

# REAL ESTATE REFORM LEGISLATION FOR CONVEYANCERS

*Last updated 18 November 2008.*

*On 28 July 2008 the Real Estate Reform Act became operative with two exceptions. Whilst it primarily focuses on the activities of agents and auctioneers, it substantially affects the rights, duties and obligations of vendors and purchasers – hence it has a major impact on what conveyancers do and need to know. Minor variations were made to the regulations on 25 September 2008.*

## 1. INTRODUCTION

The *Statutes Amendment (Real Estate Industry Reform) Act 2007* (the “**REIR**” Act) amends the *Conveyancers Act*, *Land Agents Act* and *Land and Business (Sale and Conveyancing) Act*. It became operative (with 2 exceptions) on 28 July 2008 together with implementing regulations and new forms. More than 100 changes were made to those Acts and 38 whole sections have been introduced or substituted. The regulations under those Acts make many further changes and introduce numerous additional requirements. While the primary focus was on the activities of agents and auctioneers, some other important changes were made.



Conveyancers need to be familiar with this legislation to be able to inform clients about their rights, duties and obligations and, where appropriate, to refer their clients for legal advice. That advice can relate to existing documents, the preparation of new documentation (eg in a private sale) the actions of the agent and/or auctioneer and the consequences of those actions for the client and the agent. Caution needs to be exercised in giving that advice in the broader context.

This paper is a general introduction to the legislation from a conveyancer’s perspective. It incorporates the variations to the regulations made on 25 September 2008 to correct minor anomalies. It cannot mention every detail and draws on a simple

reading and interpretation of the legislation. It is not and cannot be legal advice. Consequently, it is not a substitute for careful reading of the whole legislation and conveyancers must look to their legal advisers to determine the precise meaning and consequences of the legislation in any particular situation.

For easy future reference, the paper is divided as follows:

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    - 6.6.5. Disruptive Practices (*Continued overleaf*)

 <p>For more information, contact: <b>Craig Cram (General Manager)</b> <b>Mobile: 0422 287 688</b> E: <a href="mailto:craig.cram@directconnect.com.au">craig.cram@directconnect.com.au</a></p>	<p><b>Benefits for your clients</b></p> <ul style="list-style-type: none"> <li>• Free, hassle-free connections to utilities (telephone, internet, electricity, gas, etc.)</li> <li>• No shuffling and waiting on lots of call centres: we phone the client</li> <li>• Eliminates a major hassle at a very stressful and busy time.</li> </ul> <p><b>Save your client the delays, hassle and stress.</b></p>	<p><b>Benefits for you</b></p> <ul style="list-style-type: none"> <li>• Provide an additional service</li> <li>• No cost to you, just log-in (takes 60 seconds)</li> <li>• Assist your clients by solving a major stressful task of moving</li> <li>• Reduce or eliminate your annual AICSA membership and other fees</li> </ul> <p><b>One acceptance per week should pay your membership fee!</b></p>
 <p><b>First Title</b> <i>Innovation · Information · Insurance</i></p> <p><b>Nicola Wilson (Business Development Manager)</b> <b>Mobile: 0410 568 793</b> E: <a href="mailto:nwilson@firsttitle.com.au">nwilson@firsttitle.com.au</a></p>	<p><b>Benefits for your clients</b></p> <ul style="list-style-type: none"> <li>• Covers unknown <u>and</u> disclosed known risks – incl unapproved building work, encroachments, incorrect adjustments, govt errors.</li> <li>• No-fault policy – just make the claim.</li> <li>• Single premium of \$275 (plus GST &amp; stamp duty of \$71.50) for residence to \$600K with no known risks.</li> </ul> <p><b>Low-cost insurance to address the dangers of buying some-one’s property.</b></p>	<p><b>Benefits for you</b></p> <ul style="list-style-type: none"> <li>• Being a no-fault policy, no claim is made against the conveyancer in absence of fraud</li> <li>• May cover negligent errors by conveyancer</li> <li>• Reduces claims on professional indemnity insurance by conveyancers – ie reduced premiums plus no PI excess.</li> </ul> <p><b>Protects you from claims and costs, too.</b></p>

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**7. Conclusion**

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**2. HISTORY OF THE LEGISLATION**

Many professional agents have been unhappy and disadvantaged by the practices of less scrupulous agents and sales representatives over the years. This led the Real Estate Institute of SA (“REISA”) at various times to suggest to government and the Commissioner for Consumer Affairs that tighter regulation of some practices was appropriate.

As a consequence of complaints by constituents, John Rau (Member for Enfield in the SA Parliament) called for public submissions in 2002 in relation to various practices of agents and auctioneers. The Australian Institute of Conveyancers (SA Division) (“AICSA”) made an 11 page submission. John Rau issued a report which recommended various legislative changes in relation to those and some other activities. The Attorney-General then initiated a working party which addressed a wider range of agent/auctioneer issues which considered the Rau materials and made a series of recommendations that led to the first of several drafts of the legislation that has become the REIR Act and ancillary regulations. Three Ministers and countless other people with differing objectives have added ingredients to and stirred the pot. In my view, it shows!

Because it was perceived that legislation affecting agents and auctioneers did not affect conveyancers, the AICSA was not satisfactorily consulted. Some other changes were included by the Government for convenience prior to introducing the legislation into the Parliament.

The Minister has committed to a review in 2 years. It appears that the review has already informally commenced.

**3. INTERPRETATION**

Legislation is contextual. Drafters of legislation need to understand the context in order to ensure that unintended consequences do not occur. It is clear that some drafting of this legislation was undertaken by some-one who did not understand the context in which it was to operate. The understanding should have been gained by full and proper consultation but that did not occur in relation to at least some of the legislation. There is also a lack of consistency of expression within the legislation. The result of all these factors is unintended consequences and lack of certainty and/or clarity.

This unfortunate situation is compounded by the unwillingness and/or inability of the regulator to express a view or reach an understanding where the legislation is uncertain or unclear and relates to conduct that may constitute an offence or lead to loss of commission or expenses.

A major objective of the legislation was to address the ongoing, wilful and serious failure by many agents to disclose information to their clients in breach of their fiduciary duties. The legislation is full of mechanisms to create greater transparency – through notices intended to create greater awareness in vendors and/or purchasers and through contrived disclosures by the agent of benefits and relationships. The intention to ‘crack down’ on various conduct by agents is obvious from the legislation and from the second reading speech of the Minister.

The lack of clarity in some aspects of the legislation plus the proscriptive nature of the legislation means that agents urgently and anxiously have sought and will continue to seek certainty through advice. Some agents simply cannot believe that the apparent effect of the legislation is intended and/or reasonable. In some respects, they are correct.

