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Conveyancing Conundrum: Who should sign a Form 1?

Sections 7 and 9 of the *Land and Business (Sale and Conveyancing) Act 1994 (SA)* ("**LBSC Act**") contain the well-known requirements for verified vendor's statements, containing particulars in relation to land, to be provided to a purchaser of land. An issue has recently been considered by the Society's Property Committee and Law Claims as to who can sign the requisite form – Form 1.

**Solicitors
should not be
signing Part C
or Part D of
Form 1**

The obligation to provide information to a purchaser as set out in section 7 is placed upon "*a vendor of land*" and involves the completion by that vendor of a form as set out in Form 1 of the *Land and Business Regulations (Sale and Conveyancing) Regulations 2010 (SA)* ("**LBSC Regulations**"). The required "*sign-off*" for this part of Form 1 is as follows:-

**"Part C – Statement with respect to prescribed particulars
(section 7 (1))**

To the purchaser:

**I/We,*

of.....

*being the *vendor(s)/person authorised to act on behalf of the vendor(s) in relation to the transaction state that the Schedule contains all particulars required to be given to you pursuant to section 7 (1) of the Land and Business (Sale and Conveyancing) Act 1994."*

In the view of the Property Committee, a solicitor should not sign Part C of Form 1, unless the solicitor is the vendor or, possibly, the attorney of the vendor. In the view of the Committee the words "*person authorised to act on behalf of the vendor*" should be limited to authorised officers of corporate vendors or attorneys acting on behalf of vendors. It is simply too risky for any solicitor (however authorised) to make representations about land on behalf of the vendor when some of the required information may be known only to the vendor. Further, it may be, a solicitor signing "*on behalf of the vendor*" would be acting as "*vendor*" and not as a legal practitioner and issues as to indemnity under the Law Claims policy might arise.

The section 9 requirement applies where an agent acts on behalf of the vendor.

In particular, section 9 requires the agent to ensure that the prescribed enquiries are made into the matters as to which particulars are required in the statement and, **the agent** must sign a certificate in the form required by regulation.

The required “*sign-off*” for this part of Form 1 is as follows:

**“Part D – Certificate with respect to prescribed inquiries by registered agent
(section 9)**

To the purchaser

I,...

*certify * that the responses/that, subject to the exceptions stated below, the responses to the inquiries made pursuant to section 9 of the Land and Business (Sale and Conveyancing) Act 1994 confirm the completeness and accuracy of the particulars set out in the Schedule.*

Exceptions:

Date:

Signed:

**Vendors/Purchaser’s agent*

**Person authorised to act on behalf of *Vendor’s/Purchaser’s agent”*

The definition of “*agent*” contained in section 3 of the LBSC Act is that “*agent*” has the same meaning as in the *Land Agents Act 1994 (SA)*. This definition is that a person is an “*agent*” if the person carries on a business that consists of or involves-

- (a) selling or purchasing or otherwise dealing with land or business on behalf of others or conducting negotiations for that purpose: or
- (b) selling land or business on his or her own behalf, or conducting negotiations for that purpose.

Crucially, sub-section (2) of the definition provides

*“However, a person does **not** act as an agent in so far as –*

- (a) the person sells or purchases or otherwise deals with land or business on behalf of others, or conducts negotiations for that purpose, **in the course of practice as a legal practitioner.....**” (emphasis added)*

The combination of section 9 of the LBSC Act and the definition of “*agent*” – especially sub-section (2) of the definition – means that legal practitioners should not be executing the Certificate contained at Part D of Form 1, even if they do so as persons authorised to act on behalf of the agent. This is because the statutory definition of “*agent*” does not extend to legal practitioners carrying on legal practice. This in turn means that if a legal practitioner signed a Part D certificate as an agent “*the agent*” he or she would not be indemnified under the Law Claim policy which defines “legal practice” as “*the provision of such legal services as are usually provided by a legal practitioner in private practice in Australia*”. The fact that there may be some legal practitioners who “*usually*” sign Part D Certificates would not be likely to overcome the specific statutory definition that acting as an agent does not apply to persons acting in the course of legal practice.

According to the Property Committee legal practitioners and registered conveyancers who sign Part D certificates will likely do so, not as “*agent*”, but as a “*person authorised to act on behalf of*” the agent. The Committee’s view is that this is also too risky and should not be done. The whole intent of Section 9 (1)(b) of the Act is to put the obligation on the agent to ensure the

completeness and accuracy of the information in the form, after all, that is what they receive commission for and they have direct contact with the property and the vendor. Increasingly, however, agents are seeking to avoid this responsibility by contracting out the preparation of Form 1 to other providers who then sign Part D as persons "*authorised to act on behalf of*" the agent. The agent still receives commission and also claims the Form 1 preparation fee as a disbursement. In the view of the Property Committee, the LBSC Act and Regs should be amended to make it clearer that only agents and their employees can sign Part D and that they cannot delegate their responsibility under Section 9.

The preparation of the information contained in Form 1 by a solicitor, on proper instructions would, however, be considered to be legal work, and any claim arising from negligence / breach of retainer in compiling the contents of the Form 1, should, in the normal course, be indemnifiable under the Law Claims policy.

This position may be seen as anomalous, however, it is a direct result of the terms of the statutory regime. Law Claims and the Property Committee invite comments from practitioners as to these issues.

GRANT FEARY

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