

Estimated Selling Price Guideline for Agents

Section 72 of the *Property Stock and Business Agents Act 2002* prohibits an agent from making false representations with respect to the agent's true estimate of the selling price of a property to either a seller or prospective seller of residential property.

Section 73 prohibits an agent, by any statement made in the course of marketing a property pursuant to an agency agreement for the sale of a residential property, falsely understating the estimated selling price of the property.

The effect of these provisions is to require agents to act reasonably and fairly in their dealings with sellers or prospective sellers of properties and with buyers or prospective buyers of properties.

Section 73 of the *Act* also contains some substantive considerations that agents need to be aware of which could trigger an offence:

- An agent or employee is considered to falsely understate the estimated selling price of residential property if the agent or employee states as his or her estimate of that selling price a price that is less than his or her true estimate of that selling price.
- For the purposes of the section, a statement is considered to be made in the course of marketing residential property if the statement is made:
 - (a) in an advertisement in respect of the property that is published or caused to be published by an agent, or
 - (b) to a person (orally or in writing) as a prospective purchaser of the property.
- Section 75 of the *Act* extends the provisions of sections 72 and 73 to estimated price range in the same way as it applies to estimated price.

A statement in the agency agreement of the agent's estimate of the selling price of residential property is evidence for the purposes of these sections of the agent's true estimate of that selling price. Regulations to the *Act* require that both an estimated price, and the price at which the property is to be offered for sale, must be recorded in the agency agreement.

The maximum penalty for a breach of the provisions of sections 72 and 73 is 200 penalty units – presently \$22,000. The Commissioner for Fair Trading may also take disciplinary action against the agent.

What if the eventual sale price is substantially different from the estimated price?

The price at which a property ultimately sells will be a factor to be considered by Fair Trading in relation to the reasonableness of the agent's estimate.

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However, it is not the only factor, and without more it is not determinative of whether an agent's estimate was fair and reasonable.

The Office of Fair Trading recognises that a significant number of external factors can affect the final selling price. Prevailing economic conditions, interest rate movements, the level of interest in a specific property, the marketing program and method of sale used in a particular case and seasonal factors all play a part in determining the final selling price of a property.

But the situation is this: an agent must act fairly and reasonably in their dealings with buyers and sellers. When estimating a selling price they should do so in a manner that can be substantiated by the agent. An agent must not dishonestly tell a buyer or potential buyer one (lower) price and a seller or potential seller another (higher) price.

Good agents will be able to develop practices that ensure that they make fair estimates of a selling price and will be able to demonstrate what information they relied on to make their estimate. This is good practice for agents and good service for consumers.

The requirement to substantiate selling price estimates – residential property

Section 74 of the *Act* empowers the Commissioner for Fair Trading to require an agent to substantiate an statements made by an agent with respect to the selling price of a property.

The Commissioner may, by a notice in writing, require an agent to provide evidence of the reasonableness of any estimate of the selling price of residential property made by the agent in a statement.

The *Act* provides a maximum penalty of 200 penalty units – presently \$22,000 for failing to comply with such a notice.

Estimates of the selling price in a statement that would be affected by this provision include the following:

- (a) orally or in writing to a seller or prospective seller of the property, or
- (b) in an advertisement in respect of the property that is published or caused to be published by the agent, or
- (c) orally or in writing to a person as a prospective purchaser of the property.

Likely scenarios where an estimated selling price could be given orally would include “open house” inspections; at auctions, prior to the commencement of the auction, and estimates given when an agent is attempting to sign up a prospective vendor to an agency agreement.

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Agents need to be particularly alert in relation to the use of price guides in advertisements promoting the auction or sale of residential properties. Careful consideration should be given to the use of the following two styles:

Specified Range These advertisements display the anticipated property price as falling within a range, eg. \$600,000 to \$650,000.

Non-specific Range These advertisements display the anticipated property price as falling within a low, mid or high range of a fixed dollar amount, eg. Low \$500,000; Mid \$500,000, or where the anticipated property price is shown as a fixed dollar amount followed by a plus sign, eg. \$550,000+

Representations such as these are taken to be estimated selling prices for the purposes of the legislation. Therefore, agents must be able to justify any price range if they use this form of advertisement. If a range is used, it must be consistent with the agent's estimated price recorded in the agency agreement.

What does the Office of Fair Trading require of agents?

When an agent provides an estimated price they must be able to demonstrate that their estimate of the selling price of a property was reasonable in all the circumstances and that they took due regard of those matters that should be included in determining an estimated selling price.

Matters that should be considered when an agent is determining an estimated selling price include:

- Features of the property which would affect the value of the property in the market, such as recreational facilities or special architectural features.
- Future use of the property (such as zoning, rights of way, redevelopment, resumption by public authorities, historical preservation orders, covenants or restriction of user, development approvals)
- Market demand in the area
- Sales of comparable properties
- Likely level of demand for the particular property
- Recent valuations of the property
- The circumstances of the vendors (are they under pressure to sell, how much time is available to develop a marketing plan, are they limited in

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terms of the way they wish to exhibit the property or in respect of their desired method of sale)

- Seasonal factors (does demand traditionally fall away or increase at the time of year the property is being marketed)
- Economic factors (the level of demand for property, whether interest rates on the move, whether the authorities warning about overheated markets).

Agents when determining the estimated selling price of a property should ensure that any information that is relied upon to determine the price is retained in the Sales File for the particular property. Agents should also ensure that any notes they made of their inquiries are also retained. A copy of the sales inspection report should also be retained on the file as it forms part of the agency agreement. This will ensure that if the Commissioner for Fair Trading requires an agent to substantiate the reasonableness of an estimated selling price, they will be able to do so quickly and with confidence.

Whilst an agent who provides an estimated selling price is responsible for its reasonableness, the licensee-in-charge of the agency is responsible for the supervision of all staff and their conduct. Licensees-in-charge must ensure that they have sufficient management and control mechanisms in place in the office to ensure that agents comply with the requirements of the *Act*.

These provisions are in addition to the general obligation on agents not to engage in misleading or deceptive conduct. Agents should particularly note the requirements of sections 51 and 52 of the *Property Stock and Business Agents Act, 2002* which address the publishing of false or misleading advertisements, and misrepresentations by licensees or registered persons.

Agents must also note the requirements placed upon them by the rules of conduct which are prescribed in the schedules to the *Property, Stock and Business Agents Regulation 2003*. These rules must be observed in the course of the carrying on of business or the exercise of functions under a licence or certificate of registration.

These provisions, and others in the *Act* and regulations, extend the requirements in relation to estimated price to the sale and purchase process for rural and commercial transactions.