Does the legislation apply to an agent who is selling land or a business in which he/she has a direct or indirect interest? Although the context may change the situation, it would appear that the legislation generally will impose the obligations of an agent only when the agent is acting as an agent – ie not when an agent is acting on his/her own behalf as the vendor or as the purchaser. However, complications arise where the agent is selling or buying with another person or where the agent is a director or shareholder of a corporation which is selling or buying. Someone acting for another person needs the authority of that other person to do so and in a sale or purchase that other person is a “vendor” or “purchaser”. New section 20(3) provides that a registered agent “*must not act on behalf of [a vendor or purchaser of land or a business] unless the agent has been authorised to so act by instrument in writing signed by the vendor or the purchaser*” – although the requirements in relation to that instrument vary, depending on whether it relates to residential land or not.<sup>1</sup> Hence it appears that an agent must comply with the applicable requirements of the legislation if acting in any capacity (as a registered agent or otherwise) on behalf of others in the sale or purchase of land or a business.

<sup>1</sup> The language used in section 20 raises some problems in this regard: see below – particularly para 6.3.1.

All these matters make interpretation of the legislation more difficult. A simple reading of a section may indicate a likely result but a more conservative interpretation may be warranted in the context of the legislation. ‘Opinion shopping’ has and will continue to occur whilst doubts and hopes remain. Those giving their views on the legislation should be mindful not to fall into the same trap as some of the persons involved in the drafting.

The identification and resolution of issues is an on-going process. This Paper will be updated from time to time and the version and date will be identified in the footer. For a potentially more current view, visit [www.aicsa.com.au](http://www.aicsa.com.au).

## 4. CHANGES TO THE CONVEYANCERS ACT

The changes made to the *Conveyancers Act* are minor and are intended to create similar requirements in both the *Conveyancers Act* and the *Land Agents Act*.

A registered conveyancer must now be ‘a fit and proper person’ (see section 7).<sup>2</sup> This was the case when conveyancers were licensed (as land brokers) prior to 1995.

In addition, the Agents’ Indemnity Fund ceases to be a fund of last resort for claimants (s34 and mirror changes to the *Land Agents Act* s.32). Claimants can now recover reasonable legal expenses incurred in taking action to recover the loss and in making the claim (s.32).

## 5. CHANGES TO THE LAND AGENTS ACT

Registration is now required for every auctioneer (who must be a registered agent) and sales representative. Educational requirements are imposed although sales representatives without those qualifications may be registered subject to conditions imposed by the Commissioner in relation to training and supervision (s.8B & r.5).

There is a new requirement that a person registered under the *Land Agents Act* is ‘a fit and proper person’ (Ss.8, 8A & 8C). This requirement had applied prior to 1995.

Persons registered under the Act will be issued with photo ID which they must carry on their person when performing duties (s.11B). Each agent will also be issued with an agent’s registration number (“**RLA**”) which must be included in every media advertisement (s.48A).

<sup>2</sup> For guidance on what amounts to a ‘fit and proper person’, see the SA Supreme Court decision of **Harrison: Application For Readmission** [2002] SASC 335 where Chief Justice Doyle said about the position of a legal practitioner (who is granted a certificate to practice by the Court in the same way as the Commissioner grants registration of conveyancers): “Legal practitioners are also held out to the public as persons upon whom the public may rely, and in whose integrity they may trust. The Court cannot hold a person out to the public as a fit and proper person to be a practitioner, if it is not satisfied that this is the case. As I have said, this has nothing to do with questions of punishment or reform or rehabilitation. ... [A]nother factor to consider is the reputation and standing of the legal profession. The Court must consider whether public confidence and trust in the legal profession would be eroded if a person were permitted to remain or to become a member of the profession, notwithstanding the past conduct that is in question.”

A registered agent can carry on business at more than one location so long as each place of business is properly managed and supervised by a registered agent or by a registered sales representative who has been approved by the Commissioner to manage a place of business – S.11. There is no prohibition against a registered agent managing more than one place of business. However, a business or place of business will not be taken to be properly managed or supervised unless –

- there are written procedures given to staff who handle trust moneys, and
- where a registered agent is not managing and supervising the place of business –
  - a registered agent must be responsible for the trust account;
  - all staff must be instructed on their statutory obligations; and
  - procedures must be in place to monitor its operation – including an inspection at least monthly of the place of business and prescribed documents.

Most penalties for breaches of the Act are increased significantly.

There are numerous other changes beyond the scope of this paper.

## 6. CHANGES TO THE LAND AND BUSINESS (SALE AND CONVEYANCING) ACT

### 6.1. DEFINITIONS – Ss.3 & 4

There are several important new or amended definitions.

The definition of a “**small business**” in section 4 is changed. The value of stock-in-trade is now to be disregarded when determining whether or not the business is a small business. This means that a “small business” now means a business sold for total consideration not exceeding \$200,000 after disregarding –

- the value of any land in fee simple and
- the “*usual selling price*” of any stock-in-trade.

The exclusion of stock means a large increase in the scope and number of businesses for which a disclosure statement under section 8 is required.

A new definition is “**place of residence**” which is defined as “a building or part of a building used, or currently designed for use, as a single dwelling, and includes outbuildings or other appurtenances incidental to such a use”.

A related new definition is “**residential land**”<sup>3</sup>. This definition

<sup>3</sup> Section 3 provides:  
 “**residential land**” means—  
 (a) land on which a residence or 2 places of residence are situated, or in the course of construction, and on which there are no other improvements; or  
 (b) vacant land on which it is lawful to construct a residence; or  
 (c) a community lot or unit under Community Titles Act 1996 or Strata Titles Act 1988 comprising a single residence, whether constructed or in the course of construction, including a place used or designed for use for a purpose ancillary to the

is important because the legislation imposes numerous additional requirements in relation to residential land – apparently because purchasers of residential land are perceived to be more vulnerable ‘consumers’. In the Act, “**residential land**” is –

- land on which a single or 2 places of residence are constructed or being constructed and “*on which there are no other improvements*”, or
- vacant land where a place of residence may be constructed, or
- a community/strata lot/unit comprising a single place of residence, or
- an exclusive right (whether deriving from the ownership of a share or interest in a body corporate or partnership or arising in some other way) to the separate occupation of a single place of residence [*This relates to the definition of ‘land’ in the Act and catches ‘company titles’.*]

unless the land –

- is more than 2.5 hectares in area, or
- is used “*wholly for non-residential purposes*”, or
- involves an exclusive right to the separate occupation of –
  - land of more than 2.5 hectares in area or
  - land used wholly for non-residential purposes.

A definition of “**offer**” has been added and is remarkable for two reasons. Firstly, it excludes a bid at auction – which traditionally would be considered to be an offer. Secondly, it includes a category of statements, some of which traditionally would not constitute an offer, by the inclusion of “*a statement of the price that the purchaser is willing to pay for the land or business including such a statement made in a tender process, request for expressions of interest or other similar process*”. This inclusion of pseudo offers has apparently occurred because of the practice of some agents to use ‘expressions of interest’ in place of an offer written in the form of a contract. The legislation requires a prescribed statement to be included on all offers but the wording for an offer “*in the form of a contract of sale document*” is slightly different than for other ‘offers’ (see below).

The definitions of “**vendor**” and “**purchaser**” have been amended to include persons authorised to act on their behalf. This apparently enables statements and notices under the Act to be served on persons authorised to receive them.

