

Modernising The Estate Agents Act 1980

Submission to the Estate Agents Council

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On behalf of:



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Introduction

I am the Legal Practitioner Director of Lawyers Real Estate Pty. Ltd., an incorporated legal practice, which was established to provide Victorian real estate consumers with a genuine alternative to the existing real estate industry.

Lawyers Real Estate is accredited to the Australian Standard as a LAW 9000 Legal Best Practice law firm, and is the only law firm in Australia to offer real estate sales services to consumers.



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Lawyers Real Estate is not a real estate agency, and neither I nor my firm have ever held a real estate agent's licence. I established Lawyers Real Estate in an effort to demonstrate to consumers and to the real estate industry that it is possible to sell real estate in a fair and transparent manner.

As a lawyer whose role it is to negotiate the sale or purchase of real estate on behalf of my clients, I fall within the definition of "estate agent" as it appears at Section 4 of the *Estate Agents Act* 1980. However, I am exempted from having to observe the provisions of the estate agents act by operation of Section 5(2)(e) of the Act.

Since 1993 I have been involved in thousands of real estate sale and purchase transactions, and I have personally represented the vendors of almost 200 real estate sale transactions in my role as lawyer/real estate agent.

As well as being a hands-on property lawyer, I am also a regular contributor to www.AustralianRealEstateBlog.com.au, an occasional instructor in conveyancing related subjects at the Leo Cussen Institute, and a real estate consumer advocate.

My experience as a property lawyer representing vendors of real estate and purchasers of real estate, and as advisor to consumers in disputes with real estate agents, lawyers and conveyancers gives me a unique insight into the problems of the real estate industry.

Overview

The real estate industry is seriously over-regulated. Many of the attempts to regulate the industry have been in reaction to public outrage at the behaviour of real estate agents and agents' representatives¹, but there has never been a genuine attempt to investigate the root causes of improper behaviour on the part of real estate agents.

Manipulation of the real estate market by commission-driven real estate agents on one hand, and interference by reactive governments on the other, have resulted in

¹ In this submission the term "estate agent" refers to both licensed estate agents and estate agents' representatives.

community confusion and a general failure of the real estate industry to deliver fair and transparent real estate sales services.

Successive governments have taken a paternalistic view of the industry, regarding vendors as requiring special guidance and supervision, and purchasers as vulnerable and in need protection.

The roles of guide, supervisor and protector appear to have fallen to the person least able to fulfil them – the estate agent. For their part, real estate agents have been only too keen to exploit the marketing opportunities afforded by the control such responsibilities provide, and the REIV has used its influence to ensure that the real estate agent has become regarded as the first person consumers should contact on any real estate related matter.

We now have a ridiculous state of affairs, where the vendor of a residential home is expected to seek advice as to the value of their home, not from a qualified valuer, but from an unqualified valuer in the form of an estate agent, receive guidance as to an appropriate sale price from the same estate agent (who, by the way, stands to profit if the vendor accepts the advice offered), and to also have the terms of the sale drafted as a formal contract of sale by that same estate agent.

And who is the “estate agent”? As far as the consumer is concerned, anyone from the real estate agency who wears a suit and a friendly smile is a real estate agent. In most cases, however, the estate agent is not a licensed estate agent at all, but an estate agent’s representative.

Invariably, the estate agent’s representative will have completed no more than a short TAFE course over a number of evenings, during which he or she will have been taught some of the basics of real estate agency procedure, a little about real estate contracts, a little about Section 32 Vendor Statements, and nothing about property valuing. Upon completion of this short and very simple course (I have completed such a course myself in order to gain first-hand experience), the estate agent’s representative is able to call himself or herself a real estate “expert” or “specialist”, and to perform the roles of valuer, conveyancer and lawyer sufficient to achieve a sale and a commission.

To ensure that the inexperienced, under-educated and inadequately supervised estate agent’s representative conforms with the law, avoids conflicts of interests, acts in the best interests of the vendor, and does not mislead or deceive purchasers, there are regulations, backed up by penalties. The estate agent’s representative must negotiate a minefield of penalties on a daily basis.

But what of the parties on behalf of whom the real estate transaction is being conducted?

Vendors are not expected to take responsibility for informing themselves about the value of their own property, or to determine an acceptable price for their property.

This must be done by the estate agent. And if it's not done properly, the estate agent may be punished.²

Similarly, a purchaser is not expected to exercise common sense or to undertake due diligence in determining the market price of a property before attending an auction. Rather, the purchaser relies on a poorly researched price range provided by the estate agent's representative pursuant to Section 47A of the *Estate Agents Act 1980*³, and then complains later about "underquoting".

Terry McCrann recently dismissed the issue of underquoting: *So-called underquoting is a crime without a victim. It's a product of hysteria and very woolly 'thinking', to use the word loosely. McCrann suggests, How about asking potential buyers to do something which is out of order in the nanny state? To take some responsibility for their own actions; to do a bit of due diligence.*⁴

The simple solution to the problem is to allow participants in the real estate market to operate as freely as possible and to allow market forces to determine the manner in which real estate is sold. The first step to deregulating and freeing up the real estate market is to repeal Section 47A of the Estate Agents Act 1980, and to prohibit estate agents from providing advice on property values and pricing.

Lawyers Real Estate has adopted this approach, with the result that vendors and consumers alike are always properly advised, are motivated to conduct their own

² Section 47A *Estate Agents Act 1980*.

³ 47A. Seller must be given estimated selling price

(1) Before obtaining a person's signature to an engagement or appointment to sell any real estate on behalf of the person, an estate agent (or an agent's representative employed by the agent) must ensure that the engagement or appointment states the agent's (or representative's) estimate of the selling price of the real estate, and that the estimate complies with this section.

Penalty: 100 penalty units.

(2) The estimate-

- (a) may be a single amount or a price range; and
- (b) must be the amount the agent or representative believes, on the basis of [his or her](#) experience, skills and knowledge, that a willing but not anxious buyer would pay for the real estate, or in the case of a price range, the range within which that amount is likely to fall; and
- (c) must be set out in a manner approved by the Director.

(3) If an estimate is expressed as a price range, the difference between the upper and lower limits of the range must not exceed 10% of the amount of the lower limit of the range.

(4) Nothing in this section requires the estimated selling price and the seller's reserve price to be the same amount.

⁴ "Home auction system just fine" Herald-Sun newspaper 21 July, 2009 accessed online <http://www.news.com.au/heraldsun/story/0,21985,25811073-36281,00.html> 10 August, 2009.

due diligence, and carry full responsibility for the outcome of the sale transaction.⁵ In other words, Lawyers Real Estate has already demonstrated that there is a better way, and that it works.

Modernisation of legislation

The modernisation of legislation regulating the real estate industry Victoria is not as great a task as it may at first seem.

In my view, much of the burdensome, redundant, ineffective and inconsistent provisions of the existing legislation can be dispensed with and replaced by provisions which clearly define and limit the role of the real estate agent.

