



REIA GUIDELINES ON THE AUSTRALIAN CONSUMER LAW

BACKGROUND

1. From time to time, concerns are raised by consumers and the broader community about misleading or deceptive conduct occurring in the real estate industry. The REIA is committed to ensuring that conduct in the real estate profession maintains standards consistent with the requirements under the Australian Consumer Law (ACL). In providing the advice below REIA consulted with the ACCC. The ACCC is committed to working with industry associations such as the REIA to inform practitioners of their obligations under the ACL.

AIM

2. The aim of this paper is to provide consistent nation-wide guidelines which are recommended by the REIA for real estate agents to comply with the ACL on issues raised by the ACCC which have had the benefit of consultation with the ACCC as follows:

- a. Two Tier Marketing
- b. Dummy Bidding
- c. Price Ranges for Properties
- d. Price Offering
- e. Photographic Representations
- f. Full & Accurate Disclosure

While the ACCC gives support for significant parts of the Guidelines, other parts cover issues that go beyond the ACCCs remit or about which the ACCC has insufficient information or understanding, which the REIA has added, including Rebates (Buyer Discounts) on Advertising. On this additional issue, the ACCC is constrained by its designated functions under the ACL. At the same time the Commission supports all efforts to develop best practice where that facilitates compliance with the ACCC.

MISLEADING AND DECEPTIVE CONDUCT

1. The ACCC has advised REIA that whilst the majority of estate agents value their clients and act accordingly, the ACCC is concerned by an increase in complaints about the conduct of some agents.
2. Moreover, the ACCC has stated that:
 - a. “Section 52 of the Australian Consumer Law prohibits misleading and deceptive conduct. This provision has been adopted by States and Territories in their respective *Fair Trading Acts*.”
 - b. “Misleading and deceptive conduct is a very broad concept. It need not be overt, and can include actions, not just words. Misleading conduct can also include acts of silence or omission. Conduct can be misleading even if the agent doesn’t actually make any specific representation. It is not necessarily relevant whether the agent actually *intended* to mislead anyone to establish negligence. What is relevant is the *overall impression* created by the conduct, and its actual or likely effect on the target audience.”
 - c. “Illegal conduct by real estate agents has the potential to mislead buyers and sellers in the market. It also has the capacity to damage the reputation of the majority of agents who act in accordance with the various legal requirements.”
 - d. “Misleading or deceptive conduct by an agent can give that agent an unfair competitive advantage over other agents in the market”.

REIA Guidelines

5. Real estate agents should bear in mind that the application of the misleading or deceptive conduct provisions of the ACL to specific instances of conduct can be complex. If Agents have any doubts regarding any issues under the ACL they should immediately seek legal advice. Nevertheless, some general principles regarding the application of the misleading and deceptive conduct provisions of the ACL can be stipulated:
 - 5.1 When determining liability for misleading or deceptive conduct, the intent of a person is usually not relevant. The issue is whether conduct, tested objectively, has been misleading or deceptive. It is not necessary for a person to have intended to mislead or deceive in order for liability to arise under the ACL.

- 5.2 Consequently, real estate agents may be liable in civil actions for passing on false information even if they have received that information from others and reasonably believe the information to be true, particularly if they appear to have adopted that information.
- 5.3 In assessing whether conduct is misleading or deceptive, a Court will have regard to the overall impression created by the conduct. Consequently, for example, the Courts will often look at what has been *implied* by particular conduct in determining liability. This can be particularly relevant when considering whether advertisements and other forms of marketing are misleading or deceptive.
- 5.4 Silence may constitute misleading or deceptive conduct where there is a duty to reveal relevant facts. Whilst the Courts have stated that there is no general duty of disclosure in commercial dealings, the failure to disclose a fact may be regarded as being misleading or deceptive, particularly where the recipient of a representation is entitled to believe that a relevant matter affecting him or her would be communicated.
- 5.5 The stating of predictions or opinions can give rise to a liability for misleading or deceptive conduct, particularly when those predictions or opinions are not based on reasonable grounds.
- 5.6 Disclaimers and exclusion clauses do not, in themselves, absolve a person engaging in misleading or deceptive conduct from liability.
- 5.7 Whilst the ability of intermediaries, such as real estate agents, to avoid liability when they have merely passed on information without adopting it is unclear, agents maximise their chances of avoiding liability for representations that have not originated from them when they make that fact clear to the recipient of the information. The High Court has suggested that a person who does no more than pass on information supplied to him or her, making it clear that he or she is merely passing it on for what it is worth and disclaiming its truth or falsity, may not have engaged in misleading conduct if the information proves to be incorrect. However a real estate agent is unlikely to escape liability if they are aware or have cause to believe the representations are false or misleading.
- 5.8 It is generally no defence to an action for misleading or deceptive conduct for a real estate agent to claim that the consumer concerned should have checked the information provided or for the agent to claim that the consumer has failed to make reasonable enquiries.