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*residence; or*

- (d) *an exclusive right (whether deriving from the ownership of a share or interest in a body corporate or partnership or arising in some other way) to the separate occupation of a single residence, whether constructed or in the course of construction, including a place used or designed for use for a purpose ancillary to the residence,*

**but does not include—**

- (e) *land that is more than 2.5 hectares in area (or such other area as may be prescribed); or*
- (f) *land or a community lot or unit used wholly for non-residential purposes; or*
- (g) *an exclusive right to the separate occupation of land referred to in paragraph (e) or (f);”*

Consequential changes are made in other sections.<sup>4</sup>

A new section 37 has similarly extended the meaning of “**agent**” in relation to signing documents. It provides that a person authorised to act on behalf of an agent may sign a document that the agent is required or authorised to sign.

The regulations also provide that a reference to a type size of printed or typewritten material is to be taken to be a reference to that type size when produced in the Times New Roman font (r.3). It appears that ‘printed’ does not mean ‘by hand’: regulation 16A(2)(a) provides that a sales agency agreement “*must be printed or typewritten in not smaller than 12-point type, however, variations to the sales agency agreement may be handwritten provided they are legible*”.

## 6.2. NEW FORMS IN GENERAL

The REIR legislation creates 7 new forms or notices. The forms/notices are numbered R1 to R7 on the website of the Office of Consumer and Business Affairs. However, not all of these forms/notices are set out in the regulations to the *Land and Business (Sale and Conveyancing) Act*. Forms R1 and R6 are merely approved by Commissioner (presumably to enable speedy changes) and accordingly the forms/notices are not given those designations in the regulations. The listed forms/notices are as follows:

- *R1 - (Vendor’s Written Guide to) Sales Agency Agreements*
- *R2 - Disclosure of Benefits*
- *R3 - Buyers Information Notice*
- *R4 - Bidders Guide*
- *R5 - Collusive Practices*
- *R6 - Warning Notice to Purchaser and*
- *R7 - Warning Notice (Financial and Investment Advice)*

***Each of these forms/notices is briefly discussed later in this document.***

Some only apply to the sale of residential land (see below). Forms R2, R3, R5 and R7 must be printed/typed in at least 12 point.

The forms may be viewed and may be downloaded from the website of the Office of Consumer and Business Affairs at [www.ocba.sa.gov.au/consumeradvice/realestate/forms.html](http://www.ocba.sa.gov.au/consumeradvice/realestate/forms.html).

Under the legislation, the vendor must receive from the agent –

- *R1 - (Vendor’s Written Guide to) Sales Agency Agreements* – for residential land and possibly other land and businesses (see below), and
- *R2 - Disclosure of Benefits* – where all of the required

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<sup>4</sup> The REIR Act deleted “*or on behalf of*” from the words “*signed by or on behalf of the vendor*” in Section 7. This has been interpreted by some to mean that only the vendor or a person holding the vendor’s power of attorney can now sign Statements under section 7. However, the new definition of vendor enables anyone who is “authorised” (including an agent, if he/she is brave enough) without any apparent need for a formal power of attorney. By the same token, an authority to sign a Statement under section 7 is not implicit in the appointment of an agent.

information is not set out in the Sales Agency Agreement<sup>5</sup>.

The purchaser must receive from the agent –

- *R3 - Buyers Information Notice* (for residential land only – on inspection of land and also attached to the Statement under section 7)
- *R4 - Bidders Guide* (if an auction of residential land)
- *R5 - Collusive Practices* (if an auction)
- *R6 - Warning Notice to Purchaser* (if on-selling or subject to sale of purchaser’s property) and
- *R7 - Warning Notice (Financial and Investment Advice)* (if such advice is given).

Note that there is no apparent requirement to serve any of these forms or notices in relation to any agreements, contracts or activity occurring before 28 July 2008. However, if an agreement or contract was entered into before 28 July 2008 but a relevant activity occurs on or after 28 July 2008, then the requirements of the legislation must be complied with (eg *R3 – Buyers Information Notice* must be attached to any Statement under Section 7 for residential land that is served on/after 28 July 2008 even if the contract was made before that date).

Where there is no agent involved, only one of these forms, *Form R3 - Buyers Information Notice*, need be used. A vendor of residential land must take all reasonable steps to ensure that –

- a person receives *Form R3 - Buyers Information Notice* at any inspection of the land at the vendor’s invitation and
- Form R3 is also attached to the Statement under section 7 – see paragraph 6.7.1 below for details.

Conveyancers who prepare contracts and related documentation for private sales should ensure that the vendor is aware of and complies with this requirement.



**6.3. SALES AGENCY AGREEMENTS**

**6.3.1. Before the Sales Agency Agreement - s.20**

The Act requires an agent to serve the 4 page *R1 - (Vendors Written Guide to) Sales Agency Agreements* before making the Sales Agency Agreement in relation to residential land and possibly any other land or a business.<sup>6</sup> The form outlines the

<sup>5</sup> If form R1 is only applicable to residential land (see para 6.1.3 below), any benefits that must be disclosed in relation to other land or a business must appear in a form R2. Transparency suggests the earlier disclosure in the written authority to act as agent would be preferable to a delayed disclosure in form R2.

<sup>6</sup> Parliament may have intended to limit the meaning of “*sales agency agreement*” in the Act to sales agency agreements for residential land.

rights, duties and obligations of the agent and the vendor – including the role of agent, marketing activities, the maximum duration of the agreement and termination.

The Act does not prescribe any period for service of the form before the Sales Agency Agreement may be signed. However, sufficient time should be allowed to enable the vendor to read and consider the form before signing the Sales Agency Agreement.

Failure by the agent to serve this form as required disentitles the agent to commission and expenses – s.20(8). Depending on the nature of the vendor’s complaint, failure to do so may also call into question the enforceability of the Sales Agency Agreement.

The content of *R1 – (Vendors Written Guide to) Sales Agency Agreements* appears to apply only to residential land: however, whilst there is any uncertainty whether section 20(2) includes that qualification, it appears prudent to serve the new form R1 whenever an agent enters into any sales agency agreement – ie not only when the agreement relates to residential land. The form is approved by the Commissioner and does not appear in the regulations.

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Section 20(1) provides “*An agent must not act on behalf of a vendor in the sale of residential land unless the agent has been authorised to so act by an agreement (a sales agency agreement) ...*”. Section 3 is headed ‘Interpretation’ and provides “*sales agency agreement*—see section 20”. If that was the intention, the requirement in section 20(2) to serve form R1 will be limited to residential land.

This interpretation is uncertain. Some differentiation appears intended between ‘sales agency agreement’ and ‘instrument’ – see section 20(3) and (9). However, Section 20(5) requires a variation to a “sales agency agreement” to be in writing signed and dated by the parties without reference to instruments yet section 20(6) inexplicably requires the agent to “*ensure that a copy of any variation of the sales agency agreement or instrument is given to the vendor or purchaser immediately*”. Section 24C(3)(a) deals with disclosure of benefits in relation to any land or a business and refers to “*a benefit disclosed in a sales agency agreement*” without any reference to an instrument: and it makes no sense to draw such distinctions in that context.