Central to my submission is the assertion that the role of the real estate agent has become so burdened with the roles of other real estate professionals (i.e. valuer and lawyer) that it has become impossible for consumers, industry professionals or legislators to determine where the role of the real estate agent starts and finishes.

Separating the role of the real estate agent from those of other industry professionals provides the starting point, if not the solution, to the problems that beset the real estate industry.

In this submission I will focus on just one area of estate agent overreach, namely the intrusion of the estate agent into the role of the real estate valuer.

Valuations and price - Section 47A

Section 47A was inserted into the Estate Agents Act 1980 in 2003.⁶ *as part of a package to deliver substantial improvements in the protection afforded to consumers when purchasing real estate and their dealings with estate agents generally.*⁷

The stated purpose of the bill was to, *inter alia*, amend the Estate Agents Act to prohibit the practices of underquoting and overquoting.

According to Mr. Lenders (Minister for Finance) in his second reading speech:

The bill will prohibit an estate agent or agent's representative making a false representation to a vendor, or prospective vendor, as to the agent's true estimated selling price of the vendor's property. This provision is designed to stamp out the practice, engaged in by some dishonest agents, whereby the

⁵ Lawyers Real Estate is a law firm and is exempted under Section 5 of the Estate Agents Act 1980 from having to observe the provisions of the Act, including Section 49A.

⁶ Estate Agents and Sale of Land Acts (Amendment) Act 2003, No. 41/2003 Section 6

⁷ Mr. Lenders, Second Reading speech of the Estate Agents and Sale of Land Acts (Amendment) Bill 2003, Parliament of Victoria Legislative Council, 22 May 2003 – Source – VicHansard (www.parliament.vic.gov.au).

agent gives the vendor an inflated estimate of the property's value in order to obtain the vendor's listing. The bill will require the estate agent to record his or her estimated selling price in the authority or agency agreement signed by the agent and the vendor.

The bill will also prohibit an estate agent or agent's representative from underquoting the estimated sale price to a prospective purchaser. This provision is designed to stamp out the practice, also engaged in by some dishonest agents, whereby the agent gives prospective purchasers a low estimate of the selling price in order to encourage interest in the property and attendance at the auction. This practice can in some cases result in purchasers spending money on architect or builder's inspections or on legal fees when in reality the property is beyond their means.

Under the new provisions, the Director of Consumer Affairs Victoria will be able to require an estate agent or an agent's representative to provide evidence of the reasonableness of his or her estimated selling price. Substantial penalties will apply for a breach of the new provisions and an estate agent or agent's representative who fails to comply may find him or herself subject to disciplinary proceedings at VCAT.

The intent of these provisions is to prohibit estate agents deliberately underquoting or overquoting. The provisions are not intended to penalise an estate agent who makes an honest mistake about the estimated selling price. Only those estate agents who flout the new laws by deliberately underquoting or overquoting will run foul of the new laws and be subject to prosecution by Consumer Affairs Victoria.⁸

In terms of stamping out underquoting and overquoting, the requirement that an estate agent or agent's representative must provide a vendor with an estimated selling price, and to provide evidence of the reasonableness of his or her estimated selling price, has been a complete failure.

Where previously a real estate agent would provide an "appraisal" or estimated selling price as a marketing strategy or perhaps a courtesy, 47A now **requires** the real estate representative, regardless of experience, competence or self-confidence, to come up with what the average consumer regards as a property valuation.

Conflict of interests

There is a clear conflict of interests whenever a an estate agent purports to advise a vendor regarding the sale price of a property the sale of which will result in payment to the estate agent's representative.

It is this competition between the interests of the estate agent and those of the vendor that leads to the following problems:

⁸ Ibid.

1. Deliberately under estimating the value of the property in order to gain a quick sale.
2. Deliberately over estimating the value of the property in order to win the listing (recall the adage *quote them high watch them die, quote them low watch them go*).⁹
3. Using the role of “valuer” in order to condition the vendor into accepting a reduced price. (When the vendor has first placed trust in the estate agent for the purposes of discovering the market value of the property, the vendor becomes “attached” to the agent for the purpose of obtaining further advice. This allows the estate agent to take advantage of the vendor’s ongoing trust in order to advise the vendor to reduce the price and to allow the estate agent to win a sale and a commission.)

To these conflicting interests, we can now add some that have been created by Section 47A:

4. Falsely claiming to have the competence, capacity and experience to satisfy the requirements of Section 47A. (For example, a former hair-dresser with little experience in the industry must convince a vendor client that he or she has the skills required to satisfy Section 47A and to properly estimate the amount the vendor’s property will fetch on sale.)
5. Avoiding the common-sense approach of telling the vendor to obtain a formal valuation provided by a qualified valuer, in order to avoid any comparison between the appraisal and the formal valuation.
6. Asserting that his or her own estimate of the property’s value is superior to that of a qualified valuer in order to win a listing or to ensure a sale.

Example: Lawyers Real Estate

As a law firm, Lawyers Real Estate (LRE) had to examine the situation in terms of its fiduciary duty to the vendor client and conflicts of interests associated with the providing of real estate appraisals or valuations.

It was decided that under no circumstances would LRE purport to assist or to offer advice regarding the value of a vendor client’s property or a suitable asking price for a vendor client’s property. Because LRE is not required to observe the provisions of Section 47A of the *Estate Agents Act 1980*, it is not required to provide any of its vendor clients with an estimate of the selling price.

Full responsibility for conducting due diligence regarding the current market value of the property, determining acceptable asking price of the property, and making a decision as to the eventual sale price of the property remains at all times with the

⁹ Estate Agents Council, Position Paper – Modernising the Estate Agents Act 1980 July 2009, p.12

vendor.

Vendors are advised that they must obtain a formal written valuation from a qualified valuer of their own choice, and that LRE's services are not available unless and until the vendor is able to furnish a current formal valuation.

The vendor is told that the vendor's obtaining of a formal valuation is a pre-requisite for the following reasons:

1. LRE has a duty to ensure that the vendor has some knowledge of the marketplace and what his or her property is likely to fetch in that marketplace. It is preferable that the vendor should discover, at an early stage, whether the current market is likely to meet the vendor's expectations in terms of price.
2. LRE is entitled to be satisfied that the vendor is undertaking the sale of their most important asset seriously, and that the decision to sell is well founded.
3. The formal valuation will have been provided by a valuer who has been chosen by the vendor, and who is completely independent of LRE.
4. Because the vendor has chosen the valuer, the vendor is entitled to make direct, personal and confidential contact with the valuer for the purposes of obtaining up-to-date and ongoing advice regarding the state of the real estate market and its impact on the vendor's property.
5. Potential purchasers and/or their representatives will be advised at the vendor's asking price is informed by a formal written valuation. This allows purchasers to have some confidence in the vendor's asking price in terms of its having been well researched and soundly based. Of course, a purchaser should undertake their own due diligence, which may also include the obtaining of a formal valuation.

If the vendor expresses dissatisfaction with the valuation, they are advised as follows:

1. The vendor should inform the valuer of their dissatisfaction, and discuss the reasons for the vendor's dissatisfaction. Usually, the valuer is able to explain factors that the vendor had not considered.
2. If the valuer confirms the valuation as being correct, then the vendor should use the valuation as a factor in determining whether or not the property should be placed on the current market.

