



PROPERTY & BUSINESS LAWYERS

Exchange of Contracts by Real Estate Agents

Real Estate Series

The information in this publication is for the assistance of real estate agents and people dealing with them. Please call us if you have any questions on this topic or on any other real estate issues.

The Agent's Role

The role of exchanging contracts in a sale or purchase of real estate was traditionally that of solicitors and later conveyancers. Due to changes in legislation this role is being fulfilled more and more by real estate agents in relation to contracts for the sale of residential real estate.

The Property Stock and Business Agents Act 2002 ("the Act") is the relevant Act dealing with real estate agents. This Act replaced the Auctioneers and Agents Act 1941.

Definition

For the purpose of the Act a real estate agent is defined as:

".....a person (whether or not the person carries on any other business) who, for reward (whether monetary or otherwise), carries on business as an auctioneer of land or as an agent:

- (a) for a real estate transaction;*
- (b) for inducing or attempting to induce or negotiating with a view to inducing any person to enter into, or to make or accept an offer to enter into, a real estate transaction or a contract for a real estate transaction;*
- (c) for the introduction, or arranging for the introduction, of a prospective purchaser, lessee or licensee of land to another licensed agent or to the owner, or the agent of the owner, of land;*
- (d) collecting rents payable in respect of any lease of land and otherwise providing property management services in respect of the leasing of any land; or*
- (e) for any other activity in connection with land that is prescribed by the regulations for the purposes of this definition".*

Please note that the definition is not limited to the selling of land and extends to an agent acting on behalf of the buyer of land (a buyer's agent).

As noted in section 168 of the Retirement Villages Act 1999 a selling agent acting on the sale of residential premises in a retirement village must be licensed as a real estate agent under the Act.

Marketing Contract

A real estate agent cannot market a residential property unless and until a marketing contract has been prepared and in the agents hands. Section 63 of the Act requires a real estate agent to have available a contract for sale at the time the residential property is offered for sale.

Section 63(1), (2), (3) and (5) of the Act provides as follows:

"63. Proposed contract for sale of residential property

(1) In this section:

"purchaser" includes a grantee of an option.

- (2) A real estate agent must not offer residential property for sale unless the required documents are all available for inspection at the real estate agent's registered office by a prospective purchaser or agent for a prospective purchaser at all times at which an offer to purchase the property may be made (or at such other place or at such other times as may be prescribed by the regulations).*
- (3) A real estate agent is considered to offer residential property for sale when the agent, expressly or by implication:*
 - (a) indicates that residential property is for sale or is to be auctioned at any future time;*

- (b) *offers to sell residential property;*
 - (c) *invites an offer to purchase residential property; or*
 - (d) *indicates that a person may be willing to grant an option to purchase residential property”.*
- (4)
- (5) *Without limiting this section, a real estate agent is taken to indicate that residential property is for sale if the real estate agent does any of the following or causes or permits any of the following to be done:*
- (a) *advertises or promotes the property in any way that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale;*
 - (b) *places a sign on or near the property that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale;*
 - (c) *advertises or in any way gives notice that the property is to be auctioned at any future time;*
 - (d) *places on display particulars or a description of, or a photograph, drawing or other representation of, the property in or on any premises, vehicle or place where the real estate agent conducts business as a real estate agent; or*
 - (e) *shows the property to a prospective purchaser or gives the address of the property to a prospective purchaser”.*

Please note that the contract must be complete and have attached to it the “required documents” referred to in subsection (4) of section 63 which provides as follows:

- “(4) *The "required documents" for the purposes of this section are:*
- (a) *a copy of the proposed contract for the sale of the property (excluding particulars of the purchaser and purchase price);*
 - (b) *the documents required by section 52A of the Conveyancing Act 1919 to be attached to the contract before signature by the purchaser; and*
 - (c) *in the case of an option to purchase residential property a copy of the proposed option document (excluding particulars of the purchaser and consideration for the option)”.*

The Act stipulates a maximum penalty of 100 penalty units for a breach of section 63.

Licensed real estate agents who come within the definition a real estate agent under the Act are authorised to exchange contracts for the sale of residential property pursuant to section 64 of the Act.

That section provides as follows:

“64. Contracts for sale of residential property

- (1) *A real estate agent may do any of the following:*
- (a) *fill up a proposed contract for the sale of residential property, by inserting details of the purchaser’s name, address and description, the purchaser’s solicitor’s name and address, the purchase price and the date;*
 - (b) *insert in or delete from a contract for the sale of residential property any description of any furnishings or chattels to be included in the sale of the property; and*
 - (c) *participate in the exchange or making of contracts for the sale of residential property.*
- (2) *If a prospective party to a proposed contract for the sale of residential property for whom a real estate agent acts in relation to the exchange or making of the contract notifies the real estate agent, or it is apparent from the proposed contract, that a solicitor is or will be acting for the party, the real estate agent may not participate in the exchange or making of the contract unless expressly authorised to do so by the party or the solicitor. A contract is not invalid merely because of the failure of a real estate agent to comply with this subsection.*
- (3) *A real estate agent who exercises any function pursuant to this section on behalf of any person who is a party or a prospective party to any contract or proposed contract is liable to compensate that person for any loss, damage or expense suffered or incurred by that person as a result of any negligent act or omission, or any unauthorised action, of the real estate agent in the*



The most important part of this last section is paragraph (1) sub-paragraphs (a), (b) and (c). These subsections set out precisely what an agent can do to the contract by way of addition or deletion and the participation in the exchange of contracts. These sub-paragraphs do not authorise the agent to add or delete any clauses in the contract.

Authority to Exchange

Further, an agent must have authority to exchange if solicitors or conveyancers are acting for a party. You should refer to subsection (2) of section 64 referred to above. Some agents mistake the authority to exchange as authority to amend the contract.

Agents do add special conditions to the contract dealing with the deposit. This is in breach of the Act and it could come unstuck if one of the parties wants to get out of the contract and could result in the agent being sued for damages under paragraph (3) of section 64 of the Act. It might be a good idea if when writing to the vendor's solicitor/conveyancer calling for a contract that you ask that an additional condition be inserted dealing the payment of the 0.25% and the balance of the deposit. A suggested clause is attached which does not require the insertion of any figures so that if such a condition is inserted the agent would not need to touch the contract other than as authorised by sub-section (1) of section 64 of the Act.

Please note that even if an agent contravenes the last referred to section the contract may bind the parties thereto but the agent may be liable to one of the parties as a consequence of paragraph (3) of section 64 of the Act.

Therefore, the lesson is to ensure that you act strictly in accordance with section 64(1) of the Act and you will not be at risk of running foul of sub-section (3) referred to above.

The contract must be dated on the date that it is exchanged not the date it has been signed.

Finally, it is imperative that both copies of the contracts are identical at the time contracts are exchanged. Failure to do this will give the purchaser a right to rescind the contract at any time up to the time of exchange.

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