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ELIZABETHAE II REGINAE

A.D. 1990

No. 74 of 1990

An Act to amend the Land Agents, Brokers and Valuers Act, 1973.

[Assented to 20 December 1990]

The Parliament of South Australia enacts as follows:

Short title

1. (1) This Act may be cited as the *Land Agents, Brokers and Valuers Act Amendment Act, 1990*.

(2) The *Land Agents, Brokers and Valuers Act, 1973*, is referred to in this Act as “the principal Act”.

Commencement

2. This Act will come into operation on a day to be fixed by proclamation.

Interpretation

3. Section 6 of the principal Act is amended by striking out the definition of “date of settlement” from subsection (1) and substituting the following definition:

“date of settlement” in relation to a contract for the sale of land or a business means—

- (a) if a date is fixed by the contract for settlement—the date fixed by the contract or some other date agreed by the parties in substitution for that date;
- (b) in any other case—the date on which settlement takes place.

Insertion of s. 87a

4. The following section is inserted in Division II of Part X of the principal Act immediately before section 88:

Interpretation

87a. (1) In this Division—

“encumbrance” in relation to land includes—

- (a) any easement (other than a statutory easement not registered on the certificate of title to the land that relates only to the provision of electricity, gas, water, sewerage or telephone to the land);

(b) any right of way, restrictive covenant, writ, summons, warrant, caveat, lien, notice, order, requirement, declaration, claim or demand;

or

(c) any other factor (whether similar or dissimilar to those mentioned in paragraphs (a) and (b)) affecting, presently or prospectively, the title to, or the possession or enjoyment of, the land:

“purchaser” means the person or persons named in a contract as purchaser or purchasers or any one or more of them and includes a prospective purchaser:

“qualified accountant” means—

(a) a person who has qualifications in accountancy approved for the purposes of this definition by the regulations;

or

(b) a person experienced in accountancy who is approved by the Tribunal as a fit and proper person to exercise the functions of a qualified accountant under this Division:

“small business” means a business that is, or is to be, sold for a total consideration not exceeding \$200 000 or, if some other amount is prescribed, that amount (but if land is, or is to be, sold in fee simple in pursuance of the same contract, any component of the consideration attributable to the value of the land will, for the purposes of this definition, be disregarded):

“vendor” means the person or persons named in a contract as vendor or vendors or any one or more of them and includes a prospective vendor:

“vendor’s statement” means the statement that the vendor of land or a small business is required to serve under section 90 or 91 and includes all certificates that are required to be endorsed on or attached to the statement.

(2) For the purposes of the definition of “small business”, the value of any land sold or to be sold in fee simple in pursuance of a contract for the sale of a business will be taken to be—

(a) the value agreed in writing between the vendor and purchaser;

(b) in the absence of such an agreement—the capital value determined under the *Valuation of Land Act, 1971*.

Substitution of s. 88

5. Section 88 of the principal Act is repealed and the following section is substituted:

Cooling-off

88. (1) Subject to this section, a purchaser under contract for the sale of land or a small business may, by giving the vendor written notice before the prescribed time of the purchaser’s intention not to be bound by the contract, rescind the contract.

(2) The notice may be given as follows:

(a) by giving it to the vendor personally;

(b) —

(i) by giving it to the vendor’s agent personally;

or

(ii) by leaving it for the agent, with a person apparently responsible to the agent,

at the agent's registered office or a registered branch office nominated by the agent for the purpose of service of the notice;

- (c) by posting it by certified mail to the vendor at the vendor's last known address (in which case the notice is taken to have been given when the notice is posted);

or

- (d) by transmitting it by facsimile transmission to a facsimile number provided by the vendor or the vendor's agent (in which case the notice is taken to have been given at the time of transmission),

and if in any legal proceedings the question arises whether a notice has been given in accordance with this section, the onus of proving the giving of the notice lies on the purchaser.

(3) If a contract is rescinded under subsection (1), the purchaser is, subject to subsection (4), entitled to the return of money paid under the contract.

(4) Where a contract is rescinded under subsection (1), the vendor may retain money paid by the purchaser—

- (a) in consideration of an option to purchase the land or small business subject to the sale;

or

- (b) by way of deposit in respect of the sale if the deposit does not exceed \$50 or, if a greater amount is prescribed, that amount.

(5) A vendor, person acting on behalf of a vendor or stakeholder who, before the prescribed time, demands or requires the payment of money by a purchaser in respect of the sale of land or a small business other than—

- (a) money payable in consideration of an option to purchase the land or small business;

or

- (b) a deposit—

- (i) in the case of the sale of land—of \$50 or such greater amount as may be prescribed;

or

- (ii) in the case of the sale of a small business—of an amount not exceeding ten per cent of the total consideration for the sale specified in the contract,

is guilty of an offence.

(6) In proceedings for an offence against subsection (5), if it is proved that the defendant received money from the purchaser, it will be presumed, in the absence of proof to the contrary, that the defendant demanded or required the payment of that money.