Anecdote: An elderly vendor complained that her property had been valued at \$340K, while she required \$380K in order to purchase a unit in a retirement village of her choice. The valuer confirmed that her property would not fetch more than \$340 in the current market, and suggested that she should defer selling her property until the market

had picked up. This client did not proceed with the sale.

The valuation is used to determine specific price range from a figure that is 5% below the valuation to a figure 5% above the valuation. If the valuation specifies a range, then this range is used. Potential purchasers are invited to submit offers within the advertised range.

Vendors must confirm that they are prepared to accept an offer that falls within the range, before the range is advertised. Of course, this does not prevent competitive bidding from taking the eventual sale price above advertised range. Similarly, the vendor is entitled to modify his or her asking price to a figure that is beyond the upper level of the range if competitive bidding takes the price above the upper limit of the range.

If a vendor states that his or her minimum acceptable price is beyond the calculated price range, they are advised that LRE cannot assist with their sale for the following reasons:

1. It would be a waste of the vendor's time and money, and it would be a waste of our time and effort to attempt to sell a property for a figure that is well beyond the current market value.

If a vendor client to whom an offer has been submitted asks if the offer should be accepted, the client is advised to consult with their valuer for guidance in making this decision. The client is advised that LRE cannot assist in this exercise because of the conflict of interests involved.

The approach taken by LRE allows the marketplace to operate freely and transparently. There is no manipulation by any party who has an interest in seeing the vendor's property sold.

No-one is forced to accept responsibility beyond their competence or their capacity, and those whose interests require protection are able to obtain independent advice and assistance from those best qualified to provide it.

In the beginning - the estate agent's "appraisal" as a marketing ploy

Initially, the estate agent's appraisal was little more than a marketing ploy. Traditionally, it has been used by estate agents as a listing tool.

The estate agent's representative is expected to drum up listings in a variety of ways, one of which is the free-of-charge market appraisal. As the recipient of countless letterbox leaflets and telemarketing calls from local real estate agents offering free appraisals, my own experience with estate agents and through dealings with them on behalf of clients, confirms for me the description offered by Brendan Gulliver at page 88 of his novel "SOLD":

Hendo used to take Will on market appraisals. These were call-ins, people wanting someone to tell them what their home was worth. Market appraisals (known as MAs) were courtship, the opportunity to get inside a house, to lay the foundations for a relationship with the owners. They were like giving your wife a shoulder massage in the hope that it would lead to sex... tedious but an essential first step.¹⁰

Commercial software applications have been developed which enable estate agent representatives to use property valuation enquiries as a lead generation tool. WhatPriceMyHouse.com is an example of such a lead generation tool disguised as a consumer service. Outwardly, the website tells consumers to “*Find out what your home is worth in 1 easy step*”¹¹ The site also tells consumers:

*In just one simple step you can receive a complete market analysis from a real estate agent. If you are selling a property, you will also receive an estimated selling price range for your property. All you need to do is provide us with the necessary information about your property...*¹²

and

3. Why is a local real estate expert required to prepare the report?

Our local real estate experts have a detailed knowledge of property prices in your area. Their expertise will provide you with a guide to assessing property values in your suburb and to assist you in making your decisions about buying or selling property.

However, estate agents are given a different view of the site’s purpose. When I visited the site soon after it was established, a link provided for the information of interested estate agents gave access to the following information:

Here's How Any Real Estate Agent Can Trade-In Their 80-Hour-A-Week Job, and instead ... Work Only 25 Hours A Week Sitting On Their Bum (At Home Or On Holiday) ... And Still Pull In \$200,000-\$300,000 A Year - no hassle at all.

What's more, you are the only agent in your area that they have given this exclusive information to. They have contacted YOU for one reason only.

You were smarter than the agent down the road because you put into action a KILLER lead-generation system that delivers bucket-loads of leads for little cost or effort.

¹⁰ Brendan Gullifer, *Sold Melbourne Sleepers* 2009 p.88.

¹¹ WhatPriceMyHouse.com Home Page [Online]. Available: <http://www.whatpricemyhouse.com/site/home.asp> [Accessed: 11 August, 2009].

¹² WhatPriceMyHouse.com Home Page [Online]. Available: <http://www.whatpricemyhouse.com/site/howdoesitwork.asp> [Accessed: 11 August, 2009].

At this stage, generally their only loyalty is to the best promotion or offer - not to you. And so it is critically important to get past their defences the passive way. Marketing by stealth, you might call it.

Without doubt, the most profitable, turn-key, lead-generating system for real estate agents in Australia ... if not the world. Designed by a real estate agent FOR real estate agents.

Here's how it works: This unique lead-generation system is the starting point for all Aussies and Kiwi's thinking about selling their home. It connects prospective home sellers directly with YOU. And upon joining this amazing program, you get EXCLUSIVE access to your chosen postcodes. So that you can dominate your area, and the leads are solely yours. Isn't that a good little concept?

No competition. Imagine that the webpage at Whatpricemyhouse.com is your huge lead-generation funnel.

A funnel that potential home sellers from all around Australia and New Zealand come through. And once any of those people (from your chosen postcodes) identify themselves for a FREE evaluation of their home, their details are forwarded directly to you.

Once they leave their details, you simply send them a Comparable Properties Form.

And it doesn't cost you a thing, because it's all done electronically!

In return you have their full details with which to follow-up. What a gift!

But you may be wondering... "How do these people find the site in the first place?"

Good question. And there are many ways this happens. Firstly, we know that more and more people are turning to the internet to obtain information about selling their home. And when they do, we have implemented some cunning search engine techniques that lead the majority of prospects to Whatpricemyhouse.com.

(Direct access to the site's public pages was removed after I published the above details in a blog posting titled "*Free Cheese in the Mousetrap*" at www.AustralianRealEstateBlog.com.au.)

Whatpricemyhouse.com is just one of a number of similar services offered to estate agents.

Indeed, during the writing of this submission, I received the following email an email titled "*Looking For Property Appraisals In Your Area?*" and providing a link to the HomeGuru website at <http://homeguru.com.au/agents/how.aspx>. The email contained the following testimonial:

Since commencing with this system we have been fortunate to receive a steady flow of client enquiry. What I particularly like about HomeGuru, is that our leads can be generally classified as “warm” leads, because the potential sellers themselves become involved in the process of seeking property sales data. The program is simple to use, and provides an excellent starting point for contact with our vendors.

Reno Muscat, REMAX

Consumers have been conditioned to believe that the estate agent is a professional valuer. The difference between a valuation and an appraisal is too subtle for anyone to appreciate. Indeed, the definitions of “*valuation*” and “*appraisal*” both rely on methodology derived from *Spencer v Commonwealth of Australia* (1907) 5 CLR 418. See also the comment of Chris Warren (below) to the effect that 50% of vendor clients expect the real estate agent to estimate the price of real estate because this is what they have become used to.

