

### **SHOULD THIS FORM BE PRESENTED TO THE BUYER BEFORE OR WITH THE CONTRACT?**

The provision of the PAMD Form 27C Disclosure to a prospective Buyer, and the presentation of Sales Contracts by a Seller or its Agent, are two completely separate obligations required by the *Property Agents and Motor Dealer Act 2000* (PAMDA).

We have identified that there remains some confusion by agents as to whether the PAMD Form 27C is to be presented to Buyers before they present the proposed Sales Contract, or at the same time that they present the Sales Contract, to Buyers.

The PAMD Form 27C has been created by the Office of Fair Trading in response to the obligations imposed on an Agent selling residential property, and contained in Section 138 of PAMDA. Section 138 (2) states that the disclosure is effective only if it is:

- a. "Given to the prospective Buyer in the approved form; and
- b. Acknowledged by the prospective Buyer in writing on the approved form; and
- c. Given and acknowledged before a contract for the sale of the residential property is entered into."

Section 138 (2) (c) therefore makes it very clear that the PAMD Form 27C must be given to the Buyer and acknowledged by the Buyer before the contract is entered into.

Whilst it can be argued that a Buyer can receive and acknowledge the 27C before it entered into a contract, even if the PAMD Form 27C was provided at the same time as the contract, the agent will have little or no evidence that the PAMD Form 27C was "given" and "acknowledged" before the contract was entered into if the PAMD Form 27C is presented at the same time as the contract.

### **PRESENTATION OF SALES CONTRACT**

The provisions in PAMDA which dictate the requirements for the presentation of the sales contract are contained in a separate chapter to the provisions that relate to the selling agents disclosure to the Buyer. The presentation provisions are contained in Chapter 11 of PAMDA.

The provisions in Chapter 11 make no mention of the PAMD Form 27C forming part of the contract documentation. The only way that the Form 27C could form part of the sales contract presentation is if it were attached as document behind all other documents. If it was attached in any other way the Seller would be in breach of its obligation as outlined in Chapter 11 which would entitle the Buyer to terminate the Contract.

Also, if the PAMD Form 27C is attached after all other documents, the Buyer would have a strong argument that it did not receive and acknowledge the PAMD Form 27C before entering into the Contract.

If an agent includes the PAMD Form 27C as part of the Sales Contract documentation when presenting to a Buyer, the agent is exposing itself to the following risks:

1. The agent breaching its obligation of disclosure by not providing the PAMD Form 27C before the Buyer enters into a Contract, and receiving that acknowledgement from the Buyer. The agent may expose itself to a fine up to \$15,000 if this does not occur.
2. If the PAMD Form 27C forms part of the Contract documentation and causes the agent to offend the provisions of Chapter 11 with respect to presentation of the Contract, the Buyer may terminate the Contract which would result in:
  - (a) the agent being fined up to \$15,000;
  - (b) the agent being sued by the Seller; and
  - (c) the agent not being paid commission.

### **OUR RECOMMENDATION**

We strongly recommend that:

1. the PAMD Form 27C is presented to the Buyer, signed by the Buyer, and returned to the agent before any contract documentation is provided to the Buyer.
2. the contract documentation be presented after the agent has received the PAMD Form 27C signed by the Buyer.
3. in addition, add to the Buyer's acknowledgement a paragraph where the Buyer confirms that it has received and acknowledged the PAMD Form 27C prior to receiving the Sales Contract. This can then be relied on as evidence if these issues are ever disputed in a Court.

Any queries in relation to these issues should be referred to Byron Cannon, Director on 07 5443 6600.