(7) This section does not apply in respect of a contract for the sale of land or a small business where—

- (a) in the case of a contract for the sale of land, the purchaser is a body corporate;

- (b) the purchaser has before entering into the contract received independent advice from a legal practitioner and the legal practitioner has signed a certificate in the prescribed form as to the giving of that advice;

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- (c) the sale is by auction;
- (d) the land or business is offered for sale, but not sold, by auction and a person by whom, or on whose behalf, a bid for the land or business was made at the auction enters into the contract on the same day as the auction;
- (e) the sale is by tender and the contract is made—
- (i) in the case of the sale of land—not less than five clear business days after the day fixed for the closing of tenders and not less than two clear business days after the vendor's statement is served on the purchaser;
 - (ii) in the case of the sale of a small business—not less than five clear business days after the day fixed for the closing of tenders and not less than five clear business days after the vendor's statement is served on the purchaser;
- (f) the contract is made by the exercise by the purchaser of an option to purchase the land or business subject to the sale and the option is exercised—
- (i) in the case of the sale of land—not less than five clear business days after the grant of the option and not less than two clear business days after the vendor's statement is served on the purchaser;
 - (ii) in the case of the sale of a small business—not less than five clear business days after the grant of the option and not less than five clear business days after the vendor's statement is served on the purchaser;
- (g) in the case of a contract for the sale of a small business (including any such contract that also provides for the sale of land), the vendor's statement has been served on the purchaser not less than five clear business days before the making of the contract;
- or
- (h) in the case of a contract for the sale of land, the contract provides also for the sale of a business that is not a small business.
- (8) In this section—
- “the prescribed time” means—
- (a) in relation to the sale of land—
 - (i) where the vendor's statement is served on the prospective purchaser before the making of the contract—the end of the second clear business day after the day on which the contract was made;
 - (ii) where the vendor's statement is served on the purchaser after the making of the contract—the end of the second clear business day from the day on which the statement was served,or the time settlement takes place (whichever is the earlier);
 - (b) in relation to the sale of a small business—
 - (i) the end of the fifth clear business day after the day on which the vendor's statement is served on the purchaser;or
 - (ii) the time settlement takes place,whichever is the earlier.

Substitution of ss. 90, 91 and 91a

6. Sections 90, 91 and 91a of the principal Act are repealed and the following sections are substituted:

Particulars to be supplied to purchaser of land before settlement

90. (1) A vendor of land must, at least ten clear days before the date of settlement, serve, or cause to be served, on the purchaser a statement in the prescribed form (signed by or on behalf of the vendor) setting out—

(a) the rights of a purchaser under section 88;

and

(b) prescribed particulars of—

(i) all mortgages, charges and prescribed encumbrances affecting the land subject to the sale;

(ii) where the vendor obtained title to the land within 12 months before the date of the contract of sale, all transactions involving transfer of title to the land occurring within that period;

and

(iii) any prescribed matters.

(2) For the purposes of subsection (1) (b) (ii), where a person enters into a transaction for the purpose of obtaining title to land and an instrument of transfer, conveyance or other instrument relating to the transaction is lodged at the Land Titles Registration Office or the General Registry Office, the person will be taken to have obtained title to the land not later than the day on which the instrument of transfer, conveyance or other instrument is so lodged.

(3) The statement need not include reference to charges arising from the imposition of rates or taxes less than 12 months before the date of service of the statement.

(4) This section—

(a) applies only to the sale of land where the interest being sold is an estate in fee simple or leasehold interest granted by the Crown in pursuance of statute;

(b) does not apply where land is sold in pursuance of a contract for the sale of a business.

Particulars to be supplied to purchaser of small business before settlement

91. (1) A vendor of a small business must, at least five clear business days before the date of settlement, serve, or cause to be served, on the purchaser a statement in the prescribed form (signed by or on behalf of the vendor) setting out—

(a) the rights of a purchaser under section 88;

(b) the prescribed particulars in relation to the business;

and

(c) where land is sold in pursuance of the contract for sale of the business—the particulars that would be required in a vendor's statement under section 90 if the land were sold separately.

(2) The statement must have endorsed on, or attached to, it a certificate in the prescribed form (signed by or on behalf of a qualified accountant) certifying—

(a) that the accountant or a person acting on behalf of the accountant has examined the accounts of the business;

and

(b) that the financial particulars disclosed under subsection (1) (b) appear to be in conformity with the accounts.

Verification of vendor's statement

91a. (1) Where a vendor's statement is required to contain particulars in relation to land, and an agent acts on behalf of the vendor—

- (a) the agent or a person acting on behalf of the agent must make the prescribed inquiries into the matters as to which particulars are required in the statement;
- (b) the agent, or some person acting on the agent's behalf, must sign a certificate in the prescribed form—
 - (i) that the responses to the inquiries confirm the completeness and accuracy of the particulars contained in the statement;or
 - (ii) that, subject to stated exceptions, the responses to the inquiries confirm the completeness and accuracy of those particulars;

and

- (c) the vendor must ensure that the certificate is endorsed on, or attached to, the vendor's statement at the time of service on the purchaser.

