



REIV THE STANDARD
FOR SUCCESS

OPTIONS PAPER

Estate Agents Act 1980
Section 55:
Options for Change

March 2015

CONTENTS

REIV BRIEFING PAPER

INTRODUCTION	4
NEED FOR CHANGE	4
OPTIONS	5
RECOMMENDATION	6
ADDENDUM 1: CASE STUDIES IN VICTORIA	7
ADDENDUM 2: BENEFITS OF OPTION 1	8
ADDENDUM 3: UNIFORMITY WITH QUEENSLAND	9



ABOUT REIV

The Real Estate Institute of Victoria has been the peak professional association for the Victorian real estate industry since 1936.

Over 2,000 real estate agencies in Victoria are Members of the REIV. These Members are located in city, rural and regional areas.

The businesses employ more than 10,000 people in Victoria in a market which handles over \$70 billion of transactions totalling 22 per cent of GSP.

Members specialise in all facets of real estate, including: residential sales, commercial and industrial sales, auctions, business broking, buyers agency, property management, owners' corporations management and valuations.

Introduction

Real estate agents across Victoria have been unfairly impacted by the inflexible requirements of Section 55 (4) (b) of the Estate Agents Act 1980.

Section 55 was last amended in 2011, and has since imposed unreasonable constraints on an agent being paid commission when selling property to parties who are associated with the agent.

The impact is perhaps greatest in small towns where there is often only one real estate agency.

In these smaller towns, associated parties are often seeking to purchase property from the agent. As the agent is unable to claim a commission when selling to an associated party, the sale results in significant hardship on the agency and unfair windfall gains for the vendor – with all of the work of listing, marketing and selling a property undertaken, yet no commission payment received.

The prohibition on payment of commission when selling to an associated party extends to the husband, wife, or domestic partner of the agent or the agent's representative. It also extends to the agent's or agent's representative's children, step-children, brothers, sisters, and parents as well as associated entities.

The extent of this impact is outlined via actual case studies in Addendum 1 to this options paper.

Need for Change

Until about four years ago real estate agents could apply for exemptions from Section 55 where associated parties were involved in a sale. This provided flexibility in the application of the Section – protecting consumers while ensuring that agents were still entitled to fair payment for their work.

Section 55 was then amended and, as outlined above, has since prohibited the payment of commission where an agent sells property to a party associated with the agent.

The penalties for a breach of section 55 are severe: a fine of up to \$35,000 for the 2014–2015 financial year or two years imprisonment, or both.

Victoria is now **out of step with other states** and the ACT and Northern Territory on this issue. Furthermore, **no explanation** of the rationale for the current restriction on payment of commission appears in any legislative document.¹

The REIV, at the request of Consumer Affairs Victoria, has considered Section 55-type legislation in other Australian jurisdictions with a view to enabling commission to be paid on sales to associated parties where it is appropriate.

The aim is to protect the consumer, while allowing agents to be paid for the service they provide.

¹ Other than aligning with a similar prohibition in the Property Agents and Motor Dealers Act of Queensland, which has been repealed.

Options

Several options to refine Section 55 have been developed based upon effective regimes in other jurisdictions and with a view to delivering:

- a fair and equitable outcome;
- greater simplicity for government, agents and the public; and
- improved uniformity with other jurisdictions.

Option 1 – the Queensland model

The current regime in Queensland allows agents to sell to associated parties where:

- the vendor signs a prescribed approval form;
- the agent acts fairly and honestly; and
- the vendor is in substantially as good a position as if the property was sold at fair market value.

Option 2 – the NSW model

The current regime in New South Wales allows agents to sell to associated parties where:

- the vendor signs a prescribed approval form and agrees to pay commission;
- the agent acts fairly and reasonably; and
- the vendor is no worse off (as per common law).

Recommendation

While the 2011 amendments to the Estate Agents Act 1980 were made to protect consumers, they have resulted in unintended, adverse consequences.

The amendments impact heavily on agents, requiring them to provide a service but forgo commission while still having to comply with all the requirements of the Estate Agents Act. In some cases the amendments also unfairly disadvantage buyers and unjustly enrich vendors.

For this reason the REIV believes change is needed.

We endorse the adoption of Option 1, whereby agents may to sell to associated parties where:

- the vendor signs a prescribed approval form; and
- the vendor is fairly and reasonably dealt with.

This option can be achieved through a repeal of sub-section 55 (4) (b) which currently places a blanket ban on the payment of a “commission or other reward” in relation to a sale affected by the section.

Further information on the benefits of adopting Option 1 are explored in Addendums 2 and 3.

ADDENDUM

Addendum 1:

Case Studies from Victoria

Both metropolitan and rural agents have written and emailed the REIV during the course of the research program, outlining the adverse consequences of Section 55, including substantial loss of income.

#1 Inner Melbourne

"Through our company we've had 13 cases in the past 12 months. We've been penalised by Section 55 to the tune of approximately \$234,000 in lost commissions."