It is too easy for a lay-person, who has successfully passed the evening TAFE course after a few weeks of part-time study, to hold themselves out as an expert in assessing the value of real estate.

Anecdote: I regularly see corflute signs announcing that a young newbie estate agent representative will be conducting “FREE Market Appraisals in this street tomorrow!” Consumers believe that they are being called upon by a fully qualified real estate agent, whose qualifications extend to those of a fully qualified valuer. I have personally spoken to consumers who have been delighted to discover that their property is worth much more than they had believed on the basis of a 5-10 minute market appraisal.

The opportunity to “advise” a consumer on the value of their property still represents a very tempting opportunity to lie and deceive for the purposes of winning a listing, despite the punitive provisions of Section 47A.

The market appraisal began life as a valuable marketing tool for the real estate agent, but it has evolved through manipulation and marketing into a pseudo service, and now, through Section 47A, it has become a requirement.

Do consumers need estate agent appraisals?

Consumers do not need estate agent appraisals. Furthermore, not all estate agents want to provide them.

Licensed Real Estate Agent, Chris Warren of Annerley, Queensland offers excellent advice at step 1 of his “4 steps to a successful sale” on his website (see advert reproduced below):

1. Obtain an independent valuation from a registered valuer. Please remember your real estate agent is a marketer and negotiator on your behalf, not a valuer.¹³

In an email to blogger Tim O'Dwyer (which is reproduced on www.AustralianRealEstateBlog.com.au) Mr. Warren had this to say about the use of independent valuations:

Hi Tim,

Have recently read your article where you say owners should get valuations before listing their properties.

You may be interested to hear that for the last 3 months we have been encouraging all our owners to get independent valuations before they go to the market. We are telling them we are marketers and negotiators NOT valuers . So far we have been able to convince only 50% approx to do this. The other half insist it is up to us to give them a price, because that of course is what the market is used to.

Interestingly, of the 50% who do get the valuation, nearly 90% sell their properties in a shorter time and most are getting a little more than the valuation, some a little less. The other 10% disregard the valuation and put on unsaleable prices. The 50% who do not get a valuation stay on the market longer and we have the same old problems.

Summing up, those owners who pay for a valuation and are prepared to be guided by that figure are much happier with the outcome and we also enjoy a much happier association with them . We end up making more sales in a shorter period of time. So it is a win/win for all.

¹³ C. Warren, cited in "Why I Like This Estate Agent," by P. Mericka www.AustralianRealEstateBlog.com.au, 30 April, 2007. [Online]. Available: http://reic.com.au/blogs/australian_real_estate_blog/archive/2007/04/30/why-i-like-this-estate-agent.aspx. [Accessed: 11 August, 2009.]

I am also encouraging my owners to have a building and pest inspection before going to the market. They and I are then aware of any potential problems with the property up front and can take that into account.

If every owner had their own independent valuation and their inspections beforehand I believe it would eliminate most of the problems that owners/buyers/solicitors/agents have with each other.

Together we have to convince owners to spend a bit of money up front to do these things and that is not easy.

Look forward to catching up with you.

Regards Chris¹⁴

On 11 August, 2009 I telephoned Mr. Warren, told him about this submission, and discussed with him the problem of estate agent appraisals. I explained to Mr. Warren that I would be proposing that all real estate agents and estate agent representatives should be prohibited from offering consumers appraisals, and that consumers should be made aware that it is not the real estate agent's role to provide advice regarding the value or pricing of real estate. The following is the gist of our telephone conversation:

*First, I asked Mr. Warren as to how he would react if he read in tomorrow's newspaper that all estate agents are now prohibited from conducting appraisals or from offering any kind of advice regarding valuations or acceptable prices. Mr. Warren's immediate response was, **"I think that would be a wonderful step in the right direction."***

*Mr. Warren went on to say, **"The only criteria estate agents can use is what other properties have sold for, but that really means nothing, and it doesn't matter how long you do them for, you just don't get any better at doing them. Every house is different, the market is changing all the time, and you just can't be accurate with them..."***

*As an example of the problem of accuracy, Mr. Warren told me of a deceased estate for sale. **"The vendor had obtained a formal valuation at \$363K, but Mr. Warren did not believe that the property would fetch more than \$340-\$350K. Another estate agent estimated \$320-\$340K. "It sold for \$363, just like the valuer said it would, and we were really surprised, but it just shows that the valuer knows the market..."***

*I asked Mr. Warren how estate agents would react if they were told that they could no longer offer market appraisals to vendors. According to Mr. Warren, **"They'll say, 'How on earth are we going to get in to see people?'"** (this accords with the quotation from Gulliver's book, referred to above).*

¹⁴ C. Warren, cited in "Estate Agents Are NOT Valuers", by P. Mericka www.AustralianRealEstateBlog.com.au, 1 May, 2007. [Online]. Available: http://reic.com.au/blogs/australian_real_estate_blog/archive/2007/05/01/estate-agents-are-not-valuers-part-2.aspx [Accessed: 11 August, 2009].

*Mr. Warren confirms that estate agents need appraisals for marketing purposes, and **"...if that option is taken from them they will feel as though they've been stripped of one of their most important roles and their best marketing tools."***

*Mr. Warren explained that he has been trying for some years to have vendors obtain their own formal written valuations, but he often comes up against stiff resistance from vendors who tell him that it is the role of the real estate agent to provide an appraisal. Sometimes this has resulted in the loss of a listing. **"They know they can go to another estate agent who is only too willing to give a free appraisal."***

Consumers don't need appraisals, and not all estate agents want to provide appraisals. The true purpose of the appraisal is that it provides estate agents with a very powerful marketing and conditioning tool.

The estate agent's "appraisal" as a conditioning tool

Lawyers Real Estate regularly represents vendor clients who have appointed real estate agents to act for them in the sale of real estate. It is common for a vendor to complain that the estate agent convinced them to sign an Exclusive Sale Authority on the basis of a particularly attractive appraisal, only to condition them down in price once the sale campaign was under way.

Anecdote: The following is an excerpt from an email sent to me earlier this month from a vendor client, and is typical of this form of conditioning:

K (estate agent's name withheld) has given me an "appraisal" 4 months ago estimating a sales price of \$ 220,000 to 230,000. At the time I had a feeling this might be inflated, but I thought even if he can achieve \$210,000 to \$215,000 I would still go ahead. I have signed an agreement with K which entitles him to \$975 advertising costs plus 3% commission. Over the last 4 months K managed to get one prospective purchaser willing to pay \$204,000.

If I walk away from the deal I have to pay K the advertising costs, pay Lawyers Real Estate the legal costs so far (around \$400), also need to find a new property/sales manager, organise a property valuation and start the sales process all over again.

As I am currently overseas I simply do not have the time to attend to all of this.

I would therefore like to go ahead with the sale based on the verbally agreed price of \$204,000.¹⁵

¹⁵ email from Lawyers Real Estate vendor client, dated 4 August, 2009. The identity of this client is known the author, and the email forms part of the client's file.

