Hardworking people, nurses, people who serve us in shops, hairdressers, people who make the food that we find delicious, all of these people deserve the joy of a dream that they have held for a long time, a dream that is part of their hopes for the future".

And Ms Taylor, Member for Southern Metropolitan (Legislative Council, 28 May 2019, p. 1438) -

"... it would be terribly distressing if you had purchased a property only to find that it was once a meth lab. … it actually becomes extremely toxic and it is very hard to rid that particular property of the toxins which remain in the walls, in the carpet and so forth and have a residual impact on the health of the particular person living in that property.
… The bill will amend the act to enable the director of Consumer Affairs Victoria to issue guidelines … I trust that that will help to resolve and overcome any further clarity that is required to understand what a material fact is. But really, at the end of the day—and I remember this previously in a lot of my training—what does a reasonable person think would induce them to make a purchase? "

And Ms Grayley, The Member for Narre Warren South (Legislative Assembly, 18 September 2018, p. 3363) -

Too often you hear of ghastly stories about people who have been taken down or who have been left with a less than satisfying experience from partaking in the real estate market. …
I refer to an *Age* article from 26 August:
This man didn't know he was living in a meth-ridden house. I was attracted to this article because of an experience I had at the previous election. Whilst I was out doorknocking I did actually come across a meth-ridden house, … we made a quick exit out of there … the owner was a man with three children who was unaware that the house he was renting out was contaminated with methamphetamine residue. Tests the owner paid for found that the house was uninhabitable, … The article contains Victoria Police statistics regarding clandestine drug labs found in residential dwellings … it is very unscrupulous of real estate agents and developers to not explain this to people when they are putting a property up for rent or sale. It is not just whether it has been a meth lab, but it is also whether somebody has, for example, died in a house. You would want to know the circumstances around that as well and again what potential pollutants could have been involved in that death. …"

45. *Living next to a former goldmine.* Ms Green, The Member for Yan Yean (Legislative Assembly, 18 September 2018, p. 3361) -

"I have numerous people in my neighbourhood who are deeply concerned at the moment that they have been living next to a former goldmine, … This is despite there being an independent report from 1998 that said this land should never be developed for residential development….
We need to strengthen the law so that people do not buy properties without the knowledge that their children could be seriously injured and have their health impacted. Facts like that should be on titles …

46. *Living over a mineshaft.* Mr Howard, The Member for Buninyong (Legislative Assembly, 18 September 2018, p. 3366) -

"… In Ballarat the other thing to be aware of is that your house is not built over a mineshaft".

47. *Cladding.* Ms Halfpenny, The Member for Thomastown (Legislative Assembly, 1 May 2019, p. 1410) –

"… 'knowingly conceal', which just means that you have to disclose if there is an issue with a property that may affect the decision of a purchaser in terms of buying the property. A good example of course is the cladding. As I understand it, there will be stakeholder consultation about what a material fact is, but it could well be, for example, that cladding is considered a material fact in relation to whether it needs to be disclosed or not when a property is being purchased".

48. *A dodgy bloke.* Ms Victoria, The Member for Bayswater (Legislative Assembly, 18 September 2018, p. 3352) –

"It might be that it was hearsay that the neighbours talked about when they said, 'Oh, 20 years ago there was a bit of a dodgy bloke who lived there'. How much of that is withholding things that are actually important if it is hearsay from neighbours and a bit of gossip? Or do you actually have to go out and start saying, 'Okay, I need to find out what went on in that property and I need to disclose that'. If that is the case, is that really the job of the vendors if they have lived in the property or if they have owned that property and perhaps rented it out? But if somebody says, 'Oh, no, we told the vendor about that', then you can say that they knowingly did not disclose that. But was it relevant and was it actually factual information that they were given, or was it just gossip? I think the burden of proof on that is going to need to be very well considered, because I think it could get a lot of people into an awful lot of trouble".

49. *Varieties of uncertainty.* The Legislative Council sitting in Committee (28 May 2019, p. 1440 – 1) –

