

# Regulators mount up

REAL ESTATE AGENTS ARE SUBJECT TO SANCTIONS FOR BREACHES OF TRUST ACCOUNT PROVISIONS AND FOR PRACTISING AS AN AGENT WITHOUT A LICENCE. BY TASMAN FLEMING



In Victoria, real estate agents (agents) are licensed professionals pursuant to the *Estate Agents Act 1980* (the Act). This affords certain rights but also brings with it certain responsibilities which, if not complied with, may lead to disciplinary action from Consumer Affairs Victoria (CAV).

Agents must strictly adhere to the maintenance of their trust accounts. Decisions of VCAT have shown that breaches of the Act, even when those breaches are technical in nature, will attract a penalty. Two cases are examined below where the CAV sought revocation of the agent's licence.

In a broader sense, where unlicensed professionals, including lawyers, are doing the work of agents, they may be liable for potential disciplinary action by CAV. Similarly, agents are not permitted to practise as lawyers without a licence and may face disciplinary action by the Legal Services Commission (LSC) if they do so. Perhaps the greatest area for crossover is the preparation of and advising on contracts.

## Inquiries

There are two types of application which are available at first instance:

- on a review application, pursuant to s21 of the Act, an affected person applies to grant or refuse a licence, impose restrictions or conditions, or vary or revoke a condition
- on an inquiry by CAV or Victoria Police under s25 of the Act into the following matters:
  - 1) at any time the Director or the Chief Commissioner of Police may apply to VCAT for the holding of an inquiry to determine whether an estate agent:
    - a) has contravened or failed to comply with this Act or the regulations or (aa) has contravened or failed to comply with the *Sale of Land Act 1962*
    - b) is of good character or is otherwise a fit and proper person to hold a licence
    - c) has been guilty of conduct as an estate agent which renders him or her unfit to hold a licence
    - d) improperly obtained, or is improperly holding, a licence.

## Trust account breaches

Agents can expect CAV to bring an action at VCAT and there will be consequences of a breach of duties even on the lower or lowest order of breach. These breaches are applied strictly and are likely to lead to reprimand even where there is no dishonesty.

VCAT must weigh the twin aims of general deterrence and maintaining the reputation of the profession when imposing orders for the protection of the community.

The decision of Proctor SM in the *Director of Consumer Affairs Victoria v Daly*<sup>1</sup> highlights the importance of keeping

### SNAPSHOT:

- Real estate agents are regulated by the *Estate Agents Act 1980*.
- Common breaches of the *Estate Agents Act* include failure to maintain trust accounts.
- Lawyers may not practise as real estate agents without a licence.
- Agents are risking reprimand through to serious financial penalty or being struck off through breaches.

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all records at the place of business and lodging audited trust accounts on time.

CAV sought to have Daly's licence cancelled or suspended. This was a case of loss of administrative control, not one of fraud for personal gain. Daly alleged, and it was accepted by CAV, that there was no dishonesty in the breaches but he was ultimately reprimanded and received a fine of \$1000 for his actions. Proctor SM did not impose any conditions on Daly.

Proctor SM summarised VCAT's powers under the act: "VCAT's powers to make disciplinary orders are protective in nature (even though they might appear to be a punishment to the person the subject of orders) (see *Mario Inglese and M Inglese Pty Ltd and Estate Agents Board* VSC 1989 [p17 and 22]. Where there is a choice of sanctions, it is to be expected that VCAT will choose that sanction which maximises the protection of the public (see *Quinn v Law Institute of Victoria* [2007] VSCA 122 [28] to [31])."<sup>2</sup>

Contrasting this is the decision of Dea M in *Consumer Affairs Victoria v Hoare*.<sup>3</sup> Hoare operated a trust account which accrued a deficiency of \$37,490 without explanation. Although Mr Hoare had used the funds to support his business, he had also taken a holiday to Queensland and used some of the money while there gambling at the casino.

VCAT was "not satisfied that Mr Hoare ought, for some time, have the privilege of holding an estate agent's licence or being employed as an agent's representative. Such a position allows an income to be earned from the financial decisions of members of the Victorian community who are entitled to depend on estate agents for their professionalism and honesty".<sup>4</sup> Mr Hoare attracted a penalty of disqualification for a period of 10 years, but was not fined. CAV did not press a financial penalty because of the lengthy sanction VCAT imposed.

### Unlicensed agents

Although there are some areas of legal practice which do spill into agent's work, a member of the legal profession may be the subject of disciplinary action by carrying on the business of an agent without the appropriate real estate agent licence.

"Agents" is defined in the Act as "any person (whether or not he carries on any other business) who exercises or carries on or advertises or notifies or states that he exercises or carries on or that he is willing to exercise or carry on or in any way holds himself out to the public as ready to undertake the business of:

- selling, buying, exchanging, letting or taking on lease of or otherwise dealing with or disposing
- negotiating for sale, purchase, exchange, letting or taking on lease of or any other dealing with or disposition of
- collecting rents – for any real estate or business on behalf of any other person."

In *Noone v Mericka*<sup>5</sup> CAV successfully brought an action against Mr Mericka for carrying on the business of an agent without the necessary licence and engaging in misleading and deceptive conduct pursuant to the *Fair Trading Act* 1999

(Vic).

