

# **Appointing a real estate agent pursuant to the provisions of the *Property Agents and Motor Dealers Act 2000* PUX/952/073**

**SLM/2013/407**

**Version 4.03**

21/06/2016

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## Version History

Version	Date	Description/Comments
3	27/08/2004	First Edition endorsed
3.1	07/07/2005	Conversion project – New WORD/XML template
4	14/07/2009	Reviewed and Updated
4.1	01/05/3013	Update to change government logo and departmental name
4.02	28/03/2014	Updated to new DERM template
4.03	21/06/2016	Minor amendment to review and insert text on new template

## Approval

Position	Name	Date
Acting Director, Operations Support – Land	Amanda Kearnan	21/06/2016



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## Procedure

### Background

The *Property Agents and Motor Dealers Act 2000* (PAMDA) provides for the regulation of the activities, licensing and conduct of real estate agents, auctioneers and their employees together with other related occupations. It has important implications for the Department of Natural Resource and Mines (the Department) real estate sales.

When the Department decides to offer surplus government property (including unallocated State land (USL) and properties controlled by another government agency) for sale by open market competition, it is the Department's practice to appoint licensed real estate agents to market and sell the property on the Department's behalf.

### ISSUES

In accordance with section 3(1) of PAMDA, the State is bound by the provisions of PAMDA. The main impact of PAMDA on the Department's freehold property disposal activities are:

1. The requirement to use PAMDA statutory 'approved forms' only;
2. Definition of agency types: exclusive agency, sole agency, open listing;
3. Appointment of real estate agents;
4. The way contracts must be prepared and presented to buyers;
5. Cooling-off periods;
6. Warning statements;
7. Commission.

This Notification is intended to deal with the appointment of real estate agents but other issues are also highlighted.

## 1. PAMDA Approved Forms

***The approved forms for real estate transactions are as follows:-***

- PAMD Form 20a Appointment of agent (letting and property management)
- PAMD Form 21a Appointment of real estate agent (commercial and industrial sales, leasing and property management)
- PAMD Form 22a Appointment of real estate agent (sales and purchases)
- PAMD Form 23 Reappointment of real estate agent, pastoral house or auctioneer
- PAMD Form 24a Appointment to act as auctioneer
- PAMD Form 25 Sole or exclusive agency notice for sale of property (pastoral house)
- PAMD Form 26 Appointment to act as pastoral house
- PAMD Form 27c Selling agent's disclosure to buyer
- PAMD Form 28 Disclosure of beneficial interest to seller
- PAMD Form 30c Warning statement
- PAMD Form 32a Lawyer's certifications, these forms are available on line at <http://www.fairtrading.qld.gov.au/property-agent-forms.htm>

The only practical and legal method that will enable the Department to impose its somewhat unique and high appointment standards when selling a property through a real estate agent is to ensure that an appointment 'Schedule' which details the Department requirements is signed by both the real estate agent and the delegated Department officer and attached to the back of the relevant PAMDA approved form.

### Practice:

Only PAMDA approved forms are to be used to appoint real estate agents and the relevant PAMDA approved form must be accompanied by the Department's approved appointment 'Schedule' detailing the department's specific requirements of appointment.

## 2. Types of Agency Appointments

PAMDA and the approved forms identify the level of agency agreement that a seller can enter into with a real estate agent. For ease of reference, the following table defines (with the use of an asterisk) the circumstances in which the agent is entitled to receive commission from the seller based on the level of appointment the agent enjoys:

Open Listing	Sole Agency	Exclusive Agency
Client sells	Client sells	Client sells *
Another agent sells	Another agent sells *	Another agent sells *
Agent sells *	Agent sells *	Agent sells *

With an open listing appointment the seller can open list their property with several agents and cancel the appointment at any time by writing to the agents. Commission is payable in an open listing only where the agent actually sells the property.

With a sole agency appointment if the seller makes the sale and the agent plays no part in getting the buyer, the agent is not entitled to commission. However, if another person or another agent sells, the sole agent is still entitled to commission.

With an exclusive agency appointment the agent is entitled to an agreed commission upon sale, whether or not the agent actually sells the property.

It is not practical for the Department to give an agent an exclusive appointment to act as a real estate agent as the Department needs to retain the ability to withdraw a property from the market at any time before a contract is signed by the Department, without then being legally liable to pay commission.

Under PAMDA, if the Department granted an agent an exclusive agency and subsequently a decision was made to withdraw the property from the market for the purpose of affecting an interagency transfer, the Department would be obliged to pay commission to the exclusive agent even though the property was not sold by the agent.

### Practice:

Real estate agents must not be appointed by the Department on an 'exclusive agency' basis. Furthermore, where a real estate agent has been appointed by the Department to undertake the sale of a property, any approach/contact received direct from a potential purchaser to the Department to purchase the property must be referred to the Department's appointed real estate agent.

## 3. Appointment of Real Estate Agent

Section 134 of PAMDA provides that 'the appointment must be in the approved form'. If not, it will become ineffective from the time it is made.

