





Lawyers asked to give written consent under s.55 of the *Estate Agents Act 1980 (Vic)*

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KEY POINTS

-  If an estate agent (or employee or relative thereof) wants to purchase a property or business that they have been engaged to sell, then from 1 January 2011 they will need to obtain the 'consent' of the vendor's legal practitioner, accountant or conveyancer.
-  It is uncertain what a legal practitioner needs to do before providing such consent.
-  The LPLC recommends that practitioners decline to give consent to these transactions, and clients should be referred to their accountant.
-  If practitioners agree to provide the consent they should follow the guidelines in this bulletin and use the recommended consent form attached.

Section 55 of the *Estate Agents Act 1980 (Vic)* (**the Act**) makes it an offence for an estate agent (or their employees, family members or other related people, including certain related corporate entities) to buy a property or business listed or commissioned for sale with their agency.

The main exception to the prohibition is found in sub-sections 55(14) and (15) of the Act requiring permissions be obtained from the Director of Consumer Affairs, Victoria. The *Consumer Affairs Legislation Amendment (Reform) Act 2010* will repeal subsection (15) and amend (14) on 1 January 2011. Subsection (14) will then read as follows:

'55 (14) A person may make a purchase that would otherwise be prohibited by this section if—

(a) the person receives the written consent of the vendor and a legal practitioner, conveyancer or accountant representing the vendor, but not the purchaser, to the sale; and

(b) the person notifies the Director within 7 days of any consent received under paragraph (a).'

As a result of this amendment, the LPLC envisages that practitioners may receive requests from vendor clients to provide 'consent' to a proposed purchase by an estate agent (or their employees, family members or other related people, or corporate entities).

What must be considered before providing the 'consent' is not stipulated.

Meaning and intent of the 2010 amendment

The Explanatory Memorandum to the Consumer Affairs Legislation Amendment (Reform) Bill said that the amendments were:

'intended to give vendors and estate agents greater flexibility when undertaking transactions to which they mutually agree while still ensuring independent oversight of such transactions.'

There is no other indication in the Bill, the explanatory memorandum or the second reading speech as to what steps (if any) a legal practitioner representing the vendor needs to undertake before giving their 'consent' to the sale.

When s.55(14) was first introduced in 1994 it required the then Estate Agents Licensing Authority to be satisfied *'that the purchase would not be contrary to the interests of the owner of the real estate or business to be sold...'*. Nothing in the new provisions requires this consideration now.

Under the new provisions there is no equivalent to the old power of the Director of CAV to impose conditions upon the purchase.

The new legislation does not stipulate whether the consent of a legal practitioner needs to be obtained prior to a contract of sale being signed. Section 55 (14) was amended in 2003 to make it explicit that it was necessary for the purchaser to apply for permission to make the purchase *'before the contract of sale is signed'*. There is no such explicit requirement in the new provisions so it is arguable that it is not necessary to obtain the consent of a legal practitioner prior to the contract of sale being signed. It should, of course, be obtained before settlement. This leaves the possibility open that vendor clients will be asked by their estate agents to obtain written consent from practitioners only days before settlement. Conveyancing practitioners should bear this issue in mind when they act for vendors. The purchaser's relationship with the vendor's agent may not be initially obvious.

Practitioners should also note that a breach of s.55 does not render the contract void and unenforceable.¹ This means that a breach of s.55 will not necessarily give a vendor any right of rescission nor any right to refuse to settle the contract.

In summary it is unclear what is intended or required of legal practitioners when asked to give written consent under s.55(14).

What is the consequence of a practitioner giving consent pursuant to s.55(14)?

To understand the precise legal consequences of a practitioner giving consent pursuant to s.55(14) it is necessary to carefully consider the operation of s.55 in detail.

Sub-sections 55(1), (3) and (5) create criminal offences (with 120 penalty units) where an estate agent or an employee is beneficially interested in the purchase of any real estate or business which he or his employer is commissioned to sell. Sub-section 55(8) deems an agent or an employee to be beneficially interested in the purchase if the purchase is made by or on behalf of various persons, including the spouse, domestic partner, parent, brother, sister or child of the agent or employee.

¹ *Holland v Ropeti* [2009] VSC 378 at [77]

If a person is convicted of an offence against sub-sections 55(1) or (3), sub-sections 55 (2), (4), (6) and (7) impose other consequences; that the person convicted must account for all profits and/or transfer the title back to the vendor, and repay any commission.

