

September 2014

Sections 55 and 55A of the *Estate Agents Act 1980* (Vic)

This bulletin replaces LPLC Bulletin dated March 2013

Key points

- If an agent (or employee or relative) wants to purchase a property or business the agent has been engaged to sell, they must sign a form prepared by Consumer Affairs Victoria (**CAV**).
- LPLC recommends practitioners refer their vendor client to a valuer for independent valuation advice to ensure the sale is for a 'fair market value'.
- Practitioners should explain sections 55 and 55A to their vendor client and recommend they obtain financial advice from their accountant.

Section 55

Section 55 of the *Estate Agents Act 1980* (Vic) (**the Act**) makes it a criminal offence for an agent (or their employees, family members or other related people) to buy a property or business listed or commissioned for sale with their agency. The penalty includes 240 penalty units, imprisonment for two years or both.

The only exception to the prohibition is found in sub-section 55(4) of the Act which reads as follows (note - an example of a 'principal' in this section is a vendor selling land):

'55 (4) A person does not contravene subsection (1) or (2) if-

(a) the person-

(i) before a contract for the sale of the real estate or business is entered into, obtains the principal's written acknowledgment in the form approved by the Director that the principal-

(A) is aware that the person is interested in obtaining a beneficial interest in the real estate or business; and

(B) consents to the person obtaining the interest; and

- (ii) *acts honestly and reasonably¹ in relation to the transaction; and*
- (b) *no commission or other reward is payable in relation to the transaction; and*
- (c) *the principal is in substantially as good a position as the principal would be if the real estate or business were sold at fair market value.'*

This version of section 55 and section 55A came into operation on 23 August 2011². The previous amendments required practitioners to consent to the agent (or their employees, family members or other related people) purchasing the land and/or business. This requirement has been removed.

Explanatory Memorandum

The Explanatory Memorandum to the *Consumer Acts Amendment Act 2011* (Vic) said that the new section 55:

'makes it an offence for an estate agent to obtain a beneficial interest in any real estate or business the estate agent has been commissioned to sell. A penalty of up to 240 penalty units or two years imprisonment or both applies. This level of penalties is similar to penalties for equivalent offences in section 145 of the Property Agents and Motor Dealers Act 2000 of Queensland and section 49 of the Property, Stock and Business Agents Act 2002 of New South Wales.'

The memorandum does not assist in understanding how a vendor or an agent (or the agent's employees, family members or other related people) must practically deal with the issues around a sale by a vendor to their agent (or the agent's employees, family members or other related people).

Role of CAV

Practitioners should be aware that CAV has issued a prescribed form for the written acknowledgment vendors should sign pursuant to 55(4)(a)(1).

A copy of this form is available at:

<http://www.consumer.vic.gov.au/businesses/licensed-businesses/estate-agents/running-your-business/professional-conduct/buying-a-listed-property-section-55>

A practitioner is not required to sign this form and is not required to witness the signing by the agent (or their employees, family members or other related people) and/or the vendor.

¹ Section 55(4)(a)(ii) was amended by section 32 of the *Consumer Affairs Legislation Amendment Bill 2014* (Vic) by deleting 'fairly and honestly' and replacing with 'honestly and reasonably'. This amendment came into effect on the day of Royal Assent on 12 August 2014.

² Save for the amendment referred to footnote 1 above.

Effect of a breach of section 55

A breach of section 55 does not render the contract void and unenforceable.³ This means a breach of section 55 will not itself give a vendor or purchaser any right of rescission nor any right to refuse to settle the contract.

What should practitioners do?

When practitioners are acting for vendors proposing to sell their properties to agents or relatives of agents LPLC recommends they should:

1. explain sections 55 and 55A to the client
2. advise the client that, given the nature of the transaction and the obvious conflict of interest, it is especially important the client obtain independent financial advice including independent advice as to the value of the property or business being sold
3. make the client aware you are not providing financial advice, not providing any opinion of the market value or whether it is financially prudent for the client to enter the transaction
4. test the client's understanding of the advice given by asking the client to tell you what they have understood
5. keep a detailed file note of the advice given and the client's responses, ensuring the file notes:
 - a. are dated
 - b. record the time taken
 - c. record who was present
 - d. are a note to the file rather than a cryptic note to yourself.
6. obtain a copy of any agent's authority and/or a signed statement from the officer in effective control of the agent stating their opinion as to the current market value of the property or business
7. confirm all advice in writing to the client as soon as possible and certainly before settlement.

³ *Holland v Ropeti* [2009] VSC 378 at [77]