

Why it is safer in all cases for buyers' agents to bid at auction under a Power of Attorney rather than a letter of authority and why buyers' agents cannot conceal the capacity in which they are bidding

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This note is meant to be read in conjunction with and to update as well as correct the often read article published some years ago by Byron Rose entitled "I've got the power" which is published on the REINSW website ("the article").

In addition to remaining current as at 7 February 2014 despite amendments in September 2013 to the NSW legislation relating to Powers of Attorney, the article, subject to the three important points made below, remains a generally useful check list and guide for buyers' agents bidding on behalf of their clients at auction.

The first two points derive from several instances of sloppy and ambiguous drafting in sections 68 and 69 of the PSBA Act; one example being the ungrammatical notion in sub sections 68 (2) (a) and (b) of "...the number...of proof (sic) of identity"...upon which the subtly different sub section 69 (1) (b) is at least a comprehensible but still problematic improvement with its reference to ..."the number...of one or more proofs of identity".

The first point relates to what needs to appear in a letter of authority.

Whilst correct in saying that "[t]he PSBA Act provides in section 69(1)(b) that a letter of authority must include the prospective buyer's name and address", the article further states that section 69(1)(b) also requires that the letter of authority contain an "identifying number of their proof of identity" .

Whatever the article means by the last mentioned remark, it incorrectly paraphrases the legislation which reads "the number or other identifier of one or more proofs of identity for that person".

This is a reference not to any 'identifying number' but to the number of proofs of identity for the prospective buyer referred to in the letter of authority.

The second point is not discussed in the article, does not relate to the contents of the letter of authority but explains why it is safer in all cases for buyers' agents to bid at auction under a Power of Attorney rather than a letter of authority.

It is that on the proper interpretation, sub section 68 (2) (b) requires the buyers' agent before registering to bid to have at least sighted and therefore be able to identify the client's Australian photographic driver's licence or Australian passport as these are relevantly, the only acceptable proofs of identity required by sub section 68 (2).

In addition to this hardly ever occurring in practice, to do so would be cumbersome (especially if the client is overseas or interstate given that the legislation does not authorise the production of copies) and impossible to comply with if the client holds neither such a licence nor passport.

Even more onerous but consistent with that interpretation is that sub section 69 (1) (a) requires actual physical production to the selling agent of the client's Australian photographic driver's licence or Australian passport before the buyers' agent is entitled to be registered to bid at the auction under a letter of authority.

Again however, this seldom if ever happens in practice with all selling agents usually being satisfied with production of the buyers' agent's driver's licence and a letter of authority (or the agency agreement under Regulation 15 (5)) and may often be an onerous if not impossible requirement with which to comply.

In this note's view, that is the better interpretation and arises, for example, from the observation that when plainly referring to a person bidding in their own right rather than on behalf of someone else (eg: sub section 68 (2) (a)), the PSBA Act uses the definite article ("the person's") whereas when plainly referring to a person bidding on behalf of someone else (eg: sub section 68 (2) (b)) that legislation uses the indefinite article ("a person's") with the latter rather than the former being the language used in sub section 69(1).

Whether or not that is the better interpretation of these provisions is not the purpose of this note and should not be seen as legal advice.

Rather, the point is to flag that the argument exists and could legitimately be raised by a selling agent or auctioneer to prevent the buyers' agent from registering and therefore bidding on behalf of a client at auction if the buyers' agent is unable to produce either one or both forms of original evidence identifying their client.

For the reasons discussed in the article, proceeding by a Power of Attorney neatly avoids the above issues in the more usual case of those clients whose identity is already known to the selling agent. In that case, the buyers' agent can choose when registering whether or not to show or provide the selling agent with the original Power of Attorney or a copy of it. The other proof required in these circumstances is that buyer's agent's Australian passport or photographic Australian drivers' licence.

This leads to the third point which relates to the requirement under Regulation 15 (2) (a) to PSBA Act that the Bidders (sic) Record must also record the buyers' agent's licence number.

That requirement does not distinguish between a buyers' agent bidding at auction under a Power of Attorney and a buyers' agent bidding under a letter of authority and the use of the words "If a person who is registering to bid on behalf of another person will be bidding for the person under..." in both Regulation 15 (2) and Regulation 15(4); the latter of which expressly deals with Powers of Attorney, confirms there is no distinction.

As such, the remark in the article that "[t]hey don't even have to reveal that they are a buyer's agent if they don't want to" must also be incorrect.

In short, concealing the capacity in which you are bidding (as an agent not a principal) is prohibited.

For further information on Powers of Attorney, please see [NSW LPI Fact Sheet 13 September 2013](#) which, at numbered pages 1 to 6, includes a form of Power of Attorney.