It would appear that the practical effect of the solicitor giving consent is that there is no breach of s.55 and so the estate agent is not guilty of a criminal offence, and the vendor loses the opportunity to obtain the relief that would otherwise follow if the estate agent was charged and convicted with a breach of s.55.

But it should be remembered that estate agents owe their clients fiduciary duties.

It is arguable that s.55 of the Act does not affect the fiduciary duties that an estate agent owes to their clients. Therefore, a consent pursuant to s.55(14) would arguably have no effect on a vendor's right to sue its estate agent for breach of fiduciary duty and seek an account of profits and/or equitable compensation.

What risks are there for practitioners?

Sale of property at under value

One obvious risk for practitioners is that if the practitioner 'consents' to a purchase pursuant to s.55, it is possible that a client might later complain that the property was sold at an undervalue. The client is likely to then allege that the practitioner should have advised them of the risks of proceeding with the transaction and not given the consent.

In such a circumstance, the vendor's obvious and best avenue of redress will lie against the estate agent for breach of fiduciary duty and/or misleading and deceptive conduct².

Practitioners acting without proper authority

Another obvious risk for practitioners is if the property or business is jointly owned and the practitioner 'consents' to a purchase pursuant to s.55, without having instructions from **all** vendors to do so. Furthermore, any practitioner who acts for more than one vendor must make sure there is no potential conflict in doing so. In some circumstances (for example if the property is being sold as part of a family law property settlement), it may be appropriate for each vendor to provide separate s.55(14) consents.

Delay in giving consent

Another less obvious risk might arise if a practitioner delays or fails to provide consent despite being instructed to do so. It is conceivable that such delay or failure may cause loss to the vendor if, for example, the prospective purchasers change their mind and decide not to proceed. The vendor might complain about the loss of the opportunity to sell their property. When practitioners are retained to act for their clients, they always need to be mindful of avoiding unnecessary delay.

² See *Pedersen v. Larcombe* [2008] NSWSC 1362, *Mahoe Developments Pty Ltd v Lionbond Pty Ltd* [1992] ANZ ConvR 199 for examples of successful claims against estate agents based on breach of fiduciary duty and misleading and deceptive conduct.

What should practitioners do?

We recommend that practitioners decline to give written consent to these transactions given the uncertainty surrounding what is actually required or intended by the legislation. Where possible clients should be referred to their accountant.

However, if practitioners do agree to provide the consent they should ensure that the client(s) fully understand the choices and consequences. They should:

1. Obtain the clients' written instructions to provide a consent pursuant to s.55(14). If property or business is owned jointly, practitioners should clarify whether they are acting for only one vendor, or on behalf of all vendors. If it is the latter, practitioners should make sure that they have received proper authority to act on behalf of the various entities and there is no potential conflict in acting for all of them.
2. Explain the legal consequences that flow as a result of the practitioner providing the consent pursuant to s.55(14), namely the relevant estate agent or employee of the estate agent will not be in breach of section 55 and the client(s) will lose the opportunity to obtain the relief that would otherwise follow if the estate agent or employee of the estate agent was charged and convicted of a breach of s.55.
3. Advise the client(s) that, given the nature of the transaction and the obvious conflict of interest, it is especially important that the client(s) obtain independent financial advice, including independent advice as to the current estimated selling price of the property or business being sold.
4. Make the client(s) aware and obtain the clients' signed written acknowledgement that the practitioner is not providing financial advice, and not providing any opinion upon the current selling price of the property, or whether it is financially prudent for the vendor to enter the transaction.
5. Ensure that any consent expressly states that it is only for the purpose of s.55(14) of the Act and does not constitute consent for any other purpose. In particular, it does not constitute or evidence consent to any breach of duty owed by the purchaser or estate agent to the vendor(s).
6. Obtain a complete copy of the Agent's Authority, details of the comparable sales that the estate agent used to provide the s.47A estimate of selling price in the Authority, and a signed statement from the officer in effective control of the estate agent verifying that the s.47A estimate in the Agent's Authority is an accurate estimate of the selling price both at the time the Agent's Authority was signed, and at the time the consent is provided pursuant to s.55(14).
7. Confirm the advice in writing to the client(s) before or at the time of giving consent, and certainly before settlement.

We have attached a recommended consent form and a client acknowledgement form. Whilst practitioners may wish to use the client acknowledgement form to obtain the signature of each and every client vendor, it is also vitally important that practitioners write their own file note to record in their own words the details of the actual conference with the client(s) and the advice given.