



Underquoting guidelines for residential property

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Disclaimer

This document is a plain language guide to real estate agents' responsibilities. It must not be relied on as legal advice. For more information please refer to the appropriate legislation or seek independent legal advice.

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Introduction



Buying a property is the biggest financial investment most people will ever make.

When dealing in the residential property market, sellers (vendors) and potential buyers (purchasers) should be able to expect a real estate agent to market property ethically and professionally.

Potential buyers can spend money and time investigating properties based on the advertised or stated value. There can be significant consumer detriment if that value was not a reasonable estimate of its likely selling price.

To help protect consumers from underquoting the law requires agents to do the following:

- make reasonable estimates of selling prices and never make a statement or publish a price *lower* than these estimates
- advise the seller of the evidence the agent relied on to make an estimate or revised estimate
- revise the estimated selling price if an agent becomes aware it has ceased to be a reasonable estimate, notify the seller in writing, amend the agency agreement and take steps to ensure they do not communicate any price information lower than their revised estimated selling price.

To help agents carry out their duties and avoid conduct that breaches these laws, this document gives guidance on the laws that apply.

This document also provides further guidance on what could be considered to be best practice and should be referred to by agents as they develop their own procedures to comply with the laws.

Agents are strongly encouraged to regularly review their operational procedures to ensure they are sufficiently robust and comply with the law.



Which laws apply to property marketed for sale?



Which laws apply to property marketed for sale?

Property, Stock and Business Agents Act 2002

The *Property, Stock and Business Agents Act 2002* (the Act) is the primary law regulating the property industry in NSW. Under the Act, it is an offence to underquote the price of a property being marketed, whether in advertising or in any verbal or written representation (statement) made to a potential buyer.

The underquoting requirements **do not apply** to rural land, commercial property or other types of property.

An agent is underquoting the selling price of a residential property by making or publishing a statement about its price that is less than their reasonable estimate of the property's likely selling price.

Other requirements – Property, Stock and Business Agents Act 2002

Agents should also be familiar with licensing requirements, rules of conduct, and obligations for licensees-in-charge that come under the Act and the Property, Stock and Business Agents Regulation 2014 (the Regulation).

Agents can consult the NSW Fair Trading website for further details.



The *Property, Stock and Business Agents Act 2002* and Regulation are available on the NSW Legislation website at www.legislation.nsw.gov.au

The Australian Consumer Law

There are also requirements under the Australian Consumer Law (ACL) that an agent must follow. These requirements prohibit unfair practices and misleading or deceptive conduct. The ACL also makes it an offence to provide false or misleading representations about the price, quality or standard of a property.

These may include representations about the price or price range at which:

- an agent believed the property would sell
- the market valued the property
- a seller was prepared to sell
- a seller had instructed the agent to sell
- a seller has rejected an offer.

To comply with the ACL, agents must follow the seller's instructions on price and then ensure any selling price in advertising, print or a statement accurately reflects the seller's price instructions.

Agents must not publish or state a selling price that is less than their reasonable estimate of the likely selling price (estimated selling price) or the seller's price instructions, whichever is higher.

Agents can also refer to the Australian Consumer and Competition Commission's (ACCC) webpages on false or misleading statements, setting prices, and real estate for more details on false or misleading pricing under the ACL - visit www.accc.gov.au The full ACL is available on the Comlaw website at www.comlaw.gov.au



What is a representation and what is an advertisement?



Representations

A representation is a statement or claim that a person relies on in deciding to act in a certain way. For example, a potential buyer may rely on an agent's statement or claim that a property is likely to sell for a certain price when deciding to purchase property reports or make an offer on the property.

The representation can be made by an agent or the agent's employee during the course of marketing the residential property for sale.

NSW Fair Trading's Misrepresentation Guidelines provide more guidance on making representations and are available on our website.

If an agent is found guilty of underquoting in representations about the selling price by a court of law, the agent may also lose their fees and commissions earned from the sale of an underquoted property. These fee and commission payments will go into the Property Services Compensation Fund.

Advertisements

The laws banning underquoting in advertisements or marketing material apply whether published:

- in print (in any publication) or electronically (for example email or on a website)

or

- on public display

or

- in a broadcast.



Agents can refer to the NSW Fair Trading website for more guidance on publishing advertisements for residential properties, including:

- Guidelines for media advertising staff on real estate advertisements
- Advertising guidelines (for photographic advertising).