"Mr RICH-PHILLIPS: … So I would like to ask the minister: why didn't the government define 'material fact' for the purpose of this new clause when it brought the bill to Parliament?
Mr SOMYUREK: Mr Rich-Phillips, I am informed it is for flexibility and for further consultation—I am informed there was consultation—and ultimately for maximum flexibility should other issues arise.
Mr RICH-PHILLIPS: Minister, thank you for your answer. Minister, you would appreciate that while flexibility might be helpful to the public servants putting this legislation together, it certainly would be helpful to this Parliament in knowing what we are being asked to enact by way of this provision. You said some consultation had taken place. Are you or your advisers able to advise what that consultation was in relation to this provision and what further consultation is planned around the making of these guidelines?
Mr SOMYUREK: Mr Rich-Phillips, I am informed that there has been extensive consultation with the public and with the industry as part of the consumer property law review and that that consultation will continue. I am informed that the second-reading speech actually gives a bit of a flavour for what might be defined as material facts.
Mr RICH-PHILLIPS: … a drug lab. Another example was a property where a homicide had occurred. A third example might be where the garden is known to flood in the winter.
Mr Finn: Collingwood supporters living next door.
Mr RICH-PHILLIPS: Mr Finn advises me one of the scenarios would be Collingwood supporters living next door, but I might leave that one. A fourth example I would give you, Minister, was the property having been owned by a known criminal identity at some point in the past. Are you able to get advice from your advisers which of those four scenarios would be material for the purposes of this provision, to give the house some indication of what is intended?
Mr SOMYUREK: Mr Rich-Phillips, I am informed that the drug lab, the homicide, the property owned by a criminal identity—the things that were mentioned in the second-reading speech—are examples of some of the things that the government will be consulting on. That is not a conclusive list, but these are

the types of things that the government wants to speak to industry further about and speak to the public about and get their feedback on with regard to what ought to be deemed as material facts. So I think it is fair to say at this stage the government, or the minister, does not want to pre-empt the consultation. They want to make it a genuine consultation and not pre-empt the outcomes, but those things that were mentioned are certainly in the mix.

Mr RICH-PHILLIPS: … the government is very much saying to the house 'Take the government on trust with this provision. It is undefined. If you pass this legislation, we will now go and define what we mean by "material facts"'. I think it would have been far more helpful for the house and for the Victorian community had that consultation work been completed prior to the bill coming forward so greater clarity could have been included in the bill rather than simply leaving 'material facts' completely undefined.

The writer's view.

50. The amendment is bad legislation because of its uncertainty, even with the benefit of guidelines from The Director of Consumer Affairs. Is mere silence concealment? And what is a material fact? Certainty would be achieved if vendors are made criminally responsible for what they can reasonably be responsible for. Thus –

(a) If during the ownership of the vendor the property has been used as a drug lab this should be disclosed. Accordingly a vendor who has been a lessor will have to conduct tests to determine whether its tenant has been so using the property;

(b) If the vendor knows that there is a mineshaft under the property this should be disclosed;

(c) As regards cladding or the garden being known to flood in winter, bearing in mind that a crime is being considered, there is sufficient difficulty surrounding these issues that the vendor should not be exposed to criminality for non-disclsoure;

(d) Given their great variety and how long ago they may have occurred crimes committed on the property should not required to be disclosed. The only possible exception might be a murder by the vendor, but even then there may be a considerable delay between the homicide and a conviction for murder during which time there is uncertainty about what is to be disclosed;

(e) The identity of previous owners should not be required to be disclosed, eg a criminal or a dodgy bloke;

(f) It should not be crime not to disclose what has happened next door, eg a goldmine. The purchaser can make its own enquiries. And the reader can

form his or her own view whether it should be a crime to conceal that Collingwood supporters live next door.

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2 October 2019

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SALE OF LAND AMENDMENT ACT 2019

Law Institute of Victoria
Western District Law Association Conference
Warrnambool
18 October 2019

BY

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NSW Sunset clauses cases.

51. *Jobema Developments Pty Ltd v Zhu* [2016] NSWSC 3 – no relief – increases in construction costs and purchase prices not established – delay by original developer taken into account against subsequent developer – selective and unexplained extension of some contracts and not others.
52. *Klein v McMahon* [2017] NSWSC 1531 – purported rescission by vendor under contractual provision allowing rescission if plan not registered within a year of date of contract invalid as being in breach of legislation – no attempt by vendor to comply with legislation – purchaser gets specific performance.
53. *DGF Property Holdings Pty Ltd v Di Federico* [2018] NSWSC 344 – vendor delayed by dispute ending in litigation between it and previous owner of part of the land in the proposed subdivision and who would be owner of two subsequent lots – works also required by Council – assertion by vendor that it could not predict when necessary work could be done to satisfy Council – vendor offering

undertaking to share with each purchaser any capital gain it may derive from resale of lots – relief granted on terms including that vendor offer purchasers new contract. Paras. [193] – [199], [391] – [392].

54. *DGF Property Holdings Pty Ltd v Di Federico (No 2)* [2018] NSWSC 1137.

55. *Silver Star Fashions Pty Ltd v Dal Broi* [2018] NSWSC 1445 – no relief – significant delay due to serious breaches – unreasonable conduct including by misleading statements – increase in value – disappointment to purchasers – developer not vendor standing to gain.

56. *Scott v Ennis-Oakes*]2019] NSWSC 1257 – attempted rescission under contractual term invalid – statute not complied with.