Land and Business (sale and conveyancing) Act 1994 – section 20(2)

Sales agency agreements | rights and obligations of vendor

An agent must give you, the vendor, this guide outlining your rights and obligations before making a sales agency agreement with you.

Choosing an agent

Agents, including companies that are agents, must be registered under the Land Agents Act 1994. You can check whether they are registered on the Consumer and Business Services website: www.cbs.sa.gov.au.

Choosing the best real estate agent to negotiate the sale of your property is important. The services provided and the associated costs may vary significantly so it is a good idea to obtain advice from several agents before signing an agency agreement.

You should ask them for their proposed marketing plan — what they will do to market your property and what will be your financial contribution to the marketing of the property.

It may not be in your best interests to choose the agent who provides you with the highest estimated sale price of your property because this price may be unachievable and could delay the sale.

When the agent provides you with an estimated sale price of your property you should ask how they have determined the estimated sale price. It is a requirement to include recent sales figures for comparable properties in your area and any other information the agent relies upon for their genuine estimate of the selling price in any sales agency agreement you choose to sign with an agent. You can also engage a qualified valuer to prepare an independent valuation if you so choose.

Role of the agent

When you list your property with an agent, you are employing them to sell your property for a price that is acceptable to you. The agent should always act in your best interest and engage in good business practices.

The agent will charge a fee for their services either in the form of a commission, a set fee or a combination of both.

The agent should outline a marketing plan for your property and undertake various searches.

You can generally expect the agent to:

- advise on a method of sale
- advertise and market the property
- organise and attend open house and other inspections

- attract prospective buyers
- communicate offers to you
- organise an auction, if this is the preferred method of sale
- arrange the signing of the contract of sale
- assist in the preparation of the disclosure statement to be given to the purchaser.

The sales agency agreement

An agent must not act for you unless they have been authorised by a sales agency agreement that is dated and signed by you, the vendor, and the agent. This contractual agreement sets out the rights and obligations of both you, the vendor, and the agent. A copy must be given to you when you sign it, or at a later time within 48 hours as agreed by you and the agent.

Every sales agency agreement for residential property must include:

- a description of the land that is the subject of the agreement
- your full name and that of the agent
- the agent's registration number
- the chattels that are included in or excluded from the sale
- the services that will be provided by the agent or another person for which you
- will be separately charged (e.g. advertising and marketing)
- the nature, source and amount of rebates that the agent expects to receive in
- relation to separately charged services (e.g. advertising and marketing)
- details of the circumstances in which the agent will be entitled to receive
- commission or fees for the sale of the land, and also the circumstances in
- which the sale may not be attributable to the agent
- the duration of the agency agreement (maximum term is 90 days for sale of residential land)
- the agent's genuine estimate of the sale price of the property (a single figure)
- the selling price you are seeking or would accept (a single figure)
- comparable sales data and any other information the agent relies upon to support their estimate
- the manner of sale of the property (e.g. auction, private treaty or tender)
- your rights to terminate the agreement
- whether the agreement is a sole agency agreement
- whether the agent has authority to accept an offer for the property on your behalf
- a term warranting that the agent will comply with the Act and will act in your best interests.

Advertising and marketing

The sales agency agreement must specify all services that will be separately charged for, including advertising and marketing, and whether those services will be provided by the agent or by a third person. Amounts to be charged for the services and the time for payment must also be specified.

You should make sure you have a clear understanding of how the agent intends to market your property and what this will cost you.

The cost of advertising and marketing a property varies significantly depending on the type of advertisement and where the advertisement will appear, e.g. the internet, a newspaper. Some agents may charge a low commission rate but charge more for marketing and advertising your property.

You may be charged the upfront cost of advertising with a particular publication, but agents commonly receive a rebate as a result of placing large numbers of advertisements. You should make sure you ask the agent questions about the amount of advertising rebate that the agent expects to receive.

You are within your rights to negotiate with the agent to receive some benefit from those rebates. You should determine whether the amount you are paying for advertising and marketing a property is reasonable.

The agent must disclose the nature, source and, if known, the amount or value of any rebate, discount, refund or other benefit they expect to receive in relation to these services. You can also include in a sales agency agreement a clause requiring the return to you of some or all of the rebate when it has been paid to the agent.