#2 Kew, Inner Melbourne

"We auctioned a home with a reserve price of \$3.8m and it was sold for \$4.36m. This was \$560,000 above reserve with an extremely competitive auction and 6 bidders; however, the property was purchased by the brother of one of our sales people. Hence the vendor did not have to pay the \$64,000 fee to our company being for the 100's of hours of peoples work over 7 weeks leading up to the auction. It also meant the other 5 bidders were disadvantaged to the tune of \$64,000 throughout the bidding process."

#3 Bendigo

"The parents of one of our staff members purchased a property through our company last year. Their bid was not the highest made on the property, which was to go to auction. The vendor elected to accept their lower offer, because the net financial result for them was better."

#4 Wodonga, North Eastern Victoria

"This section of the Act has had a phenomenal effect on our agency and staff. We are the biggest agency in Wodonga, with 31 staff, and it (Section 55) throws a massive 'net' over properties that are on the market (in this area). Our revenue loss from 19 house sales has been \$114,000 which has had a huge impact on our sales team and agency. We look forward to positive changes. The system in place prior to this change was, at least, workable."

#5 Regional Victoria

"We have a staff of 35, many of whom are in the age group that are either looking to buy their first house or at purchasing their first investment this year. There have been at least five sales (in the past six months) which have cost the business around \$30,000."

The REIV has seen many instances of Section 55 impacting agencies across the state, highlighted by the examples below:

#6 Leongatha, Gippsland

"We run a stock and livestock agency and operate throughout Gippsland with 12 offices. Our business is built on strong, long-standing relationships with rural landholders and has been running for 130 years. We employ approximately 80 staff. Most of our relationships are with people on the land, and many of our employees have worked on the land as beef or dairy farmers. We often operate in small towns and regional areas, ranging from 1500 people to 4500 people. Thousands of people are excluded from buying from our property; and the biggest loser is the vendor."

#7 Warburton, Yarra Ranges

"We have had numerous sales where we have not been able to claim a commission due to family members or staff purchasing properties from our agency. It has been most unfair to the salesperson concerned, and to our office income. We live in a small community and have 11 staff, with lots of (local) people related and our families also live here. It is unfair to the vendor as (it) takes away buyers."

#8 Bairnsdale, East Gippsland

"It is a real problem, especially for country agents such as ourselves. We employ 56 staff across East Gippsland and mainly operate in smaller communities. (On many) occasions we find ourselves in a 'Section 55 dilemma'. Over the past two years it has cost our business \$122,000 as we, rightfully so, do everything required to totally comply with the act. In some instances the vendor becomes (so) disadvantaged, the agent would prefer to sell the property to someone else than a related party. Some mid-ground would suit us all."

#9 Central Victoria

"Our Company had a rural property for sale, which, after approximately 9 months of being on the market, and countless inspections, my daughter and son-in-law purchased. The final price paid was slightly higher than the original asking price, because of a private bidding duel between 2 parties. My daughter was the eventual under bidder (\$550,000) to another young couple (\$552,000). However, the vendor elected to accept my daughter's offer because of the commission free transaction."

Addendum 2:

Benefits of Option 1

The REIV's proposed changes will achieve the following.

A fair and equitable outcome because it will:

- allow an estate agent to be paid for services provided, in appropriate circumstances.
- eliminate two undesirable outcomes created by sub-section (4) (b)
 - a vendor being unjustly enriched as a result of not having to pay for services provided under a contract of agency; and
 - purchasers' in general being gazumped by Section 55 purchasers whose lesser offers are inflated by the amount of commission to be foregone by an estate agent

Greater simplicity for government because it will:

- eliminate statutory interference with commercial contracts freely entered into by vendors and their estate agents; and
- repeal an inappropriate and poorly designed law that places unnecessary administrative and financial burden on estate agents, their agent's representatives and other employees

Greater simplicity for estate agents because it will:

- result in payment of commission, in appropriate circumstances;
- remove the need for draconian estate agency business risk management policies that prohibit an estate agent, agent's representative or other employees and their family members purchasing properties or businesses listed for sale because the purchase will result in a financial loss to the estate agency.

Greater simplicity for the public because it will:

- remove a statutory barrier which has the potential to eliminate a class of buyer;
- do away with gazumping of offers where a member of the public is competing to buy with an estate agent, agent's representative, agency employee or a member of their family; on unfair terms because of the windfall advantage to a vendor

Improved uniformity with other jurisdictions

- result in all eastern seaboard jurisdictions - Queensland, NSW and Victoria - similarly applying legislation relating to an agent's beneficial interest in a sale.

In this way, the proposed changes would deliver near uniformity across eastern Australia.

Addendum 3:

Uniformity with Queensland

The criteria an estate agent, agent's representative, agency employee or members of their family have to meet to be eligible to buy a property or business their estate agency has been engaged to sell are for all intents the same in Victoria and Queensland, except in one, important aspect. In Victoria – unlike Queensland – the estate agency is prohibited being paid the commission it negotiated and agreed with its vendor at the outset of its engagement.

Otherwise, in both states:

- before a contract of sale is entered into, the estate agency must obtain the vendor's written acknowledgement on an approved form that the vendor –
 - is aware the relevant person is interested in buying; and
 - consents to that person buying;
- the relevant person has to act honestly and reasonably ("fairly", in Queensland); and
- the vendor has to be "in substantially as good a position" as he or she "would be if the property were sold at fair market value."

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