

Land and Business (Sale and Conveyancing) Act 1994

**Information for Agents and Sales Representatives
wishing to obtain a beneficial interest
in land or a business**

Section 24G Applications



**Government
of South Australia**

Consumer and
Business Services

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Introduction

This document is designed to provide important information to agents and sales representatives who wish to obtain beneficial interest in the property or business they are selling or have appraised on behalf of a client (vendor).

For more information visit the OCBA website at www.ocba.sa.gov.au or call us on 8204 9649.

This document does not substitute for an agent or sales representative obtaining their own independent legal advice.

What the Act says

It is illegal under section 24G of the *Land and Business (Sale and Conveyancing) Act 1994* (the Act) for an agent or sales representative to obtain a beneficial interest in land (or a business) that the agent is authorised to sell (or the agent or sales representative has appraised). A maximum penalty of \$20,000 or 1 year imprisonment applies.

The Act also prohibits the agent from receiving, demanding or retaining commission/expenses where the agent obtains a beneficial interest in the land (or a business) that the agent is authorised to sell. A maximum penalty of \$5,000 applies.

An agent or sales representative who wishes to obtain a beneficial interest must first obtain the approval of the Commissioner for Consumer Affairs under section 24G(5). An agent who obtains a beneficial interest and who then wishes to be paid commission or expenses must also obtain the approval of the Commissioner under section 24G(9) to be paid the commission or expenses.

Conflict of interest

Agents and sales representatives are obliged to act in their client's (vendor's) best interests and to obtain the best possible sale price for the property or business. If an agent or sales representative organises a sale involving themselves, or their associate, then there is an incentive for the agent or sales representative to get the best deal for themselves or their associate, rather than for the vendor. This creates an actual or potential conflict of interest.

Agents and sales representatives should also obtain independent legal advice as to how to deal with actual or potential conflict of interest situations.

Obtaining a 'beneficial interest'

Obtaining a beneficial interest in land or a business is a conflict of interest that all agents and sales representatives should avoid. Agents and sales representatives have a fiduciary obligation to act in their client's best interest. However, if a conflict of interest exists between the agent or sales representative and the vendor, then it brings into question whether the agent/sales representative is acting in their client's best interest. Therefore, the process of assessing applications under section 24G is a rigorous one where the Commissioner must satisfy him or herself of the merits of the application that would warrant the Commissioner's approval.

What is a beneficial interest?

By either purchasing the property themselves, or selling the property to an 'associate' of theirs, an agent and sales representative are obtaining a beneficial interest in that property (or business). Obtaining an option to purchase land or a business or being granted a general power of appointment in respect of land or a business also constitutes obtaining a beneficial interest in the land or business. Other sorts of transactions could also constitute obtaining a beneficial interest in land or businesses contrary to section 24G. Agents and sales representatives will need to seek their own legal advice about whether a contemplated transaction could breach section 24G.

An associate of an agent or sales representative could be their:

- spouse or de facto partner
- daughter or son, or grandchild
- parent or grandparent
- brother or sister
- employee or employer, or
- business partner.

It could also be:

- a corporation, if the agent or sales representative, or their relative, owns 10% or more of the shares of the corporation;
- a trustee, if the agent or sales representative, or their relative, is a beneficiary of the trust; or
- any person who will provide some benefit to the agent or sales representative connected with the subsequent sale of, or dealing with the property.

If a sale occurs to any such associate, then the agent/sales representative will obtain a beneficial interest in the property (or business) and will have committed an offence under section 24G if approval has not first been obtained under section 24G(5).

Commission and expenses

To avoid committing an offence under section 24G(9) agents must first obtain the approval of the Commissioner under section 24G(5) to obtain the beneficial interest in the land or business and must also obtain the Commissioner's approval to be paid the commission/expenses (section 24G(9)).

An application for approval of the commission and/or expenses is treated separately under section 24G(9) and will not be automatically approved even if the Commissioner has approved the obtaining of the beneficial interest under section 24G(5).

Section 24G(5) - applications to obtain a beneficial interest

Disclosures to the vendor

As a starting point, the Commissioner must be satisfied that the vendor has been fully informed of the details of the beneficial interest to be obtained by the

agent or sales representative and consents to the transaction proceeding despite the existence of that conflict of interest.

Being fully informed of the details of the beneficial interest means the vendor must have been informed sufficiently to understand how and why the agent or sales representative or their associate is to obtain a beneficial interest in the property (or business). It is not enough merely to inform the vendor that the agent or sales representative will obtain a beneficial interest. For example, if there is to be a profit or benefit from development or sale of the land, the vendor should be informed of this and have an opportunity to decide whether they should obtain that benefit themselves (refer also to section 24C of the Act).