ISSUES

Two Tier Marketing

6. **ACCC Statement of Concern.** “The ACCC has publicly expressed concern about the practice of misleading two-tier pricing, or two-tier marketing as it is also known. Two-tier marketing refers to the practice of having two prices or tiers in a real estate market, one for the locals who know the market values in that area and one price for other buyers, often from interstate, who aren’t aware of the local market prices.”

7. “The Commission believes the practice is a form of misleading or deceptive conduct.”

8. **REIA Guidelines.** Real estate agents should ensure that they do not engage in the practice of two tier marketing. To that end:

8.1 Real estate agents must not engage in the practice of setting different tiers of pricing, with higher prices being charged of consumers who are, for example, resident outside the particular area of the property or who are otherwise unaware of material facts such that they are prepared to pay prices for the property that are higher than the prices that those who are aware of those facts would be prepared to pay;

8.2 Real estate agents must not induce potential purchasers of property to believe that the stated price of a property is a fair market value when the price has been inflated by matters irrelevant to the value of the property, such as marketing fees, commissions and profits;

8.3 Real estate agents must not provide consumers with estimates of market values of properties that are misleading or deceptive;

8.4 Real estate agents must not make false or misleading representations about investment properties, including the reasonable values of those properties, the features of those properties, the likely rental returns, the nature or effect of long term management contracts, or any other matter that is material to the sale, purchase or lease of the property by the consumer concerned;

8.5 Valuations and market appraisals provided by real estate agents must be realistic and based on a sound understanding of the relevant market;

8.6 If real estate agents provide valuations, appraisals or market forecasts in a volatile market, agents shall identify that volatility to the relevant consumer and shall warn the consumer to keep that volatility in mind when evaluating the agent’s valuations, appraisals or market forecasts;

- 8.7 Real estate agents shall ensure that they do not participate in any harsh or unconscionable conduct with respect to the marketing or sale of properties;
- 8.8 An ACCC warning statement should be included in all contracts for the sale of property prepared by agents that clearly and distinctly warns buyers that it is in their interest to seek independent valuations regarding the property concerned and legal advice regarding the terms of the relevant contract before the document is signed. This warning should be included on all contracts, including contracts for the private sale of land;
- 8.9 Real estate agents shall advise consumers of any significant beneficial relationships that they have with any service providers to whom the consumer is referred by the agent and any commissions, money or other benefits that the agent may receive as a result of that referral;
- 8.10 Real estate agents shall not offer gifts or items as being “free” when the true costs are disguised in the selling price of the property;
- 8.11 Real estate agents shall not engage in bait-advertising, such as by offering properties at discounted prices in a land development when the properties have in fact not been discounted at all or where the properties will not be available at that discounted price in reasonable quantities or for a reasonable time. If the purpose of the advertising properties at discounted prices is to in fact lure potential buyers to purchase more expensive properties, the conduct of the agent may amount to bait-advertising.

Auctions

9. **ACCC Statement of Concern** “The key for members’ understanding between legal and illegal bidding under the ACL is not one of vendor versus ‘dummy’ bidding, or bidding below versus above the reserve price but rather whether other potential bidders are liable to be misled that a bid is genuine when it is not. “Any bid that is not a genuine bid made by or on behalf of an intending purchaser is likely to mislead other bidders unless effective steps are taken to ensure that bidders are not misled. Full disclosure made to all prospective bidders both at the commencement of an auction and prior to each relevant bid would be such a step. In doing so, care must be taken to ensure that such disclosure is not rendered ineffective by it being disguised by the expressions used or by the way they are given. For example, expressions such as ‘the bid is with me’ that may not be understood by inexperienced bidders would not amount to effective disclosure.

