

SECTION 55

Commission in circumstances where the agent obtains a beneficial interest

Policy Background

Section 55 of the Estate Agents Act prohibits a person who is an estate agent, Agent's Representative, agency employee or relative of the estate agent or Agent's Representative from obtaining a beneficial interest in (that is, buying) any real estate or business the estate agent has been commissioned to sell unless:

- the person obtains written acknowledgement and consent from the seller before the contract of sale is entered into and the person acts honestly and reasonably in relation to the transaction;
- no commission or other reward is payable in relation to the transaction; and
- the seller is in substantially as good a position as if the real estate or business were sold at fair market value.

The withholding of commission in these circumstances has unfairly impacted on agents since its amendment in 2011, providing a 'windfall gain' to vendors who receive a service that they do not need to pay for. The estate agent undertakes all the work of listing, marketing and selling a property but receives no commission if the property is bought by a relative or associated person. Effectively the agent is providing a service and is required to comply with the requirements of the Estate Agents Act but receives no compensation for the work they undertake on the seller's behalf.

This is particularly a burden in small towns where there may only be one real estate agency, meaning that there is a more concentrated pool of people with a connection to the estate agency (such as husbands, wives, domestic partners, children, step-children, brothers, sisters and parents) seeking property to buy.

This prohibition presents substantial risk management issues for large metropolitan agencies with a high number of employees as well as smaller agencies particularly those operating in regional and rural Victoria.

At present the penalties for a breach of Section 55 are severe: a fine of more than \$37,200 or two years imprisonment, or both. Agents could also lose their licence if there is an enquiry into whether or not they are a fit and proper person.

Prior to 2011, agents could apply for exemptions from Section 55 where associated parties were involved in a sale. This provided flexibility in the application of the legislation – protecting consumers while ensuring that agents were still entitled to fair payment for their work.

Policy Issues

This provision was introduced as a consumer protection initiative and is now out of step with other jurisdictions. It is essential that this legislation balances the need to avoid conflict of interest with the fundamental right of estate agents to receive fair payment for their services.

Vendors in small regional towns are being financially disadvantaged whereby potential buyers may be excluded due to their association with the listing agency.

Section 55 has also had unintended consequences at auctions where successful bidders have been gazumped by an underbidder who was an associated person of the agency. When vendors consider how much they would save by not paying commission, they decided to sell to the underbidder instead of the successful bidder.

An estate agent or Agent's Representative who buys a property they have been commissioned to sell (or whose relative or associated person buys the property) should act honestly and reasonably, obtaining the seller's consent to both the sale and the payment of the commission in an approved form.

Discussions around removing the ban on commissions under section 55 of the Estate Agents Act seek to impose additional protections for sellers, such as a 21 day cooling-off period to allow (particularly for sellers in rural areas) access independent legal advice on a sale. REIV considers that a 21 day cooling off period is excessive, particularly as modern technology has enabled sellers (even those in regional areas) quick access to independent legal advice.

Policy

The overly restrictive Section 55 legislation should be repealed. In its current form, many agencies – operating in both regional Victoria and metropolitan Melbourne - are financially disadvantaged by this draconian legislation.

The REIV does not consider a need to prohibit commissions when an estate agent, their representative or associated person gain an interest in a property being sold by the same agency, provided appropriate consumer protections are in place. This may be either an approved form or a cooling-off period for sellers. Any cooling-off period in such circumstances should be five business days.