Further, the term ‘sales agency agreement’ has been applied universally to all agency agreements for all forms of land and businesses for several decades. To introduce a highly technical meaning in circumstances where the term is broadly used and understood would obviously produce considerable ongoing confusion for both consumers (whose protection and greater awareness is intended) and agents. Would Parliament have intended to create such confusion?

It may be that the reference to “*by an agreement (a sales agency agreement)*” is in not intended to precisely define that term but to indicate that an agreement of this nature falls within the category of document known as a sales agency agreement.

In addition, the language within section 20 appears somewhat confused. Section 20 provides that an agent must not act unless “*authorised so to act*” by an “*agreement*” (in relation to residential land – see section 20(1) or by an “*instrument*” (see section 20(3)) – but elsewhere refers to “[*a*]n agent who has been authorised to act on behalf of a vendor or purchaser under this section”: however, the authority to act clearly comes from the agreement or instrument, not the section.

Given the use of terms and general drafting of section 20 and other sections of the Act plus the universal usage of the term “*sales agency agreement*”, the application of the term “*sales agency agreement*” in section 20(2) solely to an agreement in relation to residential land is uncertain.

### 6.3.2. Sales Agency Agreements in general - s.20

The Act and regulations impose requirements in relation to Sales Agency Agreements. Additional requirements apply to Sales Agency Agreements for residential land.

All Sales Agency Agreements must be in writing and signed/dated by the vendor (or the purchaser where the agent is a purchaser's agent) and by the agent who must immediately give a copy and any variation to the client. Failure to fulfil the requirements of the Act disentitles the agent to commission and expenses – s.20(8).

### 6.3.3. Sales Agency Agreements for residential land - s.20 & r.16A

A Sales Agency Agreement for residential land is subject to additional requirements. Such agreements must specify various information including –

- the agent's genuine estimate of the selling price without qualifying words – either as single figure or as a range where the upper limit does not exceed 110% of the lower;
- the selling price sought by or acceptable to the vendor without qualifying words as single figure;
- the manner of sale and nature of the agency;
- the duration of the agreement;
- the rights of the vendor to terminate;
- the services to be provided to the vendor;
- the nature and source and known value of any rebate, discount, refund or benefit expected to be received by the agent;
- whether the agent has “*authority to accept an offer*” for the land on behalf of the vendor;
- the circumstances in which a commission is payable; and
- a warranty that the agent will comply with its statutory obligations and act in the vendor's interests.

However, Sales Agency Agreements with the South Australian Housing Trust or the Public Trustee are exempt from these requirements as a consequence of the variation to the regulations of 25 September 2008.

The maximum period of an agency (whether sole, general or a combination of both) for residential land is limited to 90 days. (This avoids the problems created by automatic ongoing open agencies.) The agreement can be renewed (by the making of a new agreement) but it is not possible to create a period greater than 90 days by simply extending or post-dating an agreement. However, as a consequence of the variation to the regulations of 25 September 2008, an agent is now exempt from specifying any period in the Sales Agency Agreement where the vendor has subdivided the land and “*carries on business as a developer*”: however, where the land is residential land, the 90 day limit on the agency has not apparently been removed despite probably contrary intentions. This apparent slip means some agents will not be entitled to commission and expenses for sales occurring after the 90 day period has elapsed. In addition, the REIR legislation does not appear to apply to Sales Agency Agreements that were entered into before the legislation became operative: hence it appears that those

agreements are not limited to 90 days and may be extended without attracting the operation of the legislation.

The need to specify if the agent has authority to accept an offer raises interesting questions. An auctioneer has express authority to sign a contract for vendor or purchaser after the fall of the hammer – see r.16F and the prescribed standard conditions of auction appearing as Schedule 2C. However, given the definition of “offer” (see para 6.1 above), what does “*accept an offer*” mean in terms of the authority conferred and consequences for a binding agreement?

- If it was intended to empower the agent to sign a contract, it should have said so. Without some form of written agreement signed by the vendor, the agreement is unenforceable owing to section 26 of the *Law of Property Act*.<sup>7</sup>
- Can acceptance of an offer by the agent bring a binding agreement into existence in any event? Even if the requirements of section 26 of the *Law of Property Act* are satisfied, problems arise with offers not “in the form of a contract of sale document”. These ‘other offers’ must include at the head of the document a prescribed statement that states not only that the offer is not binding until both vendor and purchaser have signed a contract of sale document but also that an offer “*may be withdrawn at any time before signing*” that document.<sup>8</sup> Some ‘other offers’ are incapable of acceptance because they are not intended to be offers that are capable of acceptance – ie are only simple expressions of interest. However, it is uncertain whether a Court, applying the law of contract and equitable principles, would find that the prescribed statement prevented a binding agreement coming into existence in circumstances where, but for that prescribed statement, the offer was capable of acceptance. See also the discussion under para 6.5.

For a discussion of the disclosure in relation to a ‘benefit’, see item 6.4 below.

A parcel of land exceeding to 2.5 hectares cannot be “*residential land*” for the purposes of section 3 (see para 6.1 above). But what if the agent gets an agency to sell all land within a subdivision by allotment? The answer appears to lie in identifying what the agent is authorised to sell: if the agent is authorised to sell an interest in land that falls within the definition of “*residential land*”, the requirements of section 20

<sup>7</sup> **Section 26 - Contracts for sale of land to be in writing**

(1) *No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some person thereunto by him lawfully authorised.*

(2) *This section does not affect the law relating to part performance, or sale by the court.*

<sup>8</sup> The prescribed statement is as follows:

*“Note: This is not a contract of sale document. Both the purchaser and vendor must sign a contract of sale document before this offer becomes legally binding. An offer may be withdrawn at any time before signing a contract of sale document. Contracts of sale may also be subject to a 2 day cooling-off period (exercisable by the purchaser) under section 5 of the Land and Business (Sale and Conveyancing) Act 1994”.*

must be satisfied even though the total parcel of land does not fall within the definition.

The agreement must be printed or typewritten in not smaller than 12-point type but any variations may be legibly handwritten – r.16A(2)(a).

These requirements do not apply to an auctioneer who is not also acting as agent in the sale – r.16A(3).

An agent who fails to comply with these requirements is disentitled to commission and expenses – s.20(8).

Is the vendor’s conveyancer entitled to a copy of the sales agency agreement? Under all common agency agreements, the agent is entitled to deduct the amount of the commission and expenses from the deposit and only forward the balance for the purposes of settlement. In my view, the conveyancer cannot know if the correct amount has been forwarded unless a copy of the agency agreement is provided to the conveyancer. The conveyancer is obliged to ensure that all moneys due to the vendor under the contract (whether coming from the purchaser’s conveyancer, purchaser’s financier or the agent) are received. The agency agreement determines the amount coming from the agent and should be checked to determine that the agent has forwarded the correct amount. It is usually possible to get a copy from the vendor but a significant number of agents have failed in the past to give a copy to the vendor.

The vendor’s conveyancer must not make any payment that has not been expressly authorised by the vendor. Unless the vendor expressly gives authority to the conveyancer to pay the agent’s commission and expenses, any payment of an unsubstantiated claim by an agent is without authority.

