

What should I do: Use an Extension or do a Subsequent Agency?

1 Basic Rule of Term of Residential Agency Appointments and Period of Agency

1.1 90 day rule continues.

(s 20 1 (c) (ii) - the prescribed period in the Act

1.2 with only one (1) “extension” allowed (s 20)

2 Extending an Agency - Must use the Act procedures

2.1 An Agency can be extended with the agreement of Vendor but an Agent must follow a procedure. (s 20 (6a))

2.2 Extend only Once

An Agency can only be extended once. (s20 (6b))

2.3 To extend an Agent needs to serve a Notice of Expiry not earlier than 14 days before the Agency terminates asking (in a prescribed format) if the Vendor wants to extend.

The Extended Agency can be signed up before the 14 days period expires, leading up to the termination date of the 1st Agency, or after; but an Expiry Notice has to be served in the period.

No Expiry Notice before Agency ends – No Extension

If an Expiry Notice is not given the Agent is not able to extend. (s 20 (6c))

2.4 No refusal by Vendor and No Extension signed

The Vendor may decline an extension and this must be in writing.

The Vendor may also do nothing in the Notice period.

If no notice is given back (by the Vendor) declining then the Agency automatically extends for the prescribed period. (s20 (6a) (b)(ii)) 180 days then runs

3 Why present an Extension Agreement if a Notice is served ?

3.1 If no reply declining is given by the Vendor (to a Notice of Expiry) and no Extension is presented and signed then it appears 180 days would run automatically.

3.2 This may not be practical as new arrangements would need to be made for expenses and the like.

4 The Vendor may unilaterally Terminate in any Extension Period

4.1 The Vendor however can terminate any Extended Agency at any time without cause.

5 Form of Expiry Notice to be given to Extend

5.1 The Expiry Notice needs to comply with the Act and give information advising the Vendor they can terminate the Extended Agency during the extended term (s 20(11))

It must set out

- (a) the termination date when the Agency is to expire
- (b) advise the Vendor they can give notice they do not wish to extend
- (c) that the notice must be given 14 days prior to expiry
- (d) that it will extend for the prescribed period unless the Vendor gives notice to the Agent it does not want to extend
- (e) that it can only extend once
- (f) that a copy of an Extension must be given immediately or within 48 hours
- (g) that the Vendor can terminate at any time in the Extended period

6 Why give an Extension Notice ? Wait Instead ?

6.1 Instead of serving a Notice and triggering an extension an Agent could simply wait for the end of the term and then present a new Agency Agreement.

If no notice of expiry (as defined in s.20(11)) is given the Agency Agreement terminates on the date it is due to expire and cannot be extended. There is no reason why a new Agency Agreement could not be entered into after that expiry date. This would achieve the purpose identified by the Attorney General in the final reading in Hansard of the parties discussing whether there would be a continuation of the agency albeit under a new agreement.

The Vendor would not have unilateral termination rights if a new Agency was entered into after the end of the earlier Agency.

Even if a notice of pending expiry is given, and the Vendor exercises his rights under s.20(6a)(a) and gives notice indicating an intention not to extend the agreement, then in this case the agreement terminates on the date it is due to expire – s.20(6a)(a), then in this case there is still no reason why a new Agency Agreement (eg on different terms as to commission etc) could not be entered into after that expiry date.

So if an Agency Agreement expires and no extension was operative a new Agency can always be entered into once any existing Agency Agreement has terminated by the term of agency being reached and concluded.

So what is the alternate to all the above

7 Use a Subsequent (New) Agency

7.1 There is no prohibition in the Act restricting the parties from terminating an Agency Agreement (not an Auction Agency though, as above) early, by mutual agreement, and entering into a new Agency Agreement.

So early termination and a forming a new Agency Agreement (Subsequent Agency) may be an approach to managing Agency Agreements instead of extending an Agency and going through the arduous process of extending under the Act.

7.2 There is a prohibition in the Act to restrict an Auction Agency being terminated early and entering into a new Agency into before the Agency term would have elapsed. see s 20(6f)

This is to restrict parties from changing the Vendor's Selling Price before the Auction.

So in summary, to tie back in before the Agency lapses, use the Subsequent Agency form in the Society of Auctioneers forms (reaforms.com.au) NOT if an Auction Agency though