Mr Mericka ran the businesses Lawyers Real Estate Pty Ltd (LRE) and SLOD Pty Ltd (all three were defendants in this matter) which offered real estate services such as photography and listing mixed with legal services including contract preparation and negotiation. Mr Mericka argued that he and the businesses were covered and didn't need a real estate agent's licence because it was operated by a law practice. One of the advertisements read:

"Does a lawyer need an Estate Agent's Licence to sell real estate? No. A lawyer's Practising Certificate issued pursuant to the *Legal Profession Act* allows a lawyer to operate a trust account, and to perform all aspects of the real estate sale transaction, including the preparation of sale documents, negotiation and closure of the sale, and all legal and conveyancing work associated with the completion of the matter".<sup>6</sup>

This was an allegation of pure breach – the action was not on the basis that there were any complaints regarding the services that had been performed.

The defendants argued that there were three categories of work undertaken by each of them and that they could be covered by the following exemptions:

- "those which are not functions restricted to licensed real estate agents by the *Estate Agents Act* and may thus be provided lawfully by anyone without an estate agent's licence
- those which are legal services and may only be provided by an Australian legal practitioner
- those which are functions that might otherwise be restricted to licensed real estate agents under the *Estate Agent's Act*, but which are ordinary functions of a legal practitioner and may therefore be provided lawfully by a legal practitioner without an estate agent's licence".<sup>7</sup>

It is the third of these arguments which goes to the grey area of overlap between lawyer's work and agent's work. The statutory exemption under the Act states that s5(2)(e) of the Act relevantly states that:

"This Act shall not be construed as requiring

(e) any Australian legal practitioner (within the meaning of the *Legal Profession Act 2004*) for the purpose only of carrying out the ordinary functions of an Australian legal practitioner to hold a licence under or (except in respect of any provision of this Act which is specifically expressed to apply to any class of persons referred to in this subsection) to observe the requirements of this Act."

His Honour found that CAV had made out the allegations against all three defendants.

Conversely, agents must be careful not to undertake legal work without a licence.

The leading authority in relation to non-lawyers undertaking legal work in Victoria is the decision of Phillips J in *Cornall v Nagle*.<sup>8</sup>

Nagle was not and had never been a lawyer and had been the subject of an earlier order by McGarvie J restraining him from inter alia engaging in legal practice or holding himself out as a lawyer.

There were four matters in which Mr Nagle was accused

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of doing the work of a lawyer and CAV brought an action for contempt for breaching the earlier restraining order. Phillips J made findings beyond reasonable doubt of contempt in two of the matters. In one of the matters it appeared that Mr Nagle was acting as an agent for a firm of solicitors and was assisting with litigation but not overseeing it and not holding himself out to be a solicitor, filing and serving the documents. That conduct in and of itself could constitute legal work but less likely when it is as an agent for a lawyer.<sup>9</sup>

### The exception for agents

Section 53 of the Act gives agents the right to prepare in a limited way a standard form contract for the sale of land (a contract) under the following limited circumstances:

- 1) An agent or agent's representative is not guilty of an offence against section 10 of the Legal Profession Uniform Law (Victoria) only because he or she fills out:
  - a) a standard form contract:
    - i) permitted by the regulations; or
    - ii) approved by the Victorian Legal Services Commissioner or a local professional association within the meaning of the *Legal Profession Uniform Law Application Act 2014*; or
  - b) a contract prepared by:
    - i) an Australian legal practitioner; or
    - ii) a licensee within the meaning of the *Conveyancers Act 2006*.
- 2) This does not apply if the agent or agent's representative fills up the form for, or in expectation of, any direct or indirect fee, gain or reward other than the appropriate commission".

Agents should, therefore, be mindful that their work does not spill into what would be considered lawyers' work.

Advertising, of course, will be an indicator. The characteristics which they should look for is whether the work they are doing falls outside the work of an agent, that is preparing pro forma contract only, negotiating for a sale on behalf of a vendor and attending to the marketing of properties. Agents must avoid advising on the contract, drawing fresh contracts or proceeding to litigation. An interesting question which may arise if an agent is working under direct instruction from a solicitor, is whether the bar in *Cornall v Nagle* would be met.

### Conclusion

Agents must adhere to trust account regulations. If they do not, they risk a minimum of reprimand and a fine through to the imposition of a serious financial penalty and being struck off. The imposition of these penalties must meet the aims of general deterrence and protection of the profession's reputation. It is a protective power. As far as their work, agents and lawyers must stick to the confines of their licence. ■

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1. *Director of Consumer Affairs Victoria v Daly (Review and Regulation)*[2017] VCAT 1421.
2. Note 1 above, at [59].
3. *Consumer Affairs Victoria v Hoare (No 2) (Review and Regulation)*[2015] VCAT 1077.
4. Note 3 above, at [31].
5. *Noone v Mericka & Ors* [2012] VSC 101.
6. Note 5 above, at [9(k)].
7. Note 5 above, at [28].
8. *Cornall v Nagle*[1995] VicRp 50; [1995] 2 VR 188.
9. Note 8 above.



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