#### **6.4. DISCLOSURE OF BENEFITS – SS.24C & 24D & R.16B**

In the sale of any land or business, an agent must disclose to the client (vendor or purchaser) in a prescribed form the nature, source and amount (or estimated amount or value) of any benefit that the agent or any other person receives or expects to receive from a third person.

With residential land, the disclosure must be made in the Sales Agency Agreement (see item 6.3 above). In addition, form R2 - *Disclosure of Benefits* (appearing as Schedule 2B to the regulations) is to be used in all other transactions unless the benefit –

- is disclosed in a Sales Agency Agreement in relation to residential land (but see the discussion under para 6.3.1) or
- payable pursuant to the sales agency agreement or the contract for the sale and purchase.

A ‘benefit’ includes a rebate, discount or refund (eg advertising rebate or discount). Where the benefit is non-monetary, the reasonable estimate of the value in dollars to the agent is to be used. A benefit from multiple transactions (same/different clients) is to be apportioned.

An agent can receive a benefit from a conveyancer in various circumstances where the conveyancer provides a service that benefits the agent but does not recover the cost of that service (including the associated administrative costs) in full from the

agent. There are several notable common examples. One arises in relation to prescribed inquiries undertaken by a conveyancer. Where the conveyancer directly or indirectly makes the prescribed inquiries for an agent to enable the agent to give its certificate for the vendor’s Statement under section 7 (ie the inquiries are not made to check that a statement which has already been served is complete and accurate), the conveyancer confers a benefit on the agent unless the conveyancer promptly requires payment of the search costs plus a fee that is not less than the cost of providing the service. A related benefit arises where the conveyancer forgoes charging a fee to a client that the agent was liable to pay (eg waiver of the administrative costs of conducting the prescribed inquiries). A benefit also arises where a conveyancer prepares a contract for an agent but does not promptly require payment for that service. In each of these circumstances, the agent is obliged to disclose the nature of the benefit and the value to the agent. In the first example, the benefit is worth several hundred dollars to the agent.

It appears possible to update the disclosure in a Sales Agency Agreement or an earlier form R2. However, when updating an earlier form R2, the benefits disclosed in the earlier form R2 should be repeated – see S.24C(3).

There are additional requirements in relation to residential land – s.24D. The agent may only seek to recover the amount of the expenses paid or payable. The agent may estimate the expenses where it is not reasonably possible to determine them and in any event must immediately repay any excessive payment received upon becoming aware of that excessive payment. Any benefit that is received as a result of referring the client to or contracting with a third party is to be paid to client unless already disclosed in the Sales Agency Agreement or form R2.

Failure to make the required disclosures in a Sales Agency Agreement for residential land disentitles the agent to commission and expenses – s.20(8): however, an agent may not know that he/she will be able to gain a benefit at the time that the agency agreement is entered into. But failure to disclose the benefits required to be disclosed in form R2 attracts a maximum penalty of \$20,000 – s.24C(2).

#### **6.5. OFFERS FOR RESIDENTIAL LAND – SS.21 & 22 & R.16B**

The REIR Act prescribes a process that agents and sales representatives must follow in relation to offers for residential land.

If a person communicates an offer, the agent or sales representative must take “*all reasonable steps*” to record the offer in writing. A copy of the offer must be given to the purchaser immediately. The agent or sales representative must give a copy to the vendor within 48 hours (or at a later time agreed with the vendor) and ensure that the vendor has copies of all offers “*before taking any step on behalf of the vendor directed towards acceptance of an offer*”.

The term “*offer*” is defined in the Act (see above). However, offers for residential land that have been prepared by an agent or sales representative are divided by regulation 16B into –

- offers “*in the form of a contract of sale document*” and

- other offers.

An offer in the form of “a contract of sale document” must include a prescribed statement<sup>9</sup> at the head of the document.

Any other offer (ie any offer that is not in the form of a ‘contract of sale’ document) must include a similarly worded statement plus certain prescribed information (including the amount of the offer, the proposed settlement date and the conditions to which the offer is subject). The prescribed statement<sup>10</sup> indicates that the offer is not binding.

Unfortunately, there is no definition of “a contract of sale document”. To most agents and members of the public, “an offer in the form of a contract of sale document” means a *pro forma* contract of sale upon which the terms of an offer have been recorded. Applying this meaning, the category of ‘other offers’ includes documents containing offers that potentially are capable of being accepted and enforced – for example tenders and options to purchase. In such situations, the prescribed statement appears misleading. See also the discussion under para 6.3.3.

The prescribed statement and the prescribed information (if any) must be printed/typed in at least 12 point.

The agent/sales representative must keep details of the offer confidential.



**6.6. AUCTIONS – PART 4A**

**6.6.1. Conditions of auction for residential land in general – ss.24I & 24J & r.16H**

Prescribed standard conditions now apply to an auction of residential land – see Schedule 2C. These conditions must be available for perusal at the place of auction at least 30 minutes

<sup>9</sup> “Notice to purchaser: This is a contract for the sale of residential land. You may be bound by the terms of this contract if it is signed by both you and the vendor. You should seek independent legal advice if you are unsure about the terms contained in this contract. Contracts for the sale of land may be subject to a 2 day cooling-off period (exercisable by the purchaser) under section 5 of the Land and Business (Sale and Conveyancing) Act 1994.” See regulation 16B(a).

<sup>10</sup> “Note: This is not a contract of sale document. Both the purchaser and vendor must sign a contract of sale document before this offer becomes legally binding. An offer may be withdrawn at any time before signing a contract of sale document. Contracts of sale may also be subject to a 2 day cooling-off period (exercisable by the purchaser) under section 5 of the Land and Business (Sale and Conveyancing) Act 1994”.

before auction and must be audibly announced by the auctioneer immediately before the auction. Additional conditions of auction are permitted and will be used by most auctioneers but any additional conditions do not apply to the extent that they conflict with the prescribed standard conditions.

**6.6.2. Documentation for an auction of residential land– ss. 24J, 24K & 24L & r.16I**

For residential land, the “responsible agent”<sup>11</sup> (not auctioneer) must attend to various documentation. First is the “Auction Record” which essentially is a collection of documents that provides a detailed chronology of events to and after the auction. It must be prepared before auction and include –

- the Bidders Register (see below)
- the reserve price and any changes
- the amount of each bid (identifying the bidder)
- the amount of each vendor bid
- details of successful sale (if any)
- details of any same-day negotiations with bidders (if passed in).

Details of each bid and other activity during the auction (eg changes in reserve price) must be recorded immediately.

The responsible agent must ensure that the Auction Record is kept confidential and must retain it for 5 years – s.37A & r.20.

The responsible agent must prepare and maintain a Bidders Register in which are recorded prescribed information including details of –

- the full name and address of each bidder and any person for whom bids are to be made,
- the general description of the proof of identity provided by each bidder together with the signature of the agent verifying the sighting of that proof, and
- any authority to bid for a third party.