- a. “Dummy bidding (at auctions) involves an agent, or a person acting on the agent’s behalf, making bids on a property, on an undisclosed basis, as if they are genuinely interested in purchasing the property, in order to artificially inflate the price of the property. The ACCC considers all vendor bidding to be misleading unless fully disclosed both at the start of the auction and at the time of the bid.”

- b. "The ACCC is concerned that such practices may mislead genuine bidders for the property. The ACCC would be concerned about such conduct regardless of whether it was organised by agents, auctioneers or vendors."

10. REIA Guidelines.

Whilst there is no national statutory code of practice that applies to the regulation of auctions in the real estate industry, the ACL (and the Fair Trading Acts in each State and Territory) will apply to any misleading or deceptive practice in the conduct of auctions. Further, some individual States in Australia have introduced regulations that apply to the conducting of auctions in those States, and some State Real Estate Institutes have introduced codes of practice for auctions. Real estate agents should ensure that those Acts, statutory regulations and any codes implemented by State Institutes are complied with at all times. In addition, the REIA provides the following guidelines with respect to the avoiding of misleading or deceptive conduct in relation to auctions:

- 10.1 Dummy bidding is fictitious or false bidding at an auction by non-genuine bidders in the audience with no real intention to buy the property. Such conduct is misleading or deceptive and shall not be engaged in by agents or auctioneers;
- 10.2 When properly declared, vendor bidding is a legal and ethical process. Vendor bidding (the practice of counter-bids being made by or on behalf of a vendor to ensure a property reaches a reserve price at which it can be sold) that is not fully disclosed to bidders is also likely to mislead or deceive other bidders and thus contravene the ACL and other legislation. Consequently, the following procedures must be followed at all times:
 - (a) The fact that bids are being made by or on behalf of a vendor and the identity of the person making such bids must be announced by the auctioneer both at the commencement of the auction and contemporaneously with each such bid being made, and in a form and manner that will be understood by all potential bidders;
 - (b) Where State law limits the number of vendor bids, the auctioneer shall announce prior to the commencement of bidding for a property the maximum number of bids which will or may be made during the auction by or on behalf of the vendor;
 - (c) Where State law makes no specific provisions, no agent or sales person engaged by an agent shall make or assist any other person in making a bid on behalf of the seller unless those bids have been identified in the manner referred to in these guidelines;

- (d) No agent or auctioneer shall permit a bid to be made by or on behalf of a vendor at or in excess of the vendor's reserve price. Further, if a property is being sold at auction without a reserve price being set by the vendor, no agent or auctioneer shall allow any bid to be made by or on behalf of a vendor.

10.3 A real estate agent shall not provide a potential purchaser of a property to be sold by auction:

- (a) an estimate of the value of that property; or
- (b) advice as to the amount that the vendor might be prepared to sell the property for;

when the real estate agent is aware that the value or amount referred to by that real estate agent is less than the reserve price that the seller has set for that auction, unless instructed otherwise by the vendor.

Price Ranges for Properties

11. **ACCC Statement of Concern.** "Estate agents are at a high risk of misleading consumers if they provide misleading estimates on the likely selling prices of particular properties. The ACCC is concerned by reports that properties have been listed with a price range where the reserve price is at the higher end of the price range and at no stage is the seller likely to sell the property at the lower end of the range."

12. "The ACCC is also concerned about those agents who have understated the likely selling price of a property in order to generate interest from potential buyers. There have also been various reports about agents overstating the likely selling price to the property owners which enables the agent to obtain further listings or even to entice the sale by auction."

13. REIA Guidelines.

The marketing of properties for sale with reference to a range of prices carries with it a substantial risk that there will be misleading or deceptive conduct. This is particularly the case when the range of prices the subject of the marketing includes amounts that are below those that the vendor is reasonably likely to consider accepting. Consequently, real estate agents must be aware that:

13.1. The Australian Consumer Law requires adequate and appropriate disclosure at all times of all relevant price information, so that prospective buyers and the general public can make informed pricing decisions;

13.2 Advertising or quoting a property at a price significantly less than the agent's estimated selling price, the reasonable market appraisal or the prices that the

vendor has indicated he or she is likely to accept constitutes misleading or deceptive conduct;

- 13.3 Agents must ensure that the use of price range marketing does not mislead or deceive consumers as to the price at which the vendors of the property are actually prepared to sell the property; the price at which the vendors of the property have instructed the agent to sell the property; or the price which the agent believes the property will be sold for or the estimated market price of the property;
 - 13.4 When an agent markets a property using a price range, the agent should obtain written confirmation from the vendor before the property is advertised that the vendor will seriously consider all prices within the advertising range, including the price at the lower end of the range;
 - 13.5 Price ranges advertised by an agent should not include any price that is less than a price used in a previously rejected offer unless evidence exists that the vendor has now changed his or her mind and would accept that lower price;
14. Over-quoting by a real estate agent of the estimated market price of a property in order to obtain a listing from a vendor amounts to misleading or deceptive conduct. Further, under-quoting the potential selling price of a property so as to attract the interest of purchasers also amounts to misleading or deceptive conduct. Consequently:
- 14.1 Real estate agents, in attempting to obtain an appointment to sell, auction, buy, exchange or lease property, must not mislead or deceive a person about the estimated market price of the property;
 - 14.2 A real estate agent must only express an opinion about the estimated market price of freehold or leasehold property based on reasonable grounds;
 - 14.3 A real estate agent must tell his or her client immediately if the agent considers that the freehold or leasehold estimated market price of the property has substantially altered from any estimated market price that the agent has previously placed upon that property;
 - 14.4 A real estate agent may only advertise or market a property at price that the agent has been instructed by the vendor in writing to so advertise or market that property;
 - 14.5 A real estate agent must not mislead or deceive potential purchaser as to the amount or terms of offers that a vendor may consider accepting.
 - 14.6 In accordance with guideline 8.11 above, agents must not engage in bait-advertising.

Price Offering

15. **ACCC Statement of Concern.** “Recently there have been reports that agents have not conveyed some or all of the offers made by prospective purchasers to the sellers. In fact in these cases, the agents have allegedly purported to make a counter offer on behalf of the seller. In some cases the prospective buyers have made direct contact with the sellers and have found out that the agent never conveyed the offer to the seller. Apart from breaching any obligations as an agent, such conduct could mislead consumers. Agents will engage in misleading or deceptive conduct if they fail to convey any reasonable offers to the vendor. Agents should not hide behind the agency relationship as ultimately it is the vendor who will make any decision about what price they are willing to receive.”

16. **REIA Guidelines.** It is imperative that real estate agent ensure that the parties to real estate transactions are fully informed of all material facts. To that end, agents must ensure that all reasonable offers are conveyed to a vendor. Consequently:

16.1 Real estate agents must immediately convey to a vendor all expressions of interest and offers relating to a property whether they be written or oral, unless the agent has been provided with written instructions by the vendor to the contrary;

16.2 Real estate agents who have the listing of the sale of a property must ensure that they promptly convey to a vendor any offers to purchase the property, whether written or oral, provided to that agent by any other agent acting pursuant to a conjunctive agreement or acting directly for the purchaser, unless the agent has been provided with written instructions by the vendor to the contrary.

Photographic Representations

17. **ACCC Statement of Concern.** “The increase in popularity of advertising via the Internet has seen an increase in complaints to the ACCC about the ‘touching up’ of pictures that appear on these sites. More and more consumers use the Internet as their primary source of information about a product. The ACCC is concerned that photographs of properties which have been touched up to hide undesirable characteristics or enhance other features could mislead consumers.”

