

# **Legal Practice Notes**

**Amendments to  
Land and Business (Sale and Conveyancing) Act**

**2014**

***Corsers Lawyers***

**Mark Kurtze B A L. LB**

# Changes and Practice Issues and Comments Act commencing 1 January 2014

## *Land Business (Sale & Conveyancing) Act (the Act)*

### **These provisions apply only to Residential Sales Agency**

#### **Appointments and Period of Agency**

1.1 90 day rule continues.

(s 20 1 (c) (ii) - the prescribed period in the Act

1.2 with only one (1) "extension" allowed (s 20)

#### **Extending an Agency**

2.1 An Agency can be extended with the agreement of Vendor but must follow a procedure. (s 20 (6a) )

2.2 Extend only Once

An Agency can only be extended once. (s20 (6b))

2.3 To extend an Agent needs to serve a Notice of Expiry not earlier than 14 days before the Agency terminates asking (in a prescribed format) if the Vendor wants to extend.

The Extended Agency can be signed up before the 14 days period expires, leading up to the termination date of the 1<sup>st</sup> Agency, or after; but an Expiry Notice has to be served in the period.

#### No Expiry Notice before Agency ends – No Extension

If an Expiry Notice is not given the Agent is not able to extend. (s 20 (6c)

2.4 No refusal by Vendor and No Extension signed

The Vendor may decline an extension and this must be in writing.

The Vendor may also do nothing in the Notice period.

If no notice is given back (by the Vendor) declining then the Agency

automatically extends for the prescribed period. (s20 (6a) (b)(ii))

days then runs

180

### **Why present an Extension Agreement if a Notice is served ?**

- 3.1 If no reply declining is given by the Vendor (to a Notice of Pending Expiry) and no Extension is presented and signed then it appears 180 days would run automatically.
- 3.2 This may not be practical as new arrangements would need to be made for expenses and the like.

### **The Vendor may unilaterally Terminate in any Extension Period**

- 4.1 The Vendor however can terminate any Extended Agency at any time without cause.

### **Form of Expiry Notice to be given to Extend**

- 5.1 The Expiry Notice needs to comply with the Act and give information advising the Vendor they can terminate the Extended Agency during the extended term (s 20(11))

It must set out

- (a) the termination date when the Agency is to expire
- (b) advise the Vendor they can give notice they do not wish to extend
- (c) that the notice must be given 14 days prior to expiry
- (d) that it will extend for the prescribed period unless the Vendor gives notice to the Agent it does not want to extend
- (e) that it can only extend once
- (f) that a copy of an Extension must be given immediately or within 48 hours
- (g) that the Vendor can terminate at any time in the Extended period

### **Why give an Extension Notice ? Wait Instead ?**

- 6.1 Instead of serving a Notice and triggering an extension an Agent could simply wait for the end of the term and then present a new Agency Agreement.

If no notice of expiry (as defined in s.20(11)) is given the Agency Agreement terminates on the date it is due to expire and cannot be extended. There is no reason why a new Agency Agreement could not be entered into after that expiry date. This would achieve the purpose identified by the Attorney General in the final reading in Hansard of the parties discussing whether there would be a continuation of the agency albeit under a new agreement.

The Vendor would not have unilateral termination rights if a new Agency was entered into after the end of the earlier Agency.

Even if a notice of pending expiry is given, and the Vendor exercises his rights under s.20(6a)(a) and gives notice indicating an intention not to extend the agreement, then in this case the agreement terminates on the date it is due to expire – s.20(6a)(a), then in this case there is still no reason why a new Agency Agreement (eg on different terms as to commission etc) could not be entered into after that expiry date.

So if an Agency Agreement expires and no extension was operative a new Agency can always be entered into once any existing Agency Agreement has terminated by the term of agency being reached and concluded.

### **Subsequent (New) Agency**

- 7.1 There is a prohibition in the Act to restrict an Auction Agency being terminated early and entering into a new Agency into before the Agency term would have elapsed. see s 20(6f)

This is to restrict parties from changing the Vendor's Selling Price before the Auction.

- 7.2 There is no prohibition in the Act restricting parties from terminating an Agency Agreement (not an Auction Agency though, as above) early, by mutual agreement, and entering into a new Agency Agreement.