Before recording the registration of a bidder, the responsible agent must establish the identity of the bidder and of any person for whom bids are to be made. This proof of identity is established by viewing (without the need to retain a copy) any one of a wide range of documents including a driver’s licence, passport, credit or debit card, a gas, electricity or telephone account, any similar document or card and a certificate of incorporation (for bodies corporate). Hence establishing proof of identity and authority to act is simple: to do it fraudulently will also be simple.

A written authority to bid on behalf of another person must be signed by that person. The agent must inspect that authority. However, whilst the responsible agent should ask if a person is intending to bid on behalf of another person, there is no requirement in the Act that this information be disclosed. Consequently, the common practice of persons bidding for

<sup>11</sup> A “responsible agent” in relation to an auction means the agent who has entered into a sales agency agreement with the vendor for the sale of the land, whether or not the agent is to conduct the auction through the instrumentality of another agent – see s.24J(5) .

undisclosed principals will continue.

In the past, the name recorded in an auction contract as the purchaser has been the bidder (whether acting for a disclosed principal or not) although the phrase “and/or nominee” has usually been added. It remains to be seen whether the name of the bidder or the disclosed principal will be recorded as purchaser under this new regime.

At the time of registration, the agent must supply each bidder with *R4 - Bidders Guide* and *R5 - Collusive Practices*.

The agent must also supply each bidder prior to the start of the auction with an identity (bidder’s) number.

### 6.6.3. Bidding at auctions – ss.24J, 24K, 24N & 24O & r.16I

At any auction of residential land, the auctioneer must not take a bid from an unregistered bidder. The auction may be interrupted if necessary to allow registration of an unregistered bidder who seeks to bid but the auctioneer is expressly empowered to decline to take a bid from such persons. The responsible agent must also ensure that no bid is accepted from an unregistered bidder.

When taking a bid, the auctioneer must audibly announce bidder’s identifying number. If the auctioneer makes a bid for the vendor, the auctioneer must audibly announce “vendor bid”.

A bid for the vendor (including a mortgagee/holder of a security interest) may only be made if expressly permitted by the auction conditions – and no person other than the auctioneer may make such bids. The auctioneer must not knowingly take a bid from another person on behalf of the vendor and must not pretend to take a bid.

Where vendor bids are permitted by the auction conditions, the auctioneer may make –

- for residential land – up to 3 vendor bids, and
- for other land or a business – an unlimited number of vendor bids.

Any vendor bid must be below the reserve.

If land or a business is passed in immediately after a vendor bid, all marketing (oral or written) that gives the amount of the last bid must state that it was a vendor bid.

### 6.6.4. Collusive practices – s.24L & r.16J & Sch.2D

A person must not, by a collusive practice<sup>12</sup> relating to the sale by auction of land or a business, induce or attempt to induce any other person to –

- abstain from or limit bidding, or
- prevent free and open competition at auction.

Nor may a person willingly participate in a collusive practice.

This provision is aimed at attempts to prevent competitive

<sup>12</sup> Under s.24L(4) a “*collusive practice*” includes an agreement, arrangement or understanding under which 1 person will, on being the successful bidder at an auction of land or a business (and whether or not subject to other conditions), allow another person to take over as purchaser of the land or business through the auctioneer at the auction price.

bidding between rival bidders. It does not invalidate every nomination or an assignment of an interest in an auction contract.

For residential land, the agent must supply each bidder with *R5 - Collusive Practices* on registration as a bidder.

For non-residential auctions, the auctioneer must audibly announce the information set out in *R5 - Collusive Practices* immediately before the start of the auction.

### 6.6.5. Disruptive practices – s.24M

An intending bidder at an auction of land or a business, or a person acting on their behalf, must not –

- knowingly hinder a potential rival bidder from attending or freely bidding at the auction, or
- harass a potential rival bidder with intention of interfering with attendance or bidding, or
- do anything with the intention of preventing or causing a major disruption or cancellation of the auction.

## 6.7. MISCELLANEOUS

### 6.7.1. R3 - Buyers Information Notice – s.13A & Sch.1A

Notice *R3 – Buyers Information Notice* is only required for residential land. Unlike the requirements for all other residential forms, the obligation is placed on the vendor to ensure service of this notice. Section 13A(1) provides that the vendor of residential land “*must take all reasonable steps to deliver the prescribed notice to a purchaser when the purchaser is present on the land at the invitation of the vendor in order to inspect the land prior to its sale*”. Hence, unless the purchaser is present on the land to inspect at the invitation of the vendor, no requirement to serve this notice arises at this time. Conversely, if the purchaser inspects the land more than once, it is not necessary to give the notice again.

However, whether given previously or not, the notice must be “*attached*” to the Statement under section 7 (including any statement on display at an auction) – ie the purchaser should usually receive the notice twice. No definition of “*attached*” appears in the legislation. However, if it is not “*attached*” (ie physically affixed by staple or some other fastener, the requirements of the section are not apparently satisfied.<sup>13</sup>

The requirement that the Notice be “*attached*” to the Statement

<sup>13</sup> The Queensland Court of Appeal considered similar legislation in the *Property Agents and Motor Dealers Act 2000* in *MNM Developments P/L v Gerrard* [2005] QCA 230. The legislation in that case required a warning statement to be “*attached [to the contract] as its first or top sheet*”. The contract and warning statement were served in one continuous fax transmission. The judgments (especially that of Chief Justice de Jersey) indicate that “*the ordinary concept of ‘attach’*” should be adopted – which required a “*physical relationship between the documents*” – and which was not possible by fax. In *M P Management (Aust) Pty Ltd v Churven* [2002] QSC 320, Muir J said in relation to the same legislation that “*‘attached’ connotes some form of joinder, fastening or affixation*”. Subsequently, section 364 of that Act was amended to include a definition of “*attached*” meaning (in relation to a warning statement) “*attached in a secure way so that the warning statement, any information sheet and the contract appear to be a single document*”. Examples of attachment by binding and stapling were given.

under section 7 appears to preclude service of a Statement under section 7 by fax.<sup>14</sup> Whilst section 17 of the *Land and Business (Sale and Conveyancing) Act* does not expressly contemplate service of a Statement under section 7 by facsimile transmission, it does not preclude service by that method. Proof of receipt is the issue.

If an agent acts for the vendor, that obligation is transferred to the agent – see s.13A(5).

The failure to serve the notice does not automatically render any subsequent contract void or voidable, nor does it make the vendor's Statement under section 7 incomplete or inaccurate (ie any right to cool-off expires as usual). However, failure to serve the notice as required is an offence – see s.14. It is suggested that in a private sale the vendor's conveyancer should promptly identify whether the vendor served the notice at the time of inspection of the land and, if it was not, ensure that the notice is served as soon as reasonably possible.

When preparing an *R3 – Buyers Information Notice*, it is suggested that the conveyancer include an acknowledgement of receipt (similar to the acknowledgement of receipt added to the *pro forma* Statement under section 7 published by the AICSA and the Real Estate Institute) to enable proof of service. The conveyancer should also endeavour to have this acknowledgement signed and dated by the purchaser with the acknowledgement of receipt of the Statement under section 7.

