



29 November 2010

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RB;rp

Real Estate Litigation  
c/- Education Policy & Research  
Office of Consumer & Business Affairs  
GPO Box 1719  
ADELAIDE SA 5001

Attn: Mr David Green

Dear Sir

**Review of : *Land Agents Act 1994, Conveyancers Act 1994 and  
Land and Business (Sale & Conveyancing) Act 1994.***

Thank you for your letter of 30 August 2010 inviting submissions regarding the operation of the above Acts. The matter has been considered by the Society's Property Committee, and accordingly, we provide the following comments

**1. *Land and Business (Sale & Conveyancing) Act 1994 – Section 5***

Pursuant to Section 5(2)(b) a "cooling off" notice served by registered post is deemed given by a purchaser when the notice is posted. In relation to service of a Vendor's Statement (ie Form 1), Section 17(b) has no similar deeming provision where this is served by registered post. The legislation only allows a Form 1 to be served in person or by registered post. We consider that this inconsistency should be dealt with by introducing a similar deeming provision to that found pursuant to Section 5(2)(b).

**2. *Land and Business (Sale & Conveyancing) Act 1994 – Section 5(7)***

Section 5(7) of the Act stipulates cases in which the right to "cool off" is excluded. The exclusion pursuant to Section 5(7)(a) relates to where the sale of the land is to a body corporate.

This exemption has been the case since the time the "cooling off" concept was first introduced pursuant to the 1972 Act. Since that time the use of private companies has become more widespread. These are commonly operated by "mums and dads" as trustees of family trusts or superannuation funds. In addition, it is often the case that purchasers who would otherwise purchase as an individual(s) are "encouraged" to incorporate for a myriad of legitimate business, taxation and financial planning purposes.

Whereas some forty years ago it may have been reasonable to assume that directors of any company were sufficiently sophisticated or had the necessary business acumen to consider the various risks and other considerations, including price and terms of sale relating to the purchase

of a property, this may not necessarily be so readily assumed these days. We suggest that in the majority of these cases the directors are as deserving of the protection of the "cooling off" rights as much as private individuals.

A Form 1 Statement cannot be served until a contract is formed. Consequently, in the case of a corporate purchaser the contract will not only be formed, but also be binding before the directors receive the benefit of considering the contents of the Form 1 Statement. Once the Form 1 Statement is served on the purchaser company there will be no ability on the part of the purchaser to change its decision, or even seek to negotiate in consequence of an unfavourable disclosure. The contract will already be formed thereby depriving the purchaser of these opportunities. In these circumstances the purpose of serving a Form 1 Statement is defeated.

This anomaly in the law can prompt agents to impress upon prospective purchasers the use of a corporate entity as the purchaser. Obviously, this will only be the case where the agent becomes aware that the purchaser is considering utilising a corporate entity. The agent may be aware that the purchaser is considering incorporation or has an "idle" company which can be utilised for this purpose. Nevertheless, the purpose of delivery of a Form 1 Statement can be defeated by this means.

In the circumstances, we consider that Section 5(7)(a) should be repealed, or alternatively, restricted in its operation to publicly listed corporations or subsidiaries of these, or in the alternative, restricted to a situation where the corporation has a paid up capital in excess of a specified value (eg \$250,000).

### 3. ***Land and Business (Sale & Conveyancing) Act 1994 – Section 9(1)(ba)***

This provision relates to the Part D Certificate within the Form 1 Statement. The vendor's agent is required to provide to the vendor the Part D Certificate immediately after signing the document. A maximum penalty of \$10,000 is proscribed for non-compliance (see Section 14). This provision appears impracticable to comply with, and therefore, can operate harshly. In effect, this provision requires the agent upon signing the Certificate to immediately deliver this to the vendor by personal delivery, electronic transmission or facsimile transmission. Our members question if this requirement is complied with to any appreciable level? Consequently, we suggest this requirement be deleted or, alternatively modified so as to require the agent to deliver in person or by post, facsimile or email a copy of the Certificate to the vendor within one or two business days of signing the Part D Certificate.

I thank you for extending to the Law Society of South Australia the opportunity to consider and comment upon the operation of the subject legislation. I trust these comments are of assistance. Should you require any further information please do not hesitate to contact me.

Yours faithfully



Ralph Bönig  
**PRESIDENT**