**So early termination and a forming a new Agency Agreement (Subsequent Agency) may be an approach to managing Agency Agreements instead of extending an Agency and going through the arduous process of extending under the Act.**

### **Auction Agency Rules**

- 8.1 Agent can't extend or vary certain terms in the Agency if an auction is listed

There can also be no new Appointment until the initial auction Agency expires. s20(6f) An Agent can't terminate early and create a new Agency prior to the Agency termination date.

If an auction is being held the Agent can't be appointed again by Variation or Extension until after the termination and lapse of the first Agency period specified has occurred.

This provision was drafted to stop a Vendor changing the price (PMAP) (Prescribed Minimum Advertising Price) in a new Agency, as the reserve price must not be more than 110% of the Vendors selling price as in the Agency.

- ***Query if an Agency for an auction program could be a limited term of say 3 weeks and the auction program designed for say 5- 6 weeks from signing.***
- ***This will allow termination to occur at expiry (3 weeks) and then allow a new Agency to be entered into and hence allow the Vendor re-set or determine a new reserve price.***

## 8.2 Reserve Price is locked in through the Agency Agreement

The reserve price is not able to be more than 110% of the Vendor's Selling Price.

## 8.3 Regulations can now set contract rules for Auctions

The Auction rules are in Schedule 6 of the earlier regulations and may be prescribed or changed by regulation.

They are contractually binding now (s 24I(2)) so it is important to understand that (1)(i) of Schedule 6 of the Regulations states:

*“the person accepted by the auctioneer as having made the highest bid at or above the reserve price will be the purchaser and that bid will be the purchase price”*

## 8.4 If the Reserve Price is met must the Vendor sell ?

The rules of the REI and Society of Auctioneers (joint terms) presently allow the auctioneer to still pass the property in if he decides it is the best interests of the Vendor but he would refer to the Vendor on the day at the auction and hold it over whilst seeking instructions. Otherwise if the reserve is met and accepted (see above) then a contract is binding at auction.

## 8.5 Need to set a Reserve Price in Agency ?

An Agency must have a single figure for the Vendor's selling price s 20(1) (b) also s 20(5a) can't vary the selling price if an auction Agency

There is no requirement to set a reserve price for the auction of land on signing the Agency but the reserve must not be more than 110% of the vendor's selling price in the Agency. s 24J(1)(ba)

Marketing by law must not be outside this range also.

## **Other Changes**

The Form 1 layout was amended, service by email is allowed and various other changes were made generally for instance the required Notice on a Land Contract (residential land only) was varied in a minor way in its wording.

## **Background to changes to the real estate area**

The Attorney General then (John Rau) had for some long time been intent upon changing the marketing and advertising practices of the real estate industry for residential land.

Unfortunately much of his activities have been lost in translation and just caused more paperwork, cost, confusion and complexity. Implementation was also been poorly conducted. Some changes are good such as registering bidders and having visual registered bidding but mostly it is now an over regulated area (in my view).

The impost of auction reserves being set by a Vendor or Agent's single price nomination in an Agency Agreement is entering into market interference.

The over regulation is not in any way borne out by any prosecution history or any significant problem or complaints more than normal in a commercial area. The industry fund has now been shoe horned from education into a compliance fund, so watch this space.

## **Mark Kurtze**

Mark Kurtze has practised in real estate and property areas for most of his professional career.

Mark Kurtze went through ANU Law School (BA L.LB) and was a visiting student at Adelaide University in 1982. Practising in Adelaide and Perth then establishing Corsers in Adelaide in 1990.

Mark Kurtze is also a director of several legal software businesses nationally. The Law Institute in Victoria being a partner. Mark has advised the Society of Auctioneers (SA) Inc for some 15 years.

### *Disclaimer*

*These notes are for private educational commentary only and are not to be used as advice and or relied on as advice. No claims may be brought for errors, opinions and or interpretation and any person wishing to understand the comments or the matters herein should seek independent legal advice on each factual issue and on any real estate practices which herein set out are not recommended or advised to adopt but are for commentary purposes only. Interpretation may change by law and regulation and judgments.*

*Corsers 2014*