

Property Occupations Bill 2013

1. Introduction

This is a submission regarding the Property Occupations Bill 2013, prepared by Jeff Ball.

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- "Investing in Brisbane Apartments"
- "Buying An Apartment Off The Plan in Queensland"

This submission relates to only a few sections in the Bill.

2. Section 212: False Representations About Property

Proposed section 212 states that a licensee or real estate salesperson must not make a false or misleading representation about the letting or sale of property to any person. This includes representations about the value of the property, potential income from leasing the property, prior sale date, prior sales price, or tax impact.

This section is similar to section 574 in the PAMD Act.

It is not entirely clear, but one assumes that section 212 applies both where the real estate agent makes a false or misleading representation to a potential seller (to obtain a listing) and to a potential buyer (to obtain an offer).

Based on my experience, common false or misleading representations made by real estate agents in Queensland to potential sellers include:

- How long it will take to sell the property
- The likely sales price of the property
- That a particular type of sales process will be the most effective – typically, that an auction will be more effective than private treaty to sell the property, when in fact, the agent has no basis for this representation
- That a particular form of advertising will be more effective or be necessary to sell the property.
- That the agent has a particular track record, or successfully sold a particular property.

It is unclear whether the above types of misrepresentations are covered by section 212, or any other provision of the Bill. It is recommended that section 212(2) be expanded so that the above types of misrepresentations are clearly included.

In addition, common false or misleading representations made by real estate agents in Queensland to potential buyers include:

- That other people have made an offer, when in fact that is not the case
- That the property has a certain number of bedrooms, when in fact the property does not
- That the rates or body corporate fees for a property are lower than actually is the case
- That the current gross income for a property is \$X per year, but not disclosing the costs associated with this income or disclosing the true net income of the property – this particularly arises for holiday and short term rental properties
- In an auction situation, making false bids on behalf of a fictitious telephone bidder
- That the property has been on the market for a short period of time, when this is not true.
- That the views from the property will not be built out in the future

The above types of misrepresentations do not appear to be clearly covered by section 212, or any other provision of the Bill. It is recommended that section 212(2) be expanded so that the above types of misrepresentations are clearly included.

Section 212 should also be strengthened make sure that it clearly covers representations about other properties, not just the property that is for lease or sale. For example, it is not uncommon for an agent to make a misrepresentation about another property to a potential buyer or seller – for example, “I have sold 20 properties this year in the area” or “I just sold apartment X upstairs for \$400,000”.

The consequences for breach of section 212 are weak.

Ideally, the misled seller or buyer should have additional remedies available to them.

For example, a misled seller should be able to rely upon one or more of the following remedies if the agent breaches section 212 to obtain a property listing:

- Cancel the agents exclusive appointment
- Obtain a refund of advertising expenditure
- Obtain a refund of any commission paid to the agent

Similarly, a misled buyer should be able to rely upon one or more of the following remedies if the agent breaches section 212 to obtain an offer:

- Damages from the agent for the costs of any third party building or pest inspections etc.
- Ability to cancel the contract of sale, prior to settlement (and with the seller having the ability to claim damages from the agent for any loss as a result of such cancelation of the contract of sale)
- Ability for the seller to cancel the agents exclusive appointment

3. Section 213: Representation of Price of Property to Seller – Auctioneer

This section only applies if a seller asks an auctioneer for information about the price at which a residential property is likely to be sold if it is sold at auction.

If the seller does not ask the auctioneer for this information, then it appears the whole section does not apply. This is overly limiting. For example, if the seller only asks “what price should I set as the reserve price”, then the whole of this section will not apply at all.

In limited circumstances, the auctioneer must provide the seller with a CMA. The section does not require that the CMA include the auctioneer’s view of the likely price at which the property is likely to be sold if sold at auction, the auctioneer’s opinion of the market price for the property or of a recommended reserve price. Thus, section 213(4) requires that the auctioneer provide raw information to the seller, for the seller to decipher, but no written opinion, conclusion or recommendation.

In fact, nowhere in the Bill is there any obligation on the auctioneer to provide the seller with his or her opinion of an expected sales price, a suggested reserve price or an estimate value of the subject property.

It is unclear in section 213 whether the auctioneer must himself or herself prepare the CMA, or whether the auctioneer could have another person produce the CMA. Thus, a CMA could be provided to the seller that does not express the auctioneer’s view or opinion or selection of comparable properties. The CMA provided by the auctioneer could even be a CMA that the auctioneer believes is misleading.

4. Section 214: Auctioneer not to disclose reserve or other price

Under proposed section 214, if the auctioneer gives a CMA to the seller under section 213, the auctioneer must not give the CMA to any person without the seller's written approval.

Often an auctioneer is instructed via a real estate agent. It is noted that section 214 prohibits the auctioneer giving the CMA to the real estate agent, unless the seller approves in writing. This appears somewhat strange.

Under proposed section 214(2), the auctioneer must not disclose to a person (other than a person acting for the seller in relation to the sale):

- the reserve price set for the property
- an amount the auctioneer considers is the price likely to result in a successful bid for the property
- a price guide for the property

It is unclear what is included in the expression "a price guide for the property". A CMA is commonly considered to be a price guide for the property. How section 214 interacts with sections 213 and 216 is unclear.

Section 214(2) cannot be waived by the seller. Section 214(2) prohibits the auctioneer from telling the seller an amount the auctioneer considers is the price likely to result in a successful bid for the property, or from providing the seller with a price guide for the property. Strangely, the auctioneer can give this information to the seller's real estate agent, but not to the seller. It is recommended that section 214(2) be able to be waived by the seller, or at least, that it does not apply to disclosures to the seller.

5. Section 215: Representation of price of property - real estate agent

This section only applies if a seller asks a real estate agent for information about the price at which a residential property is likely to be sold. If the seller does not ask the agent for this information, then it appears that the whole section does not apply. Thus, if the seller asks the agent for a suggested listing price, but not the price at which the property is likely to be sold, then this section does not apply (and there is no obligation to provide a CMA).

Similar comments made above regarding section 213 also apply to proposed section 215.

6. Section 216: Real estate agent not to disclose reserve or other price

Similar comments made above regarding section 214 also apply to proposed section 216.

The section prohibits the agent giving the CMA to the auctioneer, unless the seller approves in writing.

The proposed section only prevents the agent disclosing the CMA that the agent gives to the seller. It does not prevent an agent giving a different CMA to a potential buyer.

If the agent prepares a CMA and gives it to the auctioneer with permission of the seller, there is nothing preventing the auctioneer giving that CMA to a potential buyer. Moreover, if the seller does not ask for information about the price at which the property is likely to be sold, and the agent gives a CMA to a seller on an unsolicited basis, there is nothing preventing the agent giving that CMA to a potential buyer.

It is unclear what "a price guide for the property" covers. Does this section prevent a real estate agent giving a price range or even a price for the property in an advertisement, for a private treaty sale? In relation to private treaty sales, this would be a very strange result, and is contrary to current practice.

In an auction situation, section 216(2) prohibits the real estate agent from informing the seller an amount the agent considers is the price likely to result in a successful bid for the property. This appears to contract section 215, which allows such information to be provided to the seller.

Similarly, section 216(2) prohibits the real estate from giving the seller a "price guide" for the property in an auction situation. Presumably, a "price guide" is not the CMA, because section 215 requires a CMA to be provided, but this is not clear.

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