Conditioning remains a common practice, but the method can vary from blunt and clumsy to subtle and sophisticated, as can be seen in the procedure described on the webpage of “*Best Practice – the Website For Best Practice Real Estate Agents*”:

The Best Practice 2-2-7 Rule

Best Practice property consultants know that, in order to act in the vendor's best interests, they must be able to explain the strategy surrounding any variation of the asking price.

Most have a document similar to the sample on this page which forms part of the pre-listing kit and/or listing presentation proposal and / or the agency's website.

Sample

THE BEST PRACTICE 2-2-7 RULE

Since it is our aim to achieve the highest possible price for your property, we will set the asking price for our initial marketing (in line with your instructions) a little higher than we expect the market to bear. When a property first enters the market, momentum is generated, because all the qualified buyers (those in the price range who have been looking around for some time and are ready to buy) will discover the property for the first time. Competition peaks in the first few weeks of marketing and buyers are most likely to make the highest offers for fear of losing out to someone else.

If the initial marketing does not attract the desired offers, it may be necessary to consider varying the asking price. If the price remains the same for too long, the momentum of the marketing programme is likely to fall away, affecting the property's profile and competitiveness.

It is important not to vary the asking price too early because it sends a signal to prospective buyers that the price is not genuine or that the vendor is perhaps too keen to negotiate.

Varying the asking price too late sends a signal that the seller is not aware of, or prepared to listen to, market forces - in other words, not genuine or realistic. Qualified buyers lose interest and the opportunities for receiving high offers diminish, along with the potential of achieving the best price at the end of the day.

Research with past satisfied sellers tells us that there is a simple two-point rule indicating the appropriate time to vary the asking price.

This rule is known as the Best Practice 2-2-7 Rule. There are two conditions which must be met before this rule can be applied.

1. *The property must be well-presented (please refer to our enclosed document on how sellers can effectively present their property for sale) and*
2. *The property must be professionally marketed to attract the attention of all current prospective buyers in the price range (our recommended marketing proposal(s) are enclosed).*

Provided these two conditions have been met, research indicates that residential real estate achieves its best price if the asking price is varied when there have been two advertisements and no response, or two open homes and no shows, or seven inspections and no offers.

Suggestion

Why not consider re-writing the above sample in your own words and including it in your listing materials? In your local area, the 2-2-7 rule might be a 1-3-6 rule or a 3-2-9 rule; carry out your own local research and come up with the appropriate three-step price variation rule for your area. Best practice property consultants report that provided

1. *the 2-2-7 rule is included and explained in the pre-listing kit, and*
2. *the vendor is provided with optimum feedback (minimum five contacts per week over the first two weeks of the marketing programme), and*
3. *at the time of signing the agency agreement, a face to face meeting is scheduled with the vendor on the fifteenth day of the marketing programme to "review the marketing", the first price variation occurs at the start of the third week of marketing.¹⁶*

When the estate agent has the trust of the vendor, and is permitted to guide the vendor in determining the asking price of the property, and then to guide the vendor in accepting an offered price for the property, the opportunity to deceive the vendor in order to win a commission is quite obvious.

Lack of training and skill

Real estate representatives receive no formal training whatsoever in the preparation and presentation of market appraisals.

Neither the REIV course for estate agents' representatives, nor the Swinburne course attempt to teach the skills associated with market appraisals.

¹⁶ Best Practice Real Estate Agents, "The Best Practice 2-2-7 Rule" [Online]. Available: <http://www.bestpractice.com.au/page.asp?id=301> [Accessed: 11 August 2009].

Anecdote: In 2003 I completed the “Course in Real Estate for Agents’ Representatives” at Swinburne TAFE. The manual provided by Swinburne confirms, *“The course presents basic information about the law, documentation and practice of selling and leasing property in Victoria”*.¹⁷

The entire treatment of appraisals or price estimates is contained in the following paragraphs:

“The vendor’s asking price may not agree with your own estimation of market ‘value’. If the vendor is asking more than you think the property is worth, leave room for later negotiation by talking in a range from your ‘low’ to the vendor’s ‘high’. Alternatively, you can agree to market the property at an agreed price but point out that it is the general public which ultimately determines the value of a property.

Regulation 14 of the Estate Agents (Professional Conduct) Regulations 1997 states:

‘An agent engaged to sell or purchase any real estate or business must advise his or her principal as to what the agent considers to be the current market price of that real estate or business and, if requested, give reasons for that opinion.’

Nowhere in the course materials or in classes was there any mention made of the services of the professional valuer.

The estate agent’s representative is expected to somehow acquire the skills and expertise necessary to fulfil the obligations imposed by Section 47A.

Anecdote: On 10 August, 2009 I telephoned a former hairdresser (P) who is known to me. P left his hairdressing business in his wife’s hands in order to “have a go at the real estate game” about 18 months ago. I asked P about training in the preparation and presentation of market appraisals, and he told me that the REIV estate agents’ representative course he attended provided no instruction or information on appraisals. According to P, *“You just pick it up as you go along. First you go around with someone who does them, and then you just have a go yourself. I was doing my own after about 2 months.”* Regardless of his skill and competence, P is now forced by legislation to ensure that the engagement or appointment states the agent’s (or representative’s) estimate of the selling price of the real estate, and that the estimate complies with this section.¹⁸

I can think of no other example where legislation requires a person to provide information/advice on matter in which they have received no formal training whatsoever, and where the services of true experts in the relevant field (i.e. professional valuers) are completely ignored.

¹⁷ Swinburne University of Technology TAFE, “Course in Real Estate for Agents’ Representatives” Course Introductory Booklet July, 2003 p.9.

¹⁸ Estate Agents Act 1980 Section 47A

It is interesting to note that the Victorian government is also a beneficiary of this use of unqualified estate agents in lieu of professional valuers. The State Revenue Office of Victoria will readily accept an appraisal by an estate agent, with no investigation into the estate agent's valuing skills or qualifications, as confirmation of current market value for stamp duty assessment purposes. It appears that an estate agency's letterhead is sufficient to satisfy the State Revenue Office that the author of a letter of appraisal knows what he or she is doing.

The appraisal as a DIY service

It would appear that Section 47A can be satisfied by a consumer acting on a DIY basis. According to Mr. Paul Cummaudo, licensed estate agent and Managing Director of Just Properties:

*With our online auctions vendors have a multitude of advantages (including) online DIY market appraisals...*¹⁹

Q6 As Estate Agents you should provide me with your own opinion of the possible selling price, is this correct?