An agent who does work without an appointment may incur a penalty under section 133 and is also unable to sue for fees (see section 140). Also the agent cannot recover more than what is stated in the appointment (see section 141).

All properties offered for sale by the Department on the open market must first be offered at auction or tender as required by the Property Management Committee (PMC) Government Land Disposal Policies.

### ***Sale by Auction:***

#### **(i) Direct Appointment of an Auctioneer**

##### **Practice:**

PAMDA has introduced specific forms for appointing auctioneers, however, it is the Department's practice not to directly appoint an auctioneer solely in that capacity.

The Department will seek proposals from licensed real estate agents in the first instance, then consider all proposals, select and appoint the preferred agent and then have the real estate agent responsible for facilitating a sale by public auction. It is the real estate agent's responsibility to make the necessary arrangements to provide the licensed auctioneer. The Department is required to give the appointed real estate agent the department's *Terms and Conditions of Auction*. The real estate agent must then give the auctioneer a copy of this document which must be read out at the commencement of the auction.

While not all licensed real estate agents are the holders of auctioneer's licenses, the Department's appointment 'Schedule' that is to be attached to the PAMDA approved form, gives the appointed real estate agent the specific authority to appoint, conjunct with or consult a licensed auctioneer to facilitate on the day of the auction.

The Department **will not directly appoint an auctioneer**, which would necessitate completion of PAMDA Form 24a, even if requested to do so by the real estate agent.

#### **(ii) Term and Level of Agency Appointment - Auctions**

##### **Practice:**

When proposing to sell a property by auction, the Department will only appoint the real estate agent on a sole agency basis.

PAMDA provides that an appointment to sell a residential property on a sole or exclusive agency basis must not exceed 60 days.

For properties other than residential, the Department's preferred practice is to appoint an agent for a period not exceeding 90 days.

Regardless of the appointment period, real estate agents must not be appointed by the Department on an exclusive agency basis.

#### **(iii) The Department Schedule - Auctions**

##### **Practice:**

The Department's appointment 'Schedule' must be attached to each PAMDA approved form that is approved and signed by the relevant Department delegate.



#### **(iv) The Department Pro-Forma Documentation - Auctions**

##### **Practice:**

A range of pro-forma style documentation to assist the Department with the disposal of freehold property by auction is available on the Department's 'Property Services - Disposal' Intranet page. Also available on the Intranet page are instructions for completing the PAMDA approved form to appoint a real estate agent on a sole agency basis to undertake a sale by auction.

#### **(v) Renewing Real Estate Appointments - Post Auction**

##### **Practice:**

When a property has gone to auction and remains unsold, the Department will not renew appointments with a real estate agent on a 'sole agency' basis. If it is desirable to continue a business relationship with a particular real estate agent, then an open listing appointment is only to be offered to the agent (see 'Sale by Open Listing').

However, there could be extenuating circumstances where it would be preferable to extend the sole agency appointment. For example, where negotiations are continuing with an intending buyer.

#### ***Sale by Tender***

##### **(i) Term and Level of Agency Appointment - Tender**

##### **Practice:**

When proposing to sell a property by tender, the Department will only appoint the real estate agent on a sole agency basis.

PAMDA provides that an appointment to sell a residential property on a sole or exclusive agency basis must not exceed 60 days.

For properties other than residential, the Department's preferred practice is to appoint an agent for a period not exceeding 90 days.

Regardless of the appointment period, real estate agents must not be appointed by the department on an exclusive agency basis.

##### **(ii) The Department Schedule - Tender**

##### **Practice:**

The Department's appointment 'Schedule' must be attached to each PAMDA approved form that is approved and signed by the relevant the Department's delegate.

##### **(ii) The Department Pro-Forma Documentation - Tender**

##### **Practice:**

A range of pro-forma style documentation to assist the Department with the disposal of freehold property by tender is available on the Department's 'Property Services - Disposal' Intranet page. Also on the Intranet page are instructions for completing the PAMDA approved form to appoint a real estate agent on a sole agency basis to undertake a sale by tender.





#### **(iv) Renewing Real Estate Appointments - Post Tender**

##### **Practice:**

When a property has gone to tender and remains unsold the Department will not renew appointments with a real estate agent on a sole agency basis.

If it is desirable to continue a business relationship with a particular real estate agent, then an open listing appointment is only to be offered to the agent (see 'Sale by Open Listing').

#### ***Sale by Open Listing***

All properties offered for sale by the Department on the open market must first be offered at auction or tender.

#### **(i) Term and Level of Agency Appointment - Open Listing**

##### **Practice:**

Where a property has been marketed and offered for sale by auction or tender and remains unsold, the Department will not renew the original real estate agent's sole agency appointment. Instead, only an open listing may be offered to the original real estate agent or any other suitable real estate agents.

It is possible, if not desirable in some instances, to appoint more than one real estate agent on an open listing arrangement.

PAMDA provides that an appointment to sell a residential property on a sole or exclusive agency basis must not exceed 60 days - for an open listing, a similar period of appointment not exceeding 60 days is to apply.

For properties other than residential, the Department's preferred practice is to appoint an agent for a period not exceeding 90 days.