Valuation report

A written valuation report must be given to the vendor. (A valuation report is not required if the sale is for a business.)

The valuation report must only be prepared by a qualified and approved valuer. A list of approved valuers is available at www.ocba.sa.gov.au

If the agent or sales representative has not arranged for a valuation report and a copy of this report has not been given to the vendor, the Commissioner will have reason to refuse the application to obtain the beneficial interest.

The report must be independent and free from influence and it must disclose the current market value of the property. The agent/sales representative must not tell the valuer the amount of the buyer's offer nor should the valuer try to find out this information and neither can anybody else. To do so will jeopardise the independence of the report and the Commissioner may refuse the application.

The agent/sales representative can instruct the valuer that the report is required for the purposes of an application under section 24G(5) of the *Land and Business (Sale and Conveyancing) Act 1994*.

Exceptional reasons

The onus will be on the agent or sales representative to demonstrate that the circumstances warrant a departure from the usual position that an agent or sales representative should not obtain a beneficial interest in land or businesses the agent is authorised to sell, or that the agent or sales representative have appraised. The threshold for approval of an application under section 24G(5) is considerable and the circumstances in which it will be exercised will be fairly exceptional. The agent or sales representative should therefore provide reasons in the application as to why their particular circumstances warrant the approval of the application.

Section 24G(9) - application for approval of commission or expenses

The onus will be on the agent to demonstrate that the circumstances warrant a departure from the usual position that an agent who obtains a beneficial interest is forbidden from demanding, receiving or retaining commission or expenses. The threshold for approval of an application under section 24G(9) is considerable and the circumstances in which it will be exercised will be fairly exceptional. The agent should therefore provide reasons in the application as to why their particular circumstances warrant the approval of the commission and/or expenses.

The application form

Obtain application form

Agents/sales representatives seeking approval to obtain a beneficial interest and agents seeking approval to be paid the commission/expenses must complete the form that has been approved by the Commissioner for the purpose of section 24G of the *Land and Business (Sale and Conveyancing) Act 1994*. The latest form is downloadable from the OCBA website at www.ocba.sa.gov.au

Information and documents to be supplied

The application lists the information and documents required and includes, amongst other things:

If the sale is for land:

- a copy of the sale contract
- a copy of the valuation report
- a copy of the sales agency agreement and any variations to that agreement (if sale relates to residential land)
- information about offers for the purchase of the land and copies of all written offers (if sale relates to residential land)
- information about the marketing plan and evidence of promotional activities, and
- disclosure of any benefits the agent will receive (aside from the commission and expenses) from the buyer (or anyone else) if the sale went ahead (section 24C).

If the sale is for a business:

- a copy of the sale contract
- information about the marketing plan and evidence of promotional activities, and
- disclosure of any benefits the agent will receive (aside from the commission and expenses) from the buyer (or anyone else) if the sale went ahead (section 24C).

Any information the agent/sales representative and others provide in the application must be accurate and truthful and must not be misleading. The agent/sales representative will be required to complete a series of questions about the sale and whether full disclosure of all relevant information has been given to the vendor such as the valuation report, the details of the conflict of interest and any profits or benefits that the agent could gain from the sale.

Statutory Declarations

Statutory Declarations must be signed by the agent/sales representative, and by the buyer, the vendor and the valuer. The declarations must be signed in front of a witness such as a JP or a Commissioner for Taking Affidavits. The vendor, buyer and valuer must complete the declarations under their own hand. If declarations are incomplete, false or are misleading, the Commissioner will have reason to refuse the application.

Lodge the application

Check that the application is fully completed and all required documents are attached. The Commissioner can refuse the application if the application is incomplete or inaccurate. Lodgement can be made at the Office of Consumer and Business Affairs. The address details and contact numbers are provided in the application form.

How long does the application process take?

Applications are considered carefully and may take several weeks from receipt of all information before the application is finalised. This may affect the settlement date for contractual parties so it's important the agent/sales representative let the vendor know this before a contract is signed.

Other information

Assignable sale contracts

If a sale contract is in the buyer's name and/or nominee (or similar), the Commissioner will have reason to refuse the application to obtain the beneficial interest.

Trusts

Where a trust is the nominated purchaser of the land or business, the Commissioner will have reason to refuse the application to obtain the beneficial interest.