*A6 Yes as Estate Agents we are required to provide the seller/ vendor with our opinion of value under section 47A of the Estate Agents Act 1980 which reads as follows: Seller must be given estimated selling price (1) Before obtaining a person's signature to an engagement or appointment to sell any real estate on behalf of the person, an estate agent (or an agent's representative employed by the agent) must ensure that the engagement or appointment states the agent's (or representative's) estimate of the selling price of the real estate, and that the estimate complies with this section. (2) The estimate (a) may be a single amount or a price range; and (b) must be the amount the agent or representative believes, on the basis of his or her experience, skill and knowledge, that a willing but not anxious buyer would pay for the real estate, or in the case of a price range, the range within which that amount is likely to fall; and (c) must be set out in a manner approved by the director. (3) If an estimate is expressed as a price range, the difference between the upper and lower limits of the range must not exceed 10% of the amount of the lower limit of the range. (4) Nothing in this section requires the estimated selling price and the seller's reserve price to be the same amount. **When you register with us to sell your property using our online auction system you will be required to provide us with certain information about your property, our software has been developed and programmed to enable us to comply with the above statutory requirement.**²⁰ (emphasis added)*

¹⁹ Just Properties, "JP Update – Director's Message", [Online]. Available: <http://www.justproperties.com.au/jp-latest-news.201.html> [Accessed: 11 August, 2009].

²⁰ Ibid.

It would appear that the situation has come full-circle – originally the vendor was responsible for the due diligence associated with establishing the value of the property, estate agents then assumed this role for their own marketing purposes, legislation then made it mandatory for an untrained and unskilled estate agent's representative to provide an appraisal, and now information provided by the vendor is fed into a computer program which then provides the estimate required to satisfy the estate agent's responsibilities under Section 47A.

An appraisal prepared by a computer program, on the basis of information provided by the vendor is probably no less accurate than the average appraisal based on the personal attendance of the estate agent's representative. In most cases, a personal appraisal takes no more than 5 to 15 minutes.

The skills needed for the preparation of an accurate appraisal

Compare the above processes with some of those used by the professional valuer.

According to Mr. Patrick Brady AAPI, MRICS, Dip Ed., Director of WBP Property Group and Certified Practising Valuer:

The field of property valuations is often described as an art and not a science, as it takes into consideration so many tangible and intangible aspects of a property and its surrounds. Valuations are a professional opinion based on available evidence; valuers do not set new benchmarks. They must be guided by what has sold recently, that is, within the past three to six months.

The valuation process starts with a physical inspection of the property. The valuer walks around and through the property taking measurements and note of the number and type of rooms, fixtures and fittings, and improvements. The valuer then employs three methods to further analyse the property in order to come up with a value range: direct comparison, summation, and capitalisation of net income methods.

The direct comparison method involves researching recent sales of similar properties in the immediate surrounds, referred to as 'comparable sales'. The subtle and not so subtle differences are taken into consideration to determine the extent to which these comparable sales can be used as a guide to the value of the subject property. In this way, apples are compared with apples and necessary adjustments can be made for the bruises.

The summation method is the land value plus the depreciated value of improvements, which comprises the dwelling plus ancillary features such as garage, pergola and swimming pool. Land value takes into consideration size, shape, topography, slope, location and surrounding infrastructure and amenities. The value of improvements incorporates the style, age, architectural features, layout, number and purpose of rooms, and renovations in addition to the overall appearance and condition.

The combination of these two methods allows the valuer to arrive at a valuation range. It is then up to the skill and experience of the valuer to consider any risks associated with the property or its location to be able to refine the valuation figure.

The valuer may also check these values by way of capitalising net income. This involves applying an investment yields to assessed market rental of the property to derive the current market value. This method is commonly used when valuing investment properties.

Another important tip is to ensure your valuer has the skill and experience required to provide you with an accurate and reliable valuation. Only use a qualified and licensed valuer who maintains membership of the Australian Property Institute.²¹

It is interesting to note that a Google search for "Valuation of Land Act Victoria" results in a number of references to the valuation of real estate, including a paid listing titled "Property Valuation" with a direct link to the website of www.WhatPriceMyHouse.com.au.

The vendor as the true culprit

It is a fact that many crimes are committed, not by a lone criminal, but on behalf of the true criminal by a person acting as the criminal's agent. As far as the law is concerned, a person who acts in concert with another in the commission of a criminal offence is guilty as a party to that criminal offence.

Estate agents who break the law, often do so with the tacit approval of the vendor client.

Anecdote: A vendor client who had come to me for conveyancing services intimated to me that he had chosen his estate agent because *this bloke's got a bit of the bastard in him... he can read a buyer's body language and know if they're lying... and he knows how to play them off.* When it was suggested to this client that misconduct on the part of the agent could be attributed to the client as well, the client informed me *...this bloke knows what he's doing, he's been in the game for a long time.*

Whenever I take an estate agent to task for misconduct, most commonly for the giving of legal advice to purchasers, the response from the estate agent is commonly something similar to, *it's my job to act in the vendor's best interests, and that's what I'm doing.*

²¹ "The Value of a Valuation" by Patrick Brady AAPI, MRICS, Dip. Ed www.LawyersConveyancing.com.au. [Online]. Available: http://www.lawyersconveyancing.com.au/news/patrick_brady_wbp_property_group.asp. [Accessed: 11 August, 2009.

The common theme when dealing with estate agents in the context of misconduct or misleading and deceptive behaviour, is the notion that the estate agent is acting in the interests of the vendor.

This belief that anything can be justified if it is done in the name of the vendor is borne out in a recent article titled “Confessions of an underquoter”:

Many estate agents deny deliberately underquoting property prices, but under the cover of anonymity one comes clean and tells us why it's standard practice.

I am an underquoter and I do it because it's the most effective marketing tool I know.

By advertising a lower price than I expect to get, I'm virtually guaranteeing my vendors that I will get them more money than a rival agent who uses realistic prices in their advertising.

This is because buyers will make two assumptions:

The owner of the realistically-priced property is greedy and wants too much.

The owner of the lower-priced property has modest expectations and is committed to selling at a reasonable price.

The result is that most of the buyers go to the under quoted property and it will usually sell considerably beyond (often 10 – 15 per cent) what the normal market price of that property would be.

In other words, I'll get my vendors \$60,000-\$90,000 more than the agent selling the other house. The realistically priced property might attract only one or two bidders and the owners are forced to sell for less than the market price. It's an easy choice the vendor's: lose \$20,000 or make an extra \$90,000.

The proposed clampdown on underquoting will seriously compromise agents' ability to get the best results of their clients.

As for declaring a reserve before an auction, agents and vendors use reserves loosely. We have a low reserve on the day, a high reserve if bidding is good, and a printed reserve that is higher than the real reserve if the property passes in.

If we are holding an auction where we know one buyer values the property significantly beyond the other bidders, it would be negligent of us not pass that property in, no matter what the bidding gets to.

We will tell the person we bring inside that the reserve was well higher and extract the best price from the weekend this will be threatened under the new legislation.

Sometimes the vendor is an elderly person or a family counting on every penny. No matter who it is, it's our job to get them as much money as we can.

There will always be bidders who miss out. There will always be people richer or ready to take higher risks.

No legislation in the world can save people from disappointment.²²

While the ethics and reasoning expressed in the article are dubious, the article is noteworthy because of author's constant references to what the vendor wants or expects.

The author invites the reader to accept that the will of the vendor is paramount, and that when it comes to satisfying the vendor, the ends always justify the means.

Vendors, at best, like to assume the role of passive observer, or to play naive. At worst, the vendor is a collaborator, a procurer of a dirty tactician, a believer in the estate agent's adage *buyers are liars* and that *it takes a thief to catch a thief*.