You must also ensure that any information provided to the agent about your property is factual and up to date. If a buyer can show that advertising of a property is false or misleading, the buyer may be able to take legal action. Under s36 of the Act, significant penalties apply to making false or misleading representations for the purpose of inducing another person to purchase a property.

Duration of the agreement

You should consider the length of the sales agency agreement because you may be obliged to continue under it even if you are unhappy with the services provided by the agent.

Under the Act, the maximum duration of a sales agency agreement is 90 days.

Towards the end of the sales agency agreement, you and your agent may decide to extend the sales agency agreement or enter into a subsequent or new sales agency agreement.

Price

In a sales agency agreement the agent must specify the agent's genuine estimate of the selling price of the property.

It is important to note that this genuine estimate is not a valuation but rather the agent's best estimate of the likely price you could expect based upon a whole range of factors – it is in no way any guarantee that you will receive that price in the marketplace.

The price must be expressed as a single figure without any words or symbols (eg $300,000). In addition, the agent must provide you with details of sales of comparable land and any other information on which the agent will rely in support of their genuine estimate of the selling price.

The agreement must also specify a single figure sale price for the property that you would find acceptable to ensure any price advertising is not misleading or deceptive.

If you are auctioning your property, you cannot increase your acceptable price in the agreement. To help you decide on a price you should:

- consider the agent's estimated selling price
- research sale prices in your area
- consider seeking an independent valuation by a qualified valuer
- not allow emotion to cloud your judgment.

Having a realistic idea of the likely sale price of your property will help you avoid both disappointment and the risk of purchasing another property based on an unrealistic expectation of the sale price of your own property.

Prescribed minimum advertising price

The price that you and your agent list in the sales agency agreement will affect the price for which the property can be advertised. For example, if you advertise a likely sale price for your property, the price cannot be lower than the higher of the:

- amount you specify as acceptable in the sales agency agreement and
- amount the agent has estimated as the sale price.

Reserve price

The reserve price for the land must not, at any time before or during the auction, be set at an amount exceeding 110% of the amount that you have specified as your acceptable price in the sales agency agreement. For example, if you specify $400,000 in the sales agency agreement as your acceptable selling price, then the reserve cannot be more than $440,000.

Manner of sale

The sales agency agreement must specify the manner of the sale. The most common ways to sell a property are by auction or private treaty. Your agent should advise you of the most appropriate way to sell your property. You should ask the agent about the advantages and disadvantages of both methods of sale before you decide what to do.

Termination of the agreement

A sales agency agreement must specify your rights to terminate the agreement. An agreement may limit your rights in this respect to certain circumstances or provide for costly termination fees. An agreement may also deem termination to occur in certain circumstances; for example, if you sell the property privately, or through another agent. In such circumstances, depending on the agreement, the first agent may still be entitled to a commission. You should seek independent legal advice if you are unsure about your rights or the consequences of termination of an agreement.

Sole agency agreement

The agreement must specify whether the agreement is a sole agency agreement. Sole agency agreements are the most common form of agreement in South Australia. Your agent will most likely suggest a sole agency agreement, particularly where sale is to be by auction. Under a sole agency agreement, the agent has the exclusive right to sell the property and is entitled to receive the agreed commission whether or not they are the one to actually sell the property. In other words, if you sell the property yourself you will generally still have to pay the agent their commission. This will depend on the wording of the agreement.

Authority or accept an offer

The sales agency agreement must specify whether or not the agent has authority to accept an offer on your behalf, for example when circumstances make it difficult to contact you at the time an offer to buy the property is made. If an agent signs a contract of sale on your behalf, then the contract is binding on you. So, if you think it is appropriate for the agent to be able to accept an offer on your behalf then the contract should clearly state when and in what circumstances you consider it acceptable for the agent to accept an offer. If, on the other hand, you retain the right to accept an offer yourself, then your property cannot be sold unless you agree to the offer.

Disputes and complaints

If you have a dispute with an agent, you should first try to resolve it with the agent.

If that is unsuccessful, you can contact Consumer and Business Services on 131 882 for advice.