

**The Real Estate Institute of New South Wales  
Limited**

**Submission dated 21 June 2016**

***Australian Consumer Law Review***

**By e-mail:**

Australian Consumer Law Review  
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## **INTRODUCTION**

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) in response to the *Australian Consumer Law Review* initiated in March 2016.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. REINSW seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

REINSW recognises the importance and significance of the consumer law reforms and appreciates the opportunity to provide comments and suggestions on reviewing the current law.

The Submission addresses the relationship between the Australian Consumer Law (**ACL**) and the *Property, Stock and Business Agents Act 2002* (NSW) (**PSBA Act**), particularly the law in relation to underquoting in the sale of real property. To protect the interests of property consumers and increase transparency, REINSW also suggests changes to the law that deals with a 'material fact', as that term is known in section 52 of the PSBA Act.

## **COMMENTS AND SUGGESTIONS ON THE AUSTRALIAN CONSUMER LAW**

### ***1. Underquoting***

There is currently a discrepancy between the federal and state laws.

Under sections 73 and 73A of the PSBA Act, real estate agents must not advertise or market a property at a price less than their estimated selling price for that property. The contravention of these sections is referred to as 'underquoting' in the sale of real property. Section 30 of the ACL prohibits a person making a false or misleading representation in connection with the sale of the land, including the price payable for the land.

A real estate agent could market a property at a price equal to or greater than their estimated selling price and, in doing so, comply with the relevant sections of the PSBA Act. That market representation may, however, be less than what the vendor will accept, exposing the agent to prosecution under the ACL. Conversely, if a vendor is prepared to accept a price less than the agent's estimated selling price, the agent cannot communicate that to the market as doing so will contravene the PSBA Act.

REINSW is of the view that the intentions of both Acts were to capture and protect property consumers from false and misleading representations. The ACL essentially encompasses the underquoting activities prescribed in the PSBA Act. REINSW proposes that the State law should be revised to eliminate the above discrepancy and reflect the position of the ACL. Additionally, these proposed changes for underquoting will harmonise consumer protection laws across the nation.

## **2. Material Fact**

Section 52(1) of the PSBA Act provides that:

*'A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.'*

REINSW is of the view that the current legislative provisions relating to misrepresentation by concealment of a 'material fact' (or, as is known in other jurisdictions, 'stigmatisation') lacks 'consistency, certainty and clarity'.

### **Consistency**

The current provision is only applicable to real estate agents which, therefore, excludes vendors and vendors' solicitors. In the view of REINSW, harmonising the obligations will provide better consumer outcomes.

### **Certainty**

REINSW suggests that a 'material fact' should be a mandatory disclosure in the form of a prescribed document attached with the contract of sale under Schedule 1 of the *Conveyancing (Sale of Land) Regulation 2010* (NSW). This process puts the purchaser on notice of the relevant issue in the same way as other relevant disclosures.

### **Clarity**

While the Administrative Decisions Tribunal in *Hinton & Ors v Commissioner for Fair Trading* [2006] NSWADT 257 (1 September 2006) has provided a useful guidance on the application of the law, there are no statutory meaning or court's interpretation given to the term 'material fact'. In order to increase the practicality of this provision, REINSW recommends that the ACL legislation include a statutory definition and the PSBA Regulation set out a list of 'material facts'.

### **3. Listing Sites**

REINSW is concerned with the proliferation of agent listing sites. These sites promote themselves as freely providing researched recommendations of the best agent to respond to the unique requirements of the vendor. In truth, they do little to no work and simply pass a lead to an agent that subscribes to their 'services' in the vendors area and requires a payment from the agent, usually a percentage at the agent's commission.

REINSW is of the view that these providers mislead consumers and insert themselves into the market with no added value, but require agents to pay for their referral of work. To protect the interests of consumers, REINSW suggests specific legislation be enacted to address the activities of these providers.

### **CONCLUSION**

REINSW appreciates the opportunity to make this Submission and would be pleased to discuss it further.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Tim McKibbin', written in a cursive style.

**Tim McKibbin**  
Chief Executive Officer  
The Real Estate Institute of New South Wales Limited