Estimated selling price



The relevant law on the estimated selling price

Under the *Property, Stock and Business Agents Act 2002*, agents must follow these requirements when setting or revising an estimated selling price:

- The **estimated selling price for a residential property** means the price or price range specified in the agency agreement for the sale of the property as the agent's estimate of the likely selling price of the property (section 72(1)).
- A real estate agent must not enter into an agency agreement with a person for the sale of residential property unless the agreement includes the estimated selling price (section 72A(1))*.
- The estimated selling price may be expressed as a **price range** but only if the highest price in the price range exceeds the lowest price by not more than 10% of the lowest price (section 72A(2)).
- A real estate agent must **not publish** or cause to be published an **advertisement** in relation to the sale of residential property that includes the **phrase 'offers above' or 'offers over' (or similar symbols or words in any language)** a specified selling price or price range (section 73(2))*.
- A real estate agent must ensure that the estimated selling price of a residential property is, and remains, a **reasonable** estimate of the likely selling price of the property (section 72A(3))*.
- A real estate agent must ensure that the estimated selling price is **revised** if it ceases to be a reasonable estimate of the likely selling price of a property by:
 - notifying the other party in the agency agreement, in writing, of the revised estimated selling price, and
 - amending the agency agreement (section 72A(4))*.
- A real estate agent must, as soon as practicable after revising the estimated selling price, take all reasonable steps to **amend or retract any advertisement** published in relation to the property that includes an advertised selling price for the property that is less than the revised estimated selling price (section 73(3))*.
- A real estate agent must, before or when specifying an estimated selling price or revising an estimated selling price, provide the seller or potential seller of the property with **evidence of the reasonableness** of the estimated selling price (section 72A(5))*.
- The NSW Fair Trading Commissioner may by written notice to an agent require the agent to provide evidence of the reasonableness of any estimate of the selling price of residential property made by the agent in a statement:
 - verbally or in writing to a seller or potential seller of the property, or
 - in an advertisement in respect of the property that is published or caused to be published by the agent, or
 - verbally or in writing to a person as a potential buyer of the property (section 74(1)).An agent who fails to comply with a notice under section 74(1) within the period for compliance specified in the notice is guilty of an offence (section 74(2))*.

* A maximum penalty of 200 penalty units (currently \$22,000) applies for breaching this law.

What is an 'estimated selling price'?

The Act requires real estate agents to include an 'estimated selling price' in agency agreements. The estimated selling price is the agent's **reasonable estimate of the likely selling price** for the property. This is expressed either as a single price or a price range, but only if the highest price in the price range exceeds the lowest price by not more than 10%.

For example, expressing a price range of '\$800,000 to \$880,000' is allowed. However, '\$800,000 to \$900,000' is **not allowed** as the higher figure of \$900,000 exceeds the lower figure of \$800,000 by more than 10%. If an agent publishes or states the selling price as a price range, then it is an underquoting offence if the published or stated price is lower than the lowest price in the agent's estimated price range.

The Act also now **bans the use of phrases or terms like offers above or over** when stating or publishing the estimated selling price as a price range. For example it is **not allowed** to advertise a property as being '\$800,000 plus' or, 'offers over \$800,000' or, '\$800,000+'. However, using phrases or terms like 'price guide', 'guide', 'auction guide', 'bidding guide', 'estimate' or 'price estimate' **are allowed** if the published or stated price figure or price range complies with the Act's other requirements.

What is a reasonable estimate?

A reasonable estimate will ultimately depend on the particular circumstances of each property.

The estimated selling price that an agent determines should be made following a careful consideration of factors that will affect the selling price.

Agents should exercise professional skill, care and diligence in determining the estimated selling price as NSW Fair Trading can require an agent to provide evidence that supports their estimated selling price.

How might an agent make a reasonable estimate?

When determining a reasonable estimate of the selling price of a property, an agent should take into account:

- the specific factors that will influence the expected sale price
- any sales of comparable properties
- feedback from potential purchasers
- any current or relevant valuations provided in respect of the property
- the characteristics and features of the property, such as its size and location, including the existence of any 'material facts'
- the methods used to market the property.

This list is provided as general guidance only and is not exhaustive.

Agents should consider all relevant information before putting the estimated selling price in the agency agreement.



Evidence for determining an estimated selling price

Agents must provide the seller with the evidence of how they reached an estimated selling price for the residential property.

Agents should record relevant information that would allow them to show how they determined a particular selling price estimate to be a reasonable estimate.

Agents should keep file notes and all information relied upon to determine a property's estimated selling price. For example, agents should keep file notes on:

- **Comparable sales**

This may include how such sales compare, any variations between the properties and how that may affect the estimate, and any changes in the market since the comparable properties were sold.

- **Market conditions**

This may include interest rates, the general state of the economy and the general state of the real estate market in the area where the property is located.

- **The property's features**

This may include how close it is to services, the property's general condition and location, its views, size and features of the land and any other feature likely to inform the estimated price.

- **Other relevant information**

This may include any restrictions on the land, rezoning or other uses for the land, length of settlement and any other factors which may affect the estimated price.

This list is provided as general guidance only and is not exhaustive. For example, notes should be made and kept on file of further discussions with the seller, if there is a relevant change in local market factors, or if the response to the marketing campaign suggests a need to revise the estimated selling price from the one originally set out in the agency agreement.

File notes on how an agent determined a reasonable estimated selling price may also be used if the NSW Fair Trading Commissioner writes to an agent requiring them to substantiate any statements they make about an estimated selling price of a residential property.



Revising the estimated selling price

While a property is being marketed, changes in the residential property market or feedback from potential buyers may indicate that the advertised selling price is no longer a reasonable estimate of the likely selling price. In such circumstances, real estate agents must **revise** the estimated selling price.

An agent does not need the seller's permission before revising the estimated selling price to ensure it remains a reasonable estimate.