### 6.7.2. R6 - Warning Notice to Purchaser – s.24F & r.16F

A person must not act (or enter into an agreement to act) as an agent “*on behalf of both the vendor and purchaser of the same land or business at the same time*” – which expressly includes (but is not limited to) situations where –

- the agent is offering for sale land or a business that the purchaser is contemporaneously contracted to buy from the vendor, or
- the sale of the vendor's land or business is “*subject to*” the sale of the purchaser's land or business and the agent also acts in the sale of that land or business of the purchaser (ie acts in the sale of the ‘subject to’ land or business).

The scope of the prohibition is uncertain<sup>15</sup>. A narrow interpretation limits the prohibition to acting in relation to the same land or business. Alternatively, it may extend to prohibit an agent from acting in the sale of land or a business owned by the purchaser that is totally unrelated to the sale of the vendor's land or business. – which would appear unreasonable and unfair on the purchaser and/or the agent in most situations.

However, section 24F(3) permits an agent to act for both vendor and purchaser in the ‘subject to’ situation above where the agent has given *R6 - Warning Notice to Purchaser* to the purchaser and the purchaser acknowledges receipt in writing on

<sup>14</sup> See *MNM Developments P/L v Gerrard* supra. The *Property Agents and Motor Dealers Act 2000* (Qld) now includes various procedures for providing warning statements, depending on the method of delivery of the contract.

<sup>15</sup> Section 24F(1) simply provides:

“(1) A person must not act as an agent on behalf of both the vendor and purchaser of the same land or business at the same time. Maximum penalty: \$20 000.”

form.

Auctioneers are exempt from the application of this provision if they are only “*performing the functions of an auctioneer*” which expressly includes signing a contract for the sale of land or a business on behalf of the vendor or purchaser at the fall of the hammer – r.16F.

Form R6 is approved by the Commissioner (presumably to enable speedy changes) and does not appear in the regulations.

### 6.7.3. R7 - Warning notice (for financial or investment advice) – s.24B & Sch.2A

This notice must be given in relation to any land and a business where the agent gives “*financial or investment advice*”. There is no definition of financial or investment advice but almost certainly extends beyond the advice that only holders of any of the financial services licences may legally give. The phrase would appear not to catch the mere puffery of an agent (“This is an excellent investment”) but probably catches situations where the agent gives minimum rates of return.

No time is specified for service: presumably the notice must be given before the advice is given.

### 6.7.4. Service of cooling off notice – s.5(2)

The specified means of service of a cooling-off notice (ie a notice under section 5) have been updated and refined. Notice may now be given –

- to the vendor personally;
- by registered mail to the vendor's last known address (*Note that it must be posted before prescribed time but must not be returned unclaimed*);
- by facsimile transmission to number provided by the vendor for that purpose (*Note that it must be received before prescribed time*); or
- if an agent is acting for the vendor –
  - by leaving it for the agent at the “*agent's address for service*” with a person apparently responsible to the agent, or
  - by registered mail to the “*agent's address for service*”.

The “**agent's address for service**” may be one of two addresses – the address for service of documents given to the Commissioner or an address nominated by the agent to the purchaser for service of the notice. The latter address may be nominated in the Statement under section 7 – although strictly speaking that Statement is from the vendor.

This change requires an alteration to the wording of the Forms 1 and 2 of Schedule 1 to the Regulations. Operation of this amendment was suspended, presumably to enable implementing regulations to be prepared.

### 6.7.5. Statement under section 7

The categories of transactions in the preceding 12 months that must be disclosed in a Statement under section 7 have been expanded to include some unregistered dealings. The prescribed particulars of transactions in last 12 months must now include –

- obtaining an option to purchase, and
- entering into a contract to purchase the land (on one's own behalf or on behalf of another).

This change requires an alteration to the wording of the Forms 1 and 2. Operation of this amendment was also suspended, presumably to enable implementing regulations to be prepared.



#### 6.7.6. Agent's obligation to make prescribed inquiries – s.9

The wording setting out the agent's obligation to make the prescribed inquiries has been changed. The wording originally stated that *"the agent or a person acting on behalf of the agent must make the prescribed inquiries ... and ... the agent, or some person acting on the agent's behalf, must sign a certificate ..."*. This wording clearly placed the obligation on the agent to make the prescribed inquiries for the purposes of providing a certificate that was to be attached to the vendor's Statement under section 7.

The new wording is that *"the agent must ensure that the prescribed inquiries are made ... and ... the agent must sign a certificate in the form required by regulation ... and ... the agent must ensure that a copy of the certificate is given to the vendor immediately after signing the certificate"*. New section 37 enables a person to sign the certificate on behalf of the agent.

The Institute expressed its grave concern to the Minister at this change because it appeared to remove the agent's obligations to make the prescribed inquiries. The Minister's response was that Parliamentary Counsel had confirmed that the wording was altered merely to make it consistent with other legislation and that the change did not alter the agent's obligations in relation to making the prescribed inquiries or giving the certificate in its own name although a time for giving the certificate was now specified, being *"immediately after signing"*. It was also noted that no change was intended to the agent's obligation to make the prescribed inquiries and if it appeared that the change in wording was altering the practices of agents, the matter would be included in the review of the Act in 2 years time.

The intention to retain the obligation on the agent to make the prescribed inquiries is supported by the Minister's second reading speech in relation to the amendment in which she said: *"This clause sets out the following additional requirements that an agent acting on behalf of the vendor or, in the absence of a vendor's agent, an agent acting on behalf of the purchaser must ensure are satisfied:*

- *that enquiries prescribed by regulation are made; and*
- *that immediately after the signing of the certificate in relation to the completeness and accuracy of particulars relating to land—a copy of the certificate is given to the vendor."*

We await the reaction of the agents.

#### 6.7.7. Instalment and rental purchase contracts – s.6

Contracts with payment of the purchase price by instalment (excluding payment of the deposit in not more than 3 instalments) have been void for decades.

However, rental purchase contracts are now voidable.<sup>16</sup> Section 6(2a) provides that a contract is voidable at any time by a person where that person –

- has a right or obligation to purchase land and
- has an obligation to pay rent in respect of occupation of the land for more than 6 months before the right is exercised or purchase completed.

The provision is aimed at unconscionable arrangements and a person avoiding the contract can recover any amount in excess of fair market rent for the period of occupation. Rent is defined to include any amount payable in respect of a right to occupy the land.

Unfortunately, section 6(2a) creates serious problems for a range of reasons.

- The provision is not restricted to residential land. It potentially includes any contract where a person has a right to purchase land and an obligation to pay rent in respect of occupation of the land for more than 6 months before the right is exercised or purchase completed. Hence such wording catches most commercial leases that include an option to purchase. It also catches quite legitimate arrangements where it suits a purchaser to lease the property for more than 6 months before settling.
- A compounding factor is that section 6(2a) appears to catch any such agreements, whether entered into before or after the operation of the legislation.
- The provision does not include any mechanism to enable affirm the contract or waive the requirement (for example after receiving independent legal advice – as applies to cooling-off and certain rights of commercial tenants) nor is the right to avoid the contract limited to a specified period after service of a prescribed notice detailing the person's rights. Payment under the contract is not sufficient to constitute an affirmation – see section 6(2b).

