



**Queensland University of Technology**  
Brisbane Australia

This is the author's version of a work that was submitted/accepted for publication in the following source:

[Christensen, Sharon A. & Dixon, William M.](#) (2001) Property Agents and Motor Dealers Act (Qld) : disclosure, cooling-off and marketeers. *FindLaw Australia*.

This file was downloaded from: <http://eprints.qut.edu.au/42481/>

**© Copyright 2001 Thomson Reuters (Professional) Australia Limited**

**Notice:** *Changes introduced as a result of publishing processes such as copy-editing and formatting may not be reflected in this document. For a definitive version of this work, please refer to the published source:*

## **The Property Agents and Motor Dealers Act Disclosure, Cooling-Off and Marketeers**

### **Introduction**

The *Property Agents and Motor Dealers Act 2000* commenced on 1 July 2001. Significant changes have now been made to the Act by the *Property Agents and Motor Dealers Amendment Act 2001* ("the amending Act"). The amending Act contains two distinct parts. First, ss 11-19 of the amending Act provide for increased disclosure obligations on real estate agents, property developers and lawyers together with an extension of the 5 business day cooling-off period imposed by the original Act to all residential property (other than contracts formed on a sale by auction). These provisions are expected to commence on 29 October 2001. The remaining provisions of the amending Act provide for increased jurisdiction and powers to the Property Agents and Motor Dealers Tribunal ("the Tribunal") enabling the Tribunal to deal with claims against marketeers. These provisions commenced on the date of assent (21 September 2001).

### **Disclosure Obligations**

Sections 138 and 268 of the *Property Agents and Motor Dealers Act 2000* currently impose certain disclosure obligations on real estate agents and property developers, respectively. Following proclamation both sections will also require the disclosure of the amount, value or nature of any benefit **any person** has received, receives or expects to receive in connection with the sale, promotion of the sale, or for providing a service in connection with the sale of the property. Examples of particular persons who may receive a benefit include the seller, a finance broker, financial adviser, financier, property valuer, solicitor, residential property agent or any person providing marketing or promotional services. From 29 October 2001, a real estate agent (included within the wide definition of "residential property agent") or property developer (included within the wide definition of "residential property developer") should use a **Form 27a** for this type of disclosure. Examples of the types of benefits that should be disclosed appear on page 2 of the form. This will include payments for marketing, promotion, commission to the agent or marketer, valuation and financial brokerage fees and amount paid to mortgagees.

The sections do not limit the obligation of disclosure to benefits within the knowledge of the real estate agent or property developer. It may therefore be arguable that the real estate agent or property developer has an obligation to enquire about the amount, value or nature of any benefit to enable disclosure.

Due to the new definition of "residential property agent" s138 will extend the obligation of disclosure to an unlicensed real estate agent or an unregistered sales person acting in

contravention of the Act. The introduction of the definition of “residential property developer” means s 268 will also extend the obligation of disclosure to both a licensed property developer and a person acting as a property developer in contravention of the Act.

### **Cooling off for all residential property**

The existing five business day cooling off period for contracts arising out of an unsolicited invitation to attend a property information session has been extended to the sale of all residential property in Queensland, other than a contract formed on a sale by auction. The circumstances in which a contract will be formed on a sale by auction have been clarified by the amending Act. A contract will be formed on a sale by auction if formed directly on the fall of the hammer or directly at the end of another similar type of competition for purchase. An example in the amending Act clearly indicates that where a property is passed in at auction and a bidder subsequently negotiates and purchases the property, the contract will not be a contract formed on a sale by auction. In those circumstances a cooling off period will apply to the sale.

There are no transitional provisions in relation to the application of the cooling off period to contracts. This means that a cooling off period will apply to all contracts for the sale of residential property entered into on or after the date of proclamation. This is anticipated to be 29 October 2001.

#### **(i) New Warning Statement**

The introduction of a cooling off period for all residential property also means that only one form of warning statement will be needed for all contracts. All contracts entered into on and after the date of proclamation (29 October 2001) should have as their first or top sheet a warning statement in the approved **Form 30a**. A contract will usually be entered into on the date the seller notifies their acceptance of the buyer’s offer.

The new warning statement will have the following features:

- A clear statement to the buyer to obtain independent legal advice and an independent valuation.
- A statement that the contract is subject to a 5 business day cooling off period.
- Signed by the buyer only and witnessed.
- Information on the second page concerning independent legal advice, valuations, cooling-off period and the claim fund.

#### **(ii) Commencement of cooling off period**

The date on which the cooling off period of five business days will commence is unchanged. This means that the cooling off period will commence on the day the buyer is bound by the contract in accordance with s 365 of the Act. Although the procedure is unchanged a new form (**Form 31a**) of Seller's Declaration will apply from 29 October 2001. Difficulties in complying with this procedure have been identified and it is anticipated that a further amendment to s 365 will be passed either late in 2001 or early in 2002.

### **(iii) Waiving and shortening the cooling off**

It will still be possible to waive or shorten the cooling off period through the provision of a lawyer's certificate according to ss 369 and 370 of the Act. These sections have also been amended to require a lawyer to state on the certificate that:

- a. they are independent of the seller, the seller's agent and anyone else involved in the sale, promotion of the sale or provision of a service in connection with the sale of the property;
- b. they have no business, family or other relationship with any of those persons; and
- c. they have not received nor do they expect to receive a benefit in connection with the sale, or for promotion of the sale or for the provision of a service in connection with the sale other than professional costs and disbursements payable by the buyer.

The lawyer's certificate after the date of proclamation (29 October 2001) will need to be in approved **Form 32a**. If the cooling off period is being waived sections 1 and 2 of the form need to be completed and if the cooling off period is being shortened sections 1 and 3 need to be completed.

This new requirement places a heavy onus on lawyers prior to the giving of a certificate to ensure that they do not have any current relationships with parties involved in the sale. The exact nature of the relationship other than a business or family relationship is not clear from the legislation. While it is suggested that the meaning of the phrase "other relationship" will not be limited by the words "business" or "family", it is assumed that the intention of the Act is for lawyers to disclose relationships which may affect their ability to be objective (independent) when rendering advice to a buyer. Therefore, some examples of the types of relationships that may need to be disclosed are:

- Trustee/beneficiary
- Fiduciary
- Solicitor and client (where currently acting for both parties)
- Donee of power of attorney
- Carer relationship
- Guardianship
- Emotionally dependent relationships (eg defacto)

Relationships that will not affect the objectivity of a lawyer may be:

- Casual acquaintances
- Membership of the same club or association as the seller or agent

### **Additional Requirements**

Sections 365A and 365B were inserted by the amending Act and will commence upon proclamation. Section 365A requires that a buyer should receive a copy of a property valuation where:

1. it is a term of the contract that the buyer must pay for a valuation of the property; or
2. the seller or the seller's agent requires that the buyer pay for a valuation.

In these circumstances the seller or the seller's agent is required to give the buyer a copy of the valuation prior to the relevant contract being entered into. Any term in the contract or requirement for the buyer to pay for that valuation will only be effective if the buyer receives the valuation and acknowledges its receipt in writing prior to entry into the contract. Although an offence of 200 penalty points is provided for a failure to comply, a contravention of s 365A does not affect the validity of the contract: s 365A (5).

Section 365B requires all lawyers engaged by a buyer or prospective buyer of residential property, to give that buyer a lawyer's certificate in the approved form and to explain to the buyer the purpose and nature of the certificate. After the date of proclamation the approved form will be **Form 32a**. A lawyer is required to state in the certificate:

- a. whether the lawyer is independent of the seller and the seller's agents and anyone else involved in the sale, or promotion of the sale or the provision of a service in connection with the sale of the property,
- b. whether the lawyer has a business, family or other relationship with any of the above persons,
- c. whether the lawyer has received, is receiving or expects to receive any benefit in connection with the sale, or promotion of the sale or for providing a service in connection with the sale other than professional costs and disbursements payable by the buyer; and
- d. that the lawyer has explained to the buyer the purpose and nature of the certificate.

No sanctions are provided for failure to give such a certificate or for a failure to include the required information in the certificate. However, a lawyer who represented that they were independent of the seller or were receiving no benefit in connection with the sale would be liable both at common law to the buyer and could face professional misconduct proceedings.

### **Marketeer Proceedings**

The amending Act has increased the jurisdiction of the Tribunal to hear proceedings against a marketeer and to make certain orders in respect of conduct that is misleading (S 573A), unconscionable (s 573B), or a false representation (s 573C). The types of order the Tribunal may make in a marketeer proceeding are set out in s 530A of the Act. Where the Tribunal is making an order that a person pay compensation the Tribunal should have regard to the criteria in s 530B of the Act.

**(i) Who is a Marketeer**

Marketeer is defined widely in schedule 3 of the Act. The definition is wide enough to include real estate agents, property developers, solicitors, accountants, financiers, valuers and all other parties who are involved in the sale, or promotion of the sale or the provision of services in connection with the sale.

**(ii) How is a Marketeer Proceeding Commenced?**

A marketeer proceeding may only be commenced by the chief executive filing a complaint in the approved form with the registrar. The complaint will state the grounds for starting the proceedings, the conduct constituting the grounds and that an application will be made for orders under s 530A of the Act.

**(iii) Public Examinations**

The Tribunal may, upon the application of the chief executive, conduct a public examination that investigates the conduct of a marketeer to establish whether the marketeer has contravened s 573A, 573B or 573C. This application may be made either prior to or during a marketeer proceeding.

**(iv) Interim Orders**

The Tribunal has power, after a marketeer proceeding has been commenced and upon the application of the chief executive, to make an order prohibiting a marketeer from engaging in conduct that is a contravention of s 573A, 573B or 573C until the end of the marketeer proceedings. This “stop order” will only be made by the Tribunal if the Tribunal is satisfied, or is satisfied there is a reasonable suspicion, that the marketeer has contravened or is contravening s 573A, 573B or 573C or is likely, or proposing, to engage in conduct that would contravene those sections.

**(v) Powers of the District Court**

The District Court has been given power, upon the application of the chief executive, to:

- (a) make an order preserving the assets of a marketeer where the marketeer may become liable under the Act to pay compensation or to refund an amount of money.(s 572A) The Court must be satisfied that such an order will not unduly prejudice the rights and interests of any other person and that a proceeding of the type listed in s 572A(1) has been commenced either in the District Court or before the Tribunal.
- (i) order a person, who the court is satisfied has contravened s573A, 573B or 573C, to pay a monetary penalty to the State or compensation to a person who has suffered financial loss. The District Court is entitled to make a monetary order up to the limit of its civil jurisdiction (\$250,000.00): s572D. Where the court proposes both the payment of a monetary penalty to the State and compensation, but the person does not have the resources to pay both, the court must prefer to make an order for compensation. Where an order is made against a corporation, the executive officers of the corporation will be jointly and severally liable for any amount that is not paid by the corporation. The executive officer may claim as a defence that the officer took all reasonable steps to ensure the corporation did not contravene s 573A, 573B or 573C or that the officer was not in a position to influence the conduct of the corporation. In deciding the amount a person may be ordered to pay the court must consider the criteria in s 572E of the Act.

### **Claim Fund**

An individual may make a claim against the claim fund where they have suffered loss due to the misleading conduct, unconscionable conduct or false representation of a marketeer under s 573A, 573B, or 573C of the Act: s470(1)(a).

#### **(i) Misleading Conduct**

The amending Act has introduced s 573A, which prohibits a marketeer from engaging in conduct that is misleading or likely to mislead in connection with the sale, the promotion of the sale or the provision of a service in connection with the sale of residential property in Queensland. The meaning of “misleading” or “likely to mislead” will be similar to the meaning given under s 52 of the *Trade Practices Act* 1974 (Cth) and s 38 of the *Fair Trading Act* 1989 (Qld).

#### **(ii) Unconscionable Conduct**

Section 573B prohibits a marketeer from engaging in unconscionable conduct in connection with the sale, the promotion of the sale or the provision of a service in connection with the sale of residential property in Queensland. This section mirrors substantially s 51AC of the *Trade Practices Act* 1974 (Cth). Section 573B(2) lists a range of matters that may be taken into account in deciding whether the conduct engaged in is unconscionable. The Tribunal or

court is entitled to consider a diverse range of matters including the relative bargaining strengths of the parties, undue influence or pressure exerted by the marketeer, breaches of the Code of Conduct, the extent to which the marketeer failed to advise the buyer of any risks associated with the purchase, the extent to which the marketeer failed to disclose relationships the marketeer has to other marketeers in connection with the sale, the unwillingness of the marketeer to negotiate the terms of the contract and whether the marketeer could have ascertained by reasonable inquiry that the buyer could not pay in accordance with the terms of the contract without substantial hardship.

**(iii) False Representation**

Section 573C prohibits a marketeer from representing anything in connection with the sale, the promotion of the sale or the provision of a service in connection with the sale of residential property in Queensland which is false or misleading. Particular instances of matters that a marketeer must not falsely represent, are listed in s 573C(2). Section 573C(4) deems any representation to be misleading where there are no reasonable grounds for making the representation. The onus of establishing that the person had reasonable grounds is on the person making the representation: s573C.

Sections 573 A, 573B and 573C are expressly stated to be in addition to the common law and are not intended to limit in any way remedies which may be available to a party pursuant to the common law: s573D(1). A contravention of s573A, 573B or 573C can result notwithstanding the conduct may occur outside Queensland: s573D(2).