It would not be realistic to expect agents to revise the estimated selling price every day. However, given changing market conditions, offers made and other relevant factors, real estate agencies should review selling prices weekly and consider if the estimates remain reasonable.

If the estimated selling price is revised, then the agent must:

- notify the seller in writing about the new single price or price range that is the revised estimated selling price
- provide the seller with evidence of how they estimated the revised price
- amend the agency agreement.

Once the estimated selling price is revised an agent must take all reasonable steps, as soon as is practical, to change or withdraw any advertisement displaying a selling price that is less than the revised estimated selling price.

In the case of hard copy advertising material, such as newspapers or posted flyers that are in public circulation, or information emailed to potential buyers before the estimated selling price was revised, it would not be reasonable to expect agents to try to recover all of that material.

However, agents should ensure that any new advertisements contain a selling price or price range that complies with the Act.

Unlike traditional hardcopy advertisements, online advertisements are published on an ongoing basis. Agents should therefore ensure any online price statement remains consistent with their reasonable estimate of the selling price throughout the period it is available to the public.



What if the seller wants a price different to the agent's estimated selling price?

The estimated selling price does not need to reflect the seller's expectations on price. What the law requires is an agent to determine an estimated selling price using their professional skills and market knowledge.

Agents should make the seller aware that they cannot quote a price that is less than the estimated selling price when marketing the property in advertisements or through representations.

Does an agent have to disclose any selling price to a potential buyer?

If a seller instructs an agent not to reveal any price, then an agent is not required to disclose the estimated selling price or any price to potential buyers, be it in advertising, in writing or verbally.

However, if a statement about the selling price is made or published, it must not be less than the estimated selling price in the agency agreement.

What if the eventual sale price is higher than the estimated selling price?

Agents are expected to provide a reasonable estimate of the likely selling price and in many property sales this estimate will be close to the final sale price. However, variations can occur due to factors which may be unknown to the agent; for example interest rate movements, unusually high levels of buyer interest, or factors outside of their control (such as for unique properties which can be difficult to value).

Regardless of the type of property, or what occurs during the marketing period, agents and their employees must act fairly and responsibly in their dealings with buyers and sellers.

This means that, if requested, agents should be able to provide evidence to NSW Fair Trading which demonstrates that the difference between the estimated selling price and the eventual sale price was reasonable in the circumstances. Also, agents must be able to demonstrate that any changes to the estimated sale price were communicated to all parties (seller and potential buyers) as they occurred.





Written records of selling price statements



What are the requirements for written records on selling price statements?

The relevant law on written records

The requirements for written records under the *Property, Stock and Business Agents Act 2002* are as follows:

- A real estate agent who makes a statement in the course of marketing a residential property to a buyer, potential buyer, seller or potential seller that the property is likely to be sold for a specified price or within a specified price range must make a written record of the statement (section 73B(1))*.
- The **record of the statement must contain:**
 - the address of the property concerned
 - the price or price range
 - the date and time of the representation
 - any other information that is prescribed by the regulations (section 73B(2)(a)).
- The record of the statement must be kept at a real estate agent's principal place of business for at least 3 years (section 73B(2)(b)).

* A maximum penalty of 200 penalty units (currently \$22,000) applies for breaching this law.

Having accessible and accurate records allows agents to demonstrate they have not provided a price which is less than their estimated selling price. Keeping written records also enhances accountability and transparency and will assist NSW Fair Trading in investigating and resolving underquoting claims.

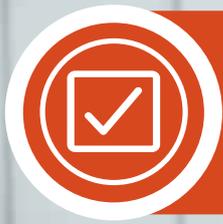
The requirements to keep written records could mean that real estate agencies need to change business practices.

While not currently required by the Regulation, agents should consider including the names of the people who they communicated with about a property's likely selling price or price range, as this may help if agents are investigated.

When should an agent make a written record?

At an open house, an agent is likely to speak to several potential buyers. If the agent is providing the same information to everyone attending the inspection, the agent may simply make a single record of information provided on the occasion.

If an agent just speaks to one or two individuals, either over the telephone or face-to-face, then they should make an individual record of the information they provided to those individuals.



Checklist to avoid underquoting



This checklist is provided as general guidance to assist real estate agents in avoiding underquoting when marketing a residential property:

- The estimated selling price is a reasonable estimate of the likely selling price for the property, with the agent having considered comparable sales, market conditions, the property's features, and other relevant information.
- The estimated selling price is either a single price (such as \$800,000) or in a price range where the highest number does not exceed the lowest number by more than 10% (such as \$800,000 to \$880,000).
- The real estate agency has provided evidence to the potential seller of how the selling price was estimated.
- Marketing material shows the selling price as a single price or a price range that is not lower than the estimated selling price.
- Any statement on the likely selling price quotes a price that is not less than the estimated selling price.
- The real estate agency has written records of any statements made to potential buyers about the likely selling price of the property.
- The estimated selling price has been revised if it no longer reflects a reasonable estimate of the likely selling price.
- The seller has been notified about the revised price in writing and the agency agreement has been amended with the revised estimated selling price.
- Advertisements have been withdrawn or changed (where possible) if the estimated selling price has been revised.



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