

On 19 April 2018, the Supreme Court of Victoria handed down an appeal decision in *Advisory Services Pty Ltd v Stella Augustin* that is causing much consternation among real estate agents in Victoria.

## Most rebate statements are non-compliant

In a nutshell, the decision is that rebate statements in REIV format agent authorities (sale, leasing and management) and rebate statements recommended by the Director of Consumer Affairs do not comply with the *Estate Agents Act 1980* and that rebate statements must strictly comply with the Act.

Most agents either use an REIV format of authority or use an authority containing a rebate statement in the form published by the Director of Consumer Affairs and therefore most authorities now used by agent — and that have been used by them over the last few years — do not comply with the Act.

## Consequences of non-compliance

When an agent's authority does not include a rebate statement that strictly complies with the Act:

- the agent's client is not liable to pay the agent commission or fees or outgoings such as advertising expenses; and
- any commissions, fees or outgoings paid to the agent over the last 6 years when a defective rebate statement was included in the agent's authorities (and that is likely to be the case in most authorities) may be recoverable by clients from their agents.

## New legislation required to 'correct' the situation

An agent whose authority contains a defective commission rebate statement provided by REIV or the Director of Consumer Affairs may be entitled to indemnity from one or both of those bodies for the losses suffered.

We estimate the amounts involved will easily be more than \$1 billion.

The REIV is, however, unlikely to have sufficient resources to cover all potential claims against it in this regard.

The Victorian Government is not likely to want to make payment of all claims that may be made against the Director of Consumer Affairs and this may spur the Government into action.

As the Supreme Court decision was an appeal decision made by three judges, it is unlikely to be further appealed against and is unlikely to be overturned by the courts.

It is our belief that the REIV, among others, will however be strenuously lobbying the Victorian Government to pass legislation to 'correct' this situation.

It seems sensible that the Government should do so promptly given the effect the recent decision may have on almost all real estate agents in Victoria.





Law

## Rebate statements — Agents not entitled to commissions and are liable to refund

### What agents should do now

**First**, agents should review the forms of authorities (including sale, leasing and management) they use.

They should remove from those authorities any rebate statement provided by the REIV or the Director of Consumer Affairs and replace it with a rebate statement that complies with the *Estate Agents Act*.

On request, KCL Law can supply a rebate statement that complies with the Act

**Secondly**, if an agent is unsure if a rebate statement in its authority complies with the Act or not, they should seek legal advice.

Naturally, KCL Law can in this regard if requested.

**Thirdly**, until the problem is 'corrected' by legislation an agent should be very circumspect about suing a client for commission, fees or outgoings when the relevant authority contains a defective rebate statement.

The client, if well advised, is likely to refuse payment based on the recent Supreme Court decision and a court hearing the case is likely to follow that decision.

Legislation that may be passed to 'correct' the problem may not allow an agent a second chance to claim commission, fees or expenses if a court has already made a decision relation to a particular claim

An agent who wishes to enforce a claim for commission, fees or outgoings when he has an authority with a defective rebate statement may accordingly be best served by deferring the action in respect of its claim to a later date.

**Fourthly**, an agent who faces a claim from a client in relation to a refund of commission, fees or expenses which is based on there being a defective rebate statement in the agents authority should:

- consider if its professional indemnity insurance will provide indemnity for the claim made and if so could promptly seek that indemnity from its insurer; and
- strenuously oppose the claim. By the time the client's claim is heard, appropriate 'corrective' legislation may have been passed and it may include an appropriate defence to the client's claim.

### More information

To discuss the implications of the recent court decision, or for assistance to ensure compliance with the Act, please contact one of the following KCL Law property lawyers:

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