(2) Where a vendor's statement is required to contain particulars in relation to land and no agent acts on behalf of the vendor but an agent acts on behalf of the purchaser—

- (a) the agent or a person acting on behalf of the agent must make the prescribed inquiries into the matters as to which particulars are required in the statement;
- (b) the agent, or some person acting on the agent's behalf, must sign a certificate in the prescribed form—
 - (i) that the responses to the inquiries confirm the completeness and accuracy of the particulars contained in the statement;or
 - (ii) that, subject to stated exceptions, the responses to the inquiries confirm the completeness and accuracy of those particulars;

and

- (c) the agent must serve the certificate or cause it to be served on the purchaser—
 - (i) when the vendor's statement is required under section 90—at least ten clear days before the date of settlement;
 - (ii) when the vendor's statement is required under section 91—at least five clear business days before the date of settlement.

Variation of particulars

91b. (1) A vendor's statement must be accurate as at the date of service on the purchaser.

(2) If after the service of a vendor's statement but before the purchaser signs the contract circumstances change so that if a fresh statement were to be prepared there would have to be some change in the particulars contained in the statement, then the vendor's statement will be regarded as defective until a notice of amendment is served and when such a notice is served it will be presumed that the vendor's statement was served, as amended by the notice, on the date of service of the notice.

Auctioneer to make statements available

91c. Where an auctioneer proposes to offer land or a small business for sale by auction—

(a) the auctioneer must make the vendor's statement available for perusal by members of the public—

(i) at the office of the auctioneer or agent acting for the vendor for at least three consecutive business days preceding the auction;

and

(ii) at the place at which the auction is to be conducted for at least 30 minutes before the auction commences;

and

(b) the auctioneer must cause public advertisement to be given in the prescribed manner and form of the times and places at which the statement may be inspected.

Councils, etc., to provide certain information

91d. (1) A council must within eight clear business days after receiving a request for information under this section provide the applicant with information reasonably required as to—

(a) any charge or prescribed encumbrance over land within the council's area of which the council has the benefit;

or

(b) insurance under Division III of Part V of the *Builders Licensing Act, 1986*, in relation to a building on land within the council's area.

(2) A statutory authority must within eight clear business days after receiving a request for information under this section provide the applicant with information reasonably required as to—

(a) any charge or prescribed encumbrance over land of which the statutory authority has the benefit;

or

(b) any other prescribed matter.

(3) An application under this section must be accompanied by the prescribed fee and any documents that are, in accordance with the regulations, to accompany the application.

False certificate

91e. A person who gives a certificate under this Division knowing it to be false in a material particular is guilty of an offence.

Offence

91f. A person who contravenes or fails to comply with this Division (whether or not the contravention or non-compliance is declared to be an offence) is guilty of an offence.

Penalty: \$2 000.

Remedies

91g. (1) Where a vendor's statement is not given or certified as required by this Division, or the statement given is defective, the purchaser may apply to a court of competent jurisdiction for an order under this section.

(2) On the hearing of an application under subsection (1) the Court may, if satisfied that the purchaser has been prejudiced by the failure to comply with this Division, exercise any one or more of the following powers:

- (a) avoid the contract and make such other orders as the Court thinks necessary or desirable to restore the parties to the contract to their respective positions before entering into the contract;
- (b) award such damages as may, in the opinion of the Court, be necessary to compensate loss arising from the non-compliance;
- (c) make such other orders as may be just in the circumstances.

(3) Damages may be awarded under subsection (2) (b) against—

- (a) the vendor;
- (b) if it appears that the purchaser has been prejudiced by a failure on the part of an agent to carry out duties imposed by this Division—the agent,

or both.

Defences

91h. It is a defence to a charge of an offence, or to civil proceedings, under this Division arising from an alleged contravention or non-compliance with a requirement of this Division if the defendant proves—

- (a) that the alleged contravention or non-compliance was unintentional and did not occur by reason of the defendant's negligence or the negligence of an officer, employee or agent of the defendant;
- (b) that the alleged contravention or non-compliance was due to reliance on information provided by a person or body to which an inquiry to obtain the information is, in accordance with the regulations, required to be made;

or

(c) that—

- (i) the purchaser received independent advice from a legal practitioner in relation to waiving compliance with that requirement;
- (ii) the legal practitioner signed a certificate in the prescribed form as to the giving of that advice;

and

- (iii) the purchaser waived compliance with that requirement by signing an instrument of waiver in the prescribed form.

Service of vendor's statement, etc.

91i. If a vendor's statement, a notice of amendment to a vendor's statement or a certificate of an agent acting on behalf of a purchaser is to be effected by post, service must be by way of certified mail.

No exclusions, etc., of rights conferred or conditions implied by Act

7. Section 92 of the principal Act is amended by striking out "Any" and substituting "Subject to this Act, any".

Service of documents**8. Section 105a of the principal Act is amended—**

(a) by striking out “Any” being the first word of subsection (1) and substituting “Subject to this Act, any”;

and

(b) by striking out from subsection (1) the word “or” between paragraphs (b) and (c) and inserting after paragraph (c) the following word and paragraph:

or

(d) transmitted by facsimile transmission to a facsimile number provided by the person (in which case the notice or document will be taken to have been given or served at the time of transmission).

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor