



# REIA

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## 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:



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- 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



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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.