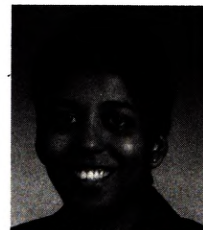


The Estate Agents and Sale of Land Acts (Amendment) Act 2003



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The *Estate Agents and Sale of Land Acts (Amendment) Act 2003 (Vic) (Act)* was passed by the Victorian Parliament on 3 June 2003 with most of the major amendments coming into effect on 1 February 2004. The legislation amends the *Estate Agents Act 1980 (Vic)* and the *Sale of Land Act 1962 (Vic)*. The government has said that the legislation results from a government review and consultation with industry and consumer groups.¹ While this article does not go through all the amendments imposed by the Act, it will focus on some of the significant amendments.

Changes to the Sale of Land Act 1962

The Act ensures that dummy or fictitious bids are prohibited under any circumstance. The Act does permit vendor bids, but only by the auctioneer and only where this is allowed by the auction rules. In such circumstances, the auctioneer must announce before the auction commences that the auction conditions permit vendor bids and must ensure that before or at the time of making a vendor bid, it is announced at the auction as a vendor bid. The Act imposes strict penalties for offences relating to dummy and undeclared vendor bidding with a maximum penalty of 240 penalty units for an individual and 600 penalty units for a corporation.

The Act also allows a purchaser to apply to the Victorian Civil and Administrative Tribunal (VCAT) for damages where the purchaser has suffered a loss as a result of a breach of the dummy bidding provisions. Such a claim for damages must be made within two years of the auction date. However, the Act does include provisions to prevent frivolous or vexatious claims and VCAT may require an applicant to pay compensation to the vendor for any loss/damages arising from a frivolous application.

Amendments to s25 of the *Estate Agents Act* allow the Director of Consumer Affairs/Chief Commissioner of Police to apply to have VCAT conduct an inquiry into whether an agent has contravened the *Sale of Land Act*. This investigative process comes with the consequential power of VCAT to cancel or suspend licences and other resulting penalties.

The Act further introduces amendments that prohibit a bidder or a buyer's advocate from harassing or interfering with another bidder or doing anything to prevent or disrupt an auction. Nevertheless, any

person at an auction may ask in good faith a reasonable number of questions about the property, the contract of sale or the rules of the auction.

The Act also introduces a range of amendments for cooling off rights for non-auction sales and amendments to regulation-making powers. Importantly, there is no longer a monetary cap on the sale price at which the cooling off provisions may be utilised, so significantly increasing the number of transactions to which those provisions may apply.

Changes to the Estate Agents Act 1980

One of the main changes arising from the Act is to prohibit an estate agent from retaining a rebate paid to the agent in relation to advertising or other outgoings purchased by the agent on behalf of their client. Any benefit of a rebate must be passed on to the client and this applies both with monetary and non-monetary benefits. There are penalties imposed on an agent for failing to pass on the rebate to the client (maximum of 60 penalty units). The Act also creates a new offence for a continuing course of conduct where an agent on three separate occasions within a 12-month period illegally retains a rebate or breaches other related provisions (maximum of 240 penalty units).

The Act reiterates the position that it is an offence for an estate agent (or their representative) to make false representation to a vendor or prospective vendor as to the true estimated selling price of the property. The same holds for an agent who falsely understates to a purchaser the estimated selling price of a property and this offence affects both written and oral representations (200 penalty units).

The right of an agent to provide an estimate of the selling price of a property remains unchanged. However, the Act requires that an agent record the estimated selling price in the authority to sell, before obtaining the vendor's signature. While the estimated selling price is not a sworn valuation or guaranteed sale price, the Act allows the Director of Consumer Affairs to require an agent to provide evidence of the reasonableness of any estimate of the selling price made by the agent (or its representative), including representations made in an advertisement. The agent must comply with the Director's requirement and failure to do so may result in a fine of 60 penalty units.

The Act also provides for changes to commission sharing whereby an agent is now permitted to share

a commission with any individuals outside their own agency. However, in such situations a "Notice of Commission Sharing" must be given before the authority to sell is signed by the vendor.

There are also a number of changes made to licensing rules in reference to agents and corporations, the employment of agents' representatives, audit rules and much more.

Net effect?

In general terms, the changes introduced through this Act suggest a desire for greater transparency in the real estate industry and a significant attempt to increase consumer protection when buying and selling real estate. The intent of many of the changes is to ensure that consumers are aware of how their agents operate during the whole transaction from the moment an authority to sell has been signed to the completion of the auction process. While there are numerous administrative amendments arising from the Act (with certain advantages to the industry), the changes highlighted in this article demonstrate that the Act is a strong piece of consumer protection legislation.

The Minister of Consumer Affairs, John Lenders has announced that Consumer Affairs Victoria (CAV) will enforce these new changes through a combination of proactive and reactive inspection strategies². CAV has a specialist team of 12 inspectors, trained by police, who will conduct random patrols of commercial and residential auctions across Melbourne. These inspectors will conduct covert investigations and respond to consumer complaints³.

It is arguable that dummy bidding was always illegal and an agent's misrepresentation would be covered under a s52 *Trade Practices Act 1974 (Cth)* action. Nevertheless, the amendments that legislate on these areas coupled with the Commissioner's new power to query the reasonableness of an agent's estimated selling price, the transparency required with commission sharing and the passing back of rebates to clients are indicative of the present government's message to the real estate industry that it needs to service its customers better than the government considers it has in the past. ■

¹ Fact Sheet, Consumer Affairs Victoria, December 2003 (RE-05-01-735).

² Media release from the Minister of Consumer Affairs, 30 January 2004.

³ "Dummies make their final bid", Cameron Houston, Helen Westerman, *The Age*, 31 January 2004.