

Advice Notes - False, misleading, deceptive statements, material facts and stigmatised property

Please note the following information is intended only to provide a summary and general overview on matters relating to false, misleading and deceptive statements, material facts and stigmatised property. It is not intended to be all-inclusive nor does it constitute legal advice.

Section 56 of the *Property Agents and Land Transactions Act 2016* makes it an offence for property agents to represent in any way to someone else anything that the agent knows is false or misleading in relation to the letting or sale of property.

An essential element of the offence is that the property agent knew when the relevant information was published that the relevant statement or representation was false or misleading.

Section 56 does not in itself create any obligation to make enquiries or to independently verify information that is given to the property agent (eg by the client).

A property agent however has a professional responsibility to ensure so far as is reasonably practicable that information that is published in connection with the sale or lease of property or business is not false or misleading.

The obligation also extends beyond general publication to all forms of communication including direct communication to a person with whom the property agent has dealings, such as potential purchasers and tenants.

The extent to which a property agent may be obliged to make enquiries to obtain information about relevant matters, or take steps to independently verify information given to the agent by a client or obtained from any other source will depend on a variety of considerations which might include, for example:

- the identity of the client
- the apparent reliability of information supplied by the client or the reliability of any other source
- the nature of the transaction
- the nature of the property
- the importance of the information in the context of the transaction.

Where there is evidence to suggest that a property agent could have discovered that information was false or misleading upon proper enquiry before making the statement or representation, but in fact made no such enquiry, the property agent is likely to be guilty of professional misconduct or unsatisfactory professional conduct in the event the statement or representation turns out to be false or misleading.

Stigmatised Property

The term stigmatised property is used to refer to property which has a stigma attached to it due to something that has happened at the property or near the property. This stigma may affect the property price and the decision of purchasers as to whether they will purchase the property or a whether a tenant wants to rent a property.

The reasons for the stigma of a property will vary, but might generally include:

- The history of the property—such as murders, suicides, sexual assaults or major crimes taking place at the property;
- Any health or safety issues—such as the proximity of the property to toxic waste, chemical residue of other matter which might affect the health of the property.
- Proximity issues—such as the proximity of the property to properties with a history or those that have been the subject of an event involving significant public comment.
- Other matters—which would clearly be relevant to purchasers or tenants.

With this in mind the Code of Conduct requires that a property agent:

- must at all times accept that his or her first responsibility is to serve the interests of the client and while serving the interest of the client, to act fairly, honestly and in a reasonable manner toward all other customers.
- does everything that can be reasonably expected to obtain the best price and conditions for the sale or lease of a client's property or business.
- must ascertain all pertinent facts in relation to a transaction undertaken for a client so as to avoid error, exaggeration or misrepresentation.

Misleading or Deceptive Conduct

There are also offences in the Australian Consumer Law (ACL) regarding misleading and deceptive conduct.

Misleading or deceptive conduct in trade and commerce has been prohibited under Australian Law since 1974. This provision is contained in Section 18 of the ACL. Section 18 also makes it clear that as well as businesses needing to comply, employees can now be the primary defendant in legal proceedings under ACL.

The ACL prohibits businesses and their staff from engaging in behaviour which:

- actually misleads or deceives; or
- is likely to mislead or deceive.

All kinds of conduct and communication are covered, including personal discussions, emails, SMS, letters, advertising, negotiations and others.

Misleading or deceptive conduct may include:

- lying or intentionally misleading the client or customer;
- encouraging a wrong conclusion;
- factually correct information that gives a false impression;
- not correcting a misunderstanding;
- not updating information that has changed;
- leaving out or concealing important information;
- making false, exaggerated or inaccurate claims; and
- staying silent about material facts (non-disclosure).

Conduct that **actually misleads** others is generally considered relatively easy to identify. For example, a brochure that wrongly states the size of a block of land is misleading.

Conduct **likely to mislead** is also prohibited but may be harder to identify, without the trigger of a complaint from someone claiming to have been misled.

Material Facts

Material facts include any fact that could influence a consumer's decision about whether to buy or lease a property, and/or how much to pay.

Property Agents should disclose all facts that a reasonable person would expect to be told. This may include facts that will not impact every purchaser or tenant but could stigmatise a property for some.

It is difficult to define just what constitutes a material fact because what is an important consideration for one person may be completely irrelevant to someone else.

For example in the NSW case of *Hinton & Others v Commissioner for Fair Trading*.

A triple murder at the property was not disclosed to potential purchasers. The stigma for the buyers was largely because of their personal religious beliefs. The court said they and all other prospective purchasers were entitled to disclosure of such a significant matter. The same principles would apply if the property was for lease. Although tenancy laws may not spell out the need for disclosure in all areas, many different types of facts can be considered 'material facts' under consumer law.