Being only voidable, contracts caught by section 6(2a) can be affirmed so long as the person does so with full knowledge of the circumstances and consequences. The affirmation should

<sup>16</sup> In *Johnstone V Poralka Investments Pty Ltd* [2008] SADC 87, Judge Clayton in the District Court held a long term rental purchase agreement to be void as an instalment contract under section 6(1). However, His Honour's decision was handed down on 4 July 2008, some 24 days before the REIR Act came into operation. In view of the provisions of the new section 6(2A), that decision may not have general application in future because such contracts cannot be both void and voidable.

be in writing.

It is strongly suggested that the purchaser should be encouraged to obtain independent legal advice before surrendering their right to avoid the contract.

Where a conveyancer identifies that the client (vendor or purchaser, landlord or tenant) may be a party to such a contract, the conveyancer should urge the client to obtain legal advice on their legal position: if the client declines to seek that advice, the conveyancer should –

- consider the wisdom/liability of any actions that the client asks them to take and
- confirm in writing the recommendation to the client to obtain legal advice concerning their legal position.

**6.7.8. Marketing of residential land – s.24A**

In the marketing of residential land, an agent must not represent the likely price for the sale to be –

- less than the greater of
  - the agent’s (minimum) estimate of the selling price and
  - the selling price sought by/acceptable to the vendor, and
- more than 110% of the lower limit (s.24A).

This provision is aimed at underquoting of the likely selling price by regulating the minimum likely price that may be quoted in marketing residential land. However, there is no requirement that the agent market a property at this likely price/range and a property can be marketed without reference to any price.

**6.7.9. Restriction on agent obtaining beneficial interest – s.24G & r.16G**

An agent, sales representative and any associate “*must not obtain or in any way be concerned in obtaining, a beneficial interest*” in any land or a business that he/she is authorised to sell or has appraised unless the sale is negotiated by an independent agent who is then authorised to sell the land or business. However, there are two exceptions – see below.

To “appraise” includes providing advice (whether at request or not of vendor) as to value of the land/business where it may be reasonably assumed that the vendor may rely on the advice.

Circumstances in which a person obtains a beneficial interest in relation to the land or business are specified to include –

- purchasing,
- obtaining an option to purchase, and
- being granted a general power of appointment.

An exception to the prohibition arises where the Commissioner approves the transaction “*before the person obtains the [beneficial] interest*” (my emphasis). A traditional interpretation of the wording would suggest that the Commissioner’s approval is required before the person enters into the contract to purchase. The previous provision included a prohibition against obtaining an “interest” but a person could apply for an exemption “in relation to the purchase” and that application was usually made after the contract had been

signed. Presently there is no apparent intention by the Commissioner to vary the original practice.

Another exception to the prohibition was introduced by the variation to the regulations of 25 September 2008. It arises where the agent or the sales representative obtains the beneficial interest in land or a business at a public auction. However, the exemption only arises if the auction has been advertised at least once per week in the fortnight immediately before the auction in a newspaper circulating generally throughout the State or the area in which the land or business is situated.

An “**associate**” is defined widely. It includes –

- a relative, spouse or domestic partner;
- a body corporate in which a person/relative/spouse/ /domestic partner has ‘a relative interest’;
- a trustee of trust in which a person/relative/spouse/ /domestic partner/above body corporate is beneficiary;
- an employee, employer or partner; and
- a person who, to the knowledge of the agent/sales representative, may give a benefit to the agent/sales representative in connection with the transaction if the negotiation is successful.

This last category catches persons who previously were not treated as an associate for the purposes of the legislation.

Where the Commissioner’s approval is required to enable the purchase, a valuation from a registered valuer of any land is required<sup>17</sup> and the agent is not entitled to any commission or expenses unless the Commissioner approves such payments.

**6.7.10. Agent to supply valuation to vendor – s.24E & r.16E**

It is not unusual for an agency to make unsolicited contact with the owner of land in relation to the possible sale of that land. If that contact is not made by advertisement or mail (eg it is made by personal approach or a card in the letter box) and the agent is consequently authorised to sell that land, the agent must not commence negotiations for the sale without prior public advertising unless the agent provides the vendor with a formal written valuation of the land. Only a valuer approved by the Commissioner may undertake the valuation and the cost of the valuation must be borne by the agent.

These requirements originally also applied to businesses. However, the variation to the regulations of 25 September 2008 deleted any reference to a business, presumably because a valuer under the *Land Valuers Act* only values land which has the same definition as in the *Land and Business (Sale and Conveyancing) Act*. Unfortunately, the variation has created another anomaly. Leases and profits à prendre are interests in land that may be included in the sale of a business.<sup>18</sup> A valuer may value leases for rental purposes. However, such

<sup>17</sup> The requirement that a valuation be obtained from a valuer under the *Land Valuers Act* originally also applied to businesses. However, the variation to the regulations of 25 September 2008 deleted any reference to a business, presumably because a valuer under the *Land Valuers Act* only values land.

<sup>18</sup> Section 3 defines land to include “*an interest in land*” – hence includes a lease and a profit à prendre.

valuations are usually somewhat insulated from the business being conducted on the premises (see the *Retail and Commercial Leases Act*). In cases where a leasehold interest is sold as part of a business, it would appear that an agent is still be required to obtain a valuation of the lease from a valuer although the valuation will often be of little relevance to the value of the business.

The incidence of profits à prendre is rare. Their formal valuation would be extremely rare but apparently required where section 24E applies.

**6.7.11. No caveat for expenses of sale of residential land – s.24**

Some sales agency agreements included a clause in which the vendor agreed to secure the authorised expenses of the sale against the land. The Act now provides that an agent must not lodge a caveat to secure payment of a debt (ie for expenses) in connection with sale of residential land. The use of a workers lien in place of a caveat has been suggested by some agents: however, that remedy is not applicable because it requires the claimant to have undertaken manual work or supplied materials in relation to the improvement of the land – see the *Workers Liens Act 1893*.

**6. CONCLUSION**

The *Real Estate Industry Reform* legislation made major changes to the way that agents and auctioneers operate as well as redefining a ‘small business’, imposing a new obligation on the vendor and changing the content of the vendor’s statement under section 7. It requires new disclosures, affects the content of documents and creates new rights for vendors and purchasers. Conveyancers need to be familiar with this legislation to be able to inform clients about their rights, duties and obligations. This paper is designed to assist conveyancers in finding and understanding this legislation.

**7. USEFUL WEBSITES**

Useful websites are –

Amended Acts and regulations	<a href="http://www.legislation.sa.gov.au">www.legislation.sa.gov.au</a>
Forms and notices R1 to R7	<a href="http://www.ocba.sa.gov.au/consumeradvice/realestate/forms.html">www.ocba.sa.gov.au/consumeradvice/realestate/forms.html</a>
Australian Institute of Conveyancers (SA Division)	<a href="http://www.aicsa.com.au">www.aicsa.com.au</a>

**Geoffrey Adam**  
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