The vendor, in whose name the improper behaviour is carried out, is every bit as guilty of misconduct as the person who has been instructed to carry it out his or her behalf.

It is submitted that the best way to deal the problem of improper behaviour by estate agents, is to ensure that the vendor is held responsible for the conduct of the estate agent, and that the sale becomes voidable at the option of the party who suffers loss as a result of the misconduct.

As soon as vendors come to understand that they will be held responsible for the behaviour of the estate agent, they will take steps to ensure that the estate agent is properly instructed and controlled.

Similarly, when estate agents realise that the sale may be lost, the incentive to win the sale through improper means and methods will disappear. The threat of a cancelled contract is the greatest deterrent to estate agent misconduct.

Anecdote: I regularly represent vendors who have engaged estate agents in property sales, and I prepare the section 32 vendor's statement to be used in the sale. Sometimes a document that I insert into the section 32 vendor's statement may contain information that could deter buyers from purchasing the property. And yet, I never have estate agents complaining about the insertion of such documents or requesting that they be removed. Why? Because this would put the sale and the commission at risk.

While estate agents will quite readily argue with lawyers about the insertion of special conditions, the length of time allowed for a finance condition etc. on the basis that *it is not in the vendor's interests* (usually because it is perceived as not being in

²² "Confessions of an underquoter" (Anonymous) Herald-Sun newspaper 8 August, 2009 p.5.

the estate agent's interests), estate agents know that a faulty section 32 vendor's statement may allow the purchaser to cancel the contract.

Similarly, a vendor who knows of the penalty for breaching Section 32, and of the purchaser's right to avoid the contract, makes the effort to ensure that the estate agent is properly instructed.

The purchaser is not an innocent victim

As alluded to by Terry McCrann²³, a purchaser who claims to be the victim of under quoting is really a victim of their own foolishness.

A purchaser who fails to properly inform themselves about auction processes and about the real estate market is a fool.

The sale of real estate is a legal process. While there are laws that require a vendor to make certain disclosures, there is also an expectation that a purchaser will conduct sensible research before attempting to purchase real estate.

Purchasers are assumed to have sufficient commonsense to determine whether or not they can afford to make a purchase. As part of this investigation an intending purchaser will investigate their creditworthiness and the likelihood that a lender will accept them as a borrower. The purchaser is also aware that the lender will expect the purchaser to buy within their means, and that the property purchased will be of sufficient value to secure the amount borrowed.

Why are purchasers permitted to portray themselves as "victims" when they fail to take the same care in investigating the risks associated with purchasing real estate at auction? An intending purchaser who fails to investigate the likely sale price of a property before investing in a building inspection, a pest inspection, check-survey and other expensive forms of investigation should be regarded as a fool rather than as a victim.

Intending purchasers who seek legal advice from me prior to entering the real estate market are told of the dangers associated with purchasing at auction. Advice to such clients includes reference to the following:

1. Real estate auctions are risky. There is no "cooling off" period, and the sale will be unconditional.
2. Unconditional finance should be obtained before bidding at auction.
3. The alternative to obtaining unconditional finance approval is a preparedness on the part of the purchaser to accept the risk that a lender will not provide finance. This is particularly so where the property being auctioned is a studio apartment or a stratum title property.

²³ "Home auction system just fine" Herald-Sun newspaper 21 July, 2009 accessed online <http://www.news.com.au/heraldsun/story/0,21985,25811073-36281,00.html> 10 August, 2009

4. Where a lender has given pre-approval, finance may still be declined if the purchaser pays too much for the property at auction. The purchaser should engage a valuer to determine current market value of the property, and for an opinion as to what the property is likely to fetch at auction.
5. Advertised price ranges are usually determined by estate agents and should not be relied upon as genuine indications of the vendor's asking price or the current market value of the property, just as valuation figures appearing on rates notices are unreliable.

This advice may result in the purchaser deciding that they do not wish to purchase at auction, and will instead make a pre-auction offer, or wait for the opportunity to make a post-auction offer.

A purchaser who fails to seek advice, and therefore does not receive the advice that they need, is not a victim of the estate agent. As Terry McCrann puts it:

To me, misleading and deceptive conduct -- the basis for the complaints about underquoting -- is not telling potential buyers that half the house isn't included in the sale, or during the auction taking bids from trees.

The sort of thing that's been well-covered in all the long-established changes to property sales and auctions and would be subject to legal action in any event.

To put alleged underquoting in that category is ludicrous.²⁴

Conclusions

Estate agents have overreached their role in the valuation of residential real estate.

A person entering the real estate industry does so as a salesperson, and approaches the task of real estate sales with the outlook of a salesperson.

The role of the valuer has been assumed by the estate agent for marketing purposes, and to assist the estate agent in convincing a vendor to alter their asking price order to bring about a sale and the commission.

By overreaching their salesperson role, estate agents have displaced consumers and industry professionals from the sale transaction.

Vendors no longer believe that they have a role in discovering the current market value of their property, informing themselves about the law governing real estate sales, or instructing the real estate agent. Instead of engaging

²⁴ Ibid.

professionals (property valuer, lawyer) to assist them with these tasks, vendors simply leave it all to the estate agent.

It is common for a vendor to engage a lawyer recommended by the estate agent *after* the estate agent has given the vendor a brief education on real estate sales, and assumed full control over the transaction. The estate agent rarely advises the vendor to seek assistance from a professional valuer.

While some estate agents may attempt to have their clients use professional valuers, such attempts are likely to result in a loss of the client and a loss of business to competing estate agents.

Government has been too quick to accept and recognise new roles assumed by the estate agent.

Although it has not been discussed in this paper, Section 53A of the *Estate Agents Act* 1980 is an example of overreach by the estate agents given the force of law. The idea that an estate agent should be permitted to assist a purchaser in filling up the blanks of a contract form has resulted in legislation that is now used by estate agents to justify their complete takeover of the role of lawyer in the preparation and execution of sale contracts.

Estate agent overreach into the role of the professional valuer has now been recognised by legislation that requires an estate agent, regardless of that estate agent's inexperience inability, to provide a vendor client with an estimate of value.

Vendors have been permitted to become benign observers instead of remaining in control of, and responsible for, the conduct of their sale.

An unscrupulous vendor can feel quite comfortable in procuring the services of an equally unscrupulous estate agent in the expectation that the belief that he or she is insulated from the estate agents misconduct.

If the estate agent is left to their own devices, the vendor can plead ignorance of the estate agent's misconduct, and there will be no consequences for the vendor. Thus, a vendor may be attracted to an estate agent who has a reputation for getting the job done by fair means or foul.

A sale or purchase procured through misleading and deceptive conduct will still bind a purchaser, leaving a satisfied vendor and an equally satisfied (through the payment of commission) estate agent.

Purchasers are not expected to use common sense in the real estate market, and estate agents are expected to carry responsibility where a purchaser suffers loss through their own failure to undertake due diligence or to obtain professional advice where professional advice is needed.

Under quoting is a symptom of the estate agent overreach into the profession of the valuer.