#### **(ii) The Department Schedule - Open Listing**

##### **Practice:**

The Department's appointment 'Schedule' must be attached to each PAMDA approved form that is approved and signed by the relevant Department delegate.

#### **(iii) The Department Pro-Forma Documentation - Open Listing**

##### **Practice:**

A range of pro-forma style documentation to assist the Department with the disposal of freehold property by an open listing agency is available on the Department's 'Property Services - Disposal' Intranet page. Also available on the Intranet page are instructions for completing the PAMDA approved form to appoint a real estate agent on an open agency basis.

#### **(iv) Renewing Real Estate Appointments - Open Listing**

##### **Practice:**

At the expiration of the 'open listing' appointment period, another open listing may be offered to the real estate agent or any other suitable real estate agents.

Real estate agents will not be appointed on a continuing appointment basis.

## 4. The way contracts must be prepared and presented

PAMDA sets important requirements for the way contracts must be prepared and presented to buyers both in the pre signing stage and in the fully signed contract stage. The contracts are prepared by the appointed real estate agent. The steps must be completed correctly and the contract documentation set out in the correct order otherwise the purchaser may be able to withdraw from a contract. Further assistance from the Department's Property Services and the Department's 'Property Services - Disposal' Intranet page should be obtained if a departmental officer is involved in contract preparation.

## 5. Cooling-Off Periods

PAMDA provides for a cooling-off period to benefit the buyers of residential property. Every contract for the sale of residential land (except where a property is sold at auction on the fall of the hammer) is subject to a cooling-off period. If the residential property is sold before or after auction the cooling-off period still applies. Cooling-off periods allow a buyer to withdraw from a contract within the prescribed timeframe (*i.e. five (5) business days from when the buyer is bound by the contract*) and not be legally in breach of contract, unless this period is shortened or waived.

In the event that a buyer is entitled to a cooling-off period and decides to terminate the contract during the cooling-off period (*five (5) business days*), section 368(3) of PAMDA provides that the seller (or real estate agent, assuming the agent is acting as deposit holder under the contract) must refund the deposit monies to the contracted buyer within fourteen (14) days. In these situations, PAMDA also provides that the seller may deduct a termination penalty equal to 0.25% of the purchase price from the deposit.

### Practice:

If a buyer decides to validly terminate the contract during the cooling-off period, the Department will retain from deposit monies a termination penalty in the amount of 0.25% of the contract purchase price and instruct the deposit holder (usually the real estate agent) to do so. A clause to this effect is contained in the Department's 'Special Conditions of Sale' attached to the contract of sale.

The Department as seller will share the termination penalty in equal parts with the real estate agent. A clause to this effect is included in the Department's appointment 'Schedule' attached to the PAMDA form appointing the real estate agent.

## 6. Warning Statements

Under section 366 of PAMDA, the appointed real estate agent is required to ensure all contracts of sale for a residential property must have attached as its top sheet a 'warning statement' - PAMD Form 30c. The overall aim of the warning statement is to highlight to both parties that the contract has a cooling-off period and the conditions attaching to a cooling-off period. It also recommends that the buyer seek an independent valuation of the property before the cooling-off period ends.

### Practice:

Warning statements are necessary for the sale of all residential property other than a contract formed on a sale by auction.

In situations where the Department is selling residential property without the services of a real estate agent, The Department must ensure that a warning statement is attached to the contract of sale and that all documentation is correctly compiled and in the correct order.



## 7. Commission

The *Property Agents and Motor Dealers Regulation 2001* sets out the maximum commission which may be charged for residential property, freehold rural land and leasehold rural land.

However, an agent is entitled to negotiate an amount lower than this amount of commission. In any other transactions the commission is not regulated.

It should be noted that commission is payable on the sale price (exclusive of GST). Some real estate agents still try to charge commission on the total purchase price (GST inclusive).

At present the maximum commission is as stated below:

### **Maximum commission on purchase or sale of residential property and freehold rural land**

The maximum commission payable on the purchase or sale is:

(a) if the purchase or sale price is not more than \$18000 - 5% of the price; or

(b) if the purchase or sale price is more than \$18000 - (i) \$900; and

(ii) 2.5% of the part of the price that is more than \$18000.

### **Maximum commission on sale of leasehold rural land**

The maximum commission payable on the sale of leasehold rural land is: (a) if the sale price is not more than \$1000 - 10% of the price; or

(b) if the sale price is more than \$1000 - (i) \$100; and

(ii) 5% of the part of the price that is more than \$1000 and not more than \$5000; and

(iii) 2.5% of the part of the price that is more than \$5000.

## Responsibilities

Implementation by relevant officers of state Land Asset Management

## Definitions

PAMDA - *Property Agents and Motor Dealers Act 2000*

The Department - Department of Natural Resources and Mines

## References

*Property Agents and Motor Dealers Act 2000*

*Property Agents and Motor Dealers Regulation 2001*

## Legislation

*Property Agents and Motor Dealers Act 2000*

*Property Agents and Motor Dealers Regulation 2001*

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**SLM/2013/407** Version 4.03 21/06/2016