18. **REIA Guidelines.** The REIA reiterates the guidelines expressed in paragraph 5 above, including the guideline that whether conduct is misleading or deceptive, including the portraying of photographic images, can depend upon the overall impression or the implied representation produced by that conduct. Therefore, agents must ensure that photographic images and other market devices are not used in a manner that can give rise to implied representations that are false or otherwise amount to misleading or deceptive conduct. Consequently:

- 18.1 Real estate agents must not alter or permit to be altered photographic images of properties, digitally or by other means, such that the images no longer truthfully and fairly represent that property;
- 18.2 Whether the alteration of a photographic representation is misleading or deceptive will depend upon all of the circumstances. For example, digitally adjusting the exposure of a photograph so as to brighten the lighting of the photograph taken on a dull day may well be legitimate. However, removing television aerials or power poles adjacent to the property; brightening up paint work on a house or over-stating the views that might be achieved from the property may well amount to misleading or deceptive conduct;
- 18.3 Real estate agents may well be liable for misleading representations contained in photographs that have originated from external sources such as an advertising sub-contractor or the vendor. The passing on of such photographs by agents to potential buyers can amount to misleading or deceptive conduct by the agent. Agents would be well advised to ensure that their contracts with advertising sub-contractors include provisions to ensure that the sub-contractors do not engage in misleading and deceptive conduct, including in connection with marketing representations contained in photographs;
- 18.4 Real estate agents should also bear in mind guideline 5.8 above, in that it is generally no defence to an action for misleading or deceptive conduct for a real estate agent to claim that the consumer concerned should have checked the information provided by the agent or for the agent to claim that the consumer has failed to make reasonable enquiries.

Description of Property

19. **ACCC Statement of Concern.** "There have also been complaints to the ACCC about misrepresentations about the characteristics of properties. Some advertisements have incorrectly represented that a property has certain features, fixtures or characteristics. Any statements made about whether or not a property has these features, fixtures or characteristics must be true."
20. **REIA Guidelines.** Real estate agents must provide a full and accurate description of the characteristics of a property. All statements about the description of a property, including its features, fixtures or characteristics, must be truthful and not misleading. Consequently:
 - 20.1 All representations made by an agent regarding the description of a property, including the property's features, fixtures and characteristics, must be true and must not amount to express or implied representations that are false or misleading;

- 20.2 Representations made by real estate agents as to the description of a property and its characteristics must be made accurately and without any embellishment;
- 20.3 The REIA reiterates guideline 5.4 above, in that silence may constitute misleading or deceptive conduct where there is a duty to reveal relevant facts. Whilst there is no general duty of disclosure in commercial dealings, the failure to disclose a fact regarding a particular characteristic of a property might be regarded as being misleading or deceptive, particularly where the recipient of a representation is entitled to believe that the relevant matter would be communicated. Agents should also bear in mind that some State-based regulatory provisions and real estate institute rules of practice contain provisions requiring agents to communicate all material facts in real estate transactions to any person who may be affected by those facts.

Rebates (Buyer Discount) on Advertisements

21. **REIA Guidelines.** The provision of rebates, commissions and discounts by entities such as advertisers to persons placing those advertisements (such as real estate agents) is an accepted part of commercial dealings, not only in the real estate industry. However:

- 21.1 Real estate agents should disclose to any consumer to whom any rebate, commission, benefit, or discount from an advertiser relates, the source and amount of that rebate, commission, benefit or discount. If, at the time that an agent makes this disclosure, the agent is unable to provide the advice of the precise amount of the rebate, commission, benefit or discount, the agent should advise a reasonable estimate of that amount;
- 21.2 Real estate agents should bear in mind that some State-based regulatory provisions and real estate institute rules of practice contain provisions requiring the disclosure to relevant consumers of any significant relationships, connections or affinities between agents and third party suppliers. Further, all jurisdictions contain criminal laws that prohibit the receipt of secret commissions.

SUMMARY

22. The ACCC has clearly advised the REIA that it is committed to ensuring that all agents practise in a manner that excludes any misleading or deceptive conduct. The enforcement of honest conduct amongst real estate agents acts so as to protect consumers and provide a fair and competitive market for those real estate agents who are abiding by the law, including the provisions of the Australian Consumer Law. The ACCC has given notice that it will take severe action against those real estate agency businesses that engage in conduct which misleads or deceives consumers and the REIA supports the ACCC in those endeavours.

23. The REIA has consequently provided these guidelines for real estate agents in order to assist real estate agents to conduct their businesses in a manner that avoids any breaches of the Australian Consumer Law, particularly with respect to the specific issues of concern that have been raised by the ACCC.

13 August 2004