There is no transparency in the setting of prices or price ranges, and it is too readily assumed that an estate agent is acting dishonestly when the eventual sale price far exceeds the advertised price or price range.

Estate agents have displaced professional property valuers so completely that neither the vendor nor the purchaser regards the obtaining of a formal written valuation as part of the essential due diligence associated with a real estate sale or purchase.

Purchasers of real estate have come to rely on the estate agent as the sole source of information regarding value and price, and feel cheated or let down if they later discover that the information provided to them through the estate agent has been less than reliable. Such purchasers will undertake due diligence regarding matters of quality associated with their intended purchase, but amazingly they will not spend a few hundred dollars in order to inform themselves about the state of the current market, or the value of the property they intend to purchase.

Recommendations

1. Real estate agents and their employees should be prohibited from providing market appraisals, real estate valuations or price estimates.

If a vendor seeks to obtain legal advice from an estate agent, the vendor will be advised to consult a qualified legal practitioner. Similarly, if financial advice is sought, the vendor will be advised to consult a qualified financial adviser or accountant.

It follows that if a vendor approaches an estate agent for advice as to the current market value of real estate, or an estimate of the price the property is likely to fetch upon sale, the vendor should be advised to consult a qualified real estate valuer.

If the estate agent is a qualified real estate valuer, the vendor should be advised to consult an independent real estate valuer (i.e. a valuer who does not have a pecuniary interest in the sale of the vendor's property).

2. Real estate agents and their employees should be prohibited from offering advice to a vendor that is contrary to advice the vendor has obtained from a qualified valuer.

An estate agent is not permitted to offer a vendor client legal advice that is contrary to the legal advice provided by the vendor client's lawyer. The most that the estate agent can do if he or she has doubts about the advice the

client has received is to suggest to the client that they should seek a second opinion.

It is highly likely that price or valuation advice offered by an estate agent to a vendor, in circumstances where the estate agent has an interest in bringing about the sale of the vendor's property, will be self-serving.

If an estate agent does not believe that he or she can affect a sale at a price that is based on the valuation prepared by the valuer chosen by the vendor, the estate agent may advise the vendor to obtain a second opinion.

Under no circumstances should the estate agent offer an opinion that the estate agent is not qualified to offer.

3. Real estate agents and their employees should be prohibited from advising a vendor to accept or reject an offer.

There is a clear conflict of interests where an estate agent offers advice regarding the acceptance or rejection of an offer, and acceptance of the offer will result in a commission for the estate agent while a rejection of the offer will result in no commission.

If a vendor seeks advice as to whether a price is acceptable, the vendor should be advised to consult the vendor's chosen valuer.

If a vendor seeks advice as to whether an offer is acceptable on the basis of the terms and conditions submitted by the intending purchaser, the vendor should be advised to consult the vendor's chosen legal representative.

4. The vendor of any real estate sold on behalf of the vendor by an estate agent should remain fully responsible for the conduct of the estate agent, including any advertising or other information disseminated in relation to the sale.

As the estate agent's principal, the vendor is responsible for the conduct of the agent. It is up to the vendor to ensure that his or her appointed agent is instructed to obey the law, and any breach of the law by the estate agent should be regarded as a breach by the vendor unless the vendor can demonstrate that the estate agents acted beyond the scope of the agency.

It is incumbent upon the vendor to ensure that he or she understands and obeys the laws associated with the sale of real estate in Victoria. If the vendor is not familiar with the relevant laws and regulations, then he or she should seek independent legal advice from a qualified legal practitioner.

If the vendor suffers loss as a result of misconduct on the part of the estate agent, then the vendor should seek legal advice regarding the recovery of such loss from the estate agent.

5. Sections 47A, 47B and 47C should be repealed.

If the estate agent has no involvement in determining the value of the vendor's property, the setting of the vendor's price or advising the vendor on the acceptance or rejection of offers, these provisions will no longer be necessary.

6. Vendors should be required to educate themselves regarding the value of their property by engaging an independent and accredited valuer.

The community's misunderstanding about the estate agent's role in valuing real estate should be addressed. Consumers should be educated about the need for independent and professional advice regarding property values, and the property valuing industry should be encouraged to promote its services to consumers.

A valuer who is an employee of the real estate agency cannot be regarded as independent. (Moves in this direction have already been suggest - See the open letter to ACCC Chairman, Mr. Graham Samuels, from Mr. Chris Plant of the API at Appendix "A") where it is recommended that *"...every auction authority be accompanied by an independent valuation by a qualified certified practising valuer. This proposal provides a practical way to combat instances of poor practice by real estate agents and will go a long way to protecting the public... by requiring professional and independent valuers to make these assessments of selling price, agents and vendors are engaging those best qualified to interpret the market. The valuation could then form the basis of quoted prices (eg a quote price range) giving independence to the process and protecting the vendor, purchaser and public."*)

The cost of obtaining an independent valuation should be regarded as a disbursement cost similar to the costs associated various forms of advertising.

7. A purchaser who is the victim of improper conduct by the estate agent should be regarded as is a victim of the estate agent and the vendor equally. A contract that results from improper conduct on the part of an estate agent should be voidable at the purchaser's option.

This recommendation follows on from recommendation 4. above, which requires the vendor to accept responsibility for the conduct of an estate agent appointed by the vendor.

The key to deterring improper conduct in the real estate industry can be found in the following comment of the EAC Modernisation Review Position Paper:

It has sometimes been remarked within the very nature of a profession which relies on commissions that sometimes untoward practices occur while trying to secure the listing or sale.²⁵

The drive to win the sale, by fair means or foul, is so strong that some estate agents will do almost anything order to make the sale and win the commission.

However, the powerful drive to win a commission can also be harnessed in order to ensure proper conduct and observance of the law. This can be achieved by linking the sale and the commission to the conduct.

Section 32 of the *Sale of Land Act* 1962 requires a vendor of real estate to disclose certain matters to a purchaser before entering into a contract of sale, and deliberate non-compliance is an offence.²⁶ But that is not the end of the matter. If the vendor, deliberately or otherwise, fails to make all of the necessary disclosures the purchaser may rescind any contract entered into on the basis of the information contained in the section 32 disclosure statement at any time before the matter has settled, subject to certain exceptions.²⁷

It is my experience that estate agents rarely seek to overreach their role by attempting to influence the compilation of the Section 32 vendor's statement. It is also my experience that estate agents will advise vendors to seek legal advice regarding matters which may require disclosure. It is quite clear that estate agents and vendors consistently comply with the requirements of Section 32 of the *Sale of Land Act* because of the threat of loss of the sale and the commission.

Criminal sanctions have little effect in the real estate industry. The most powerful sanction of all is the possibility that a purchaser who suffers loss can cancel the contract, leaving a vendor and an estate agent to determine, as between themselves, who was responsible for the other's loss.

²⁵ Estate Agents Council, Position Paper – Modernising the Estate Agents Act 1980 July 2009, p.12

²⁶ Section 32(6) *Sale of Land Act* 1962.

²⁷ Section 32(5) *Sale of Land Act* 1962.