

Accountants News

INFORMATION FOR PRACTISING ACCOUNTANTS

Queensland Residential Property - Consumer Watchdog Gets Teeth

Purchasers of Queensland residential property can now rely on powerful fair trading legislation for protection against unscrupulous marketeers.

Good News For Your Clients

Most owners will at some stage discuss the purchase of their investment property with an accountant, tax agent or financial advisor. Ideally, this discussion occurs prior to the contract being signed when your assistance can prevent the buyer acquiring an overpriced lemon. However, all too often, the purchase is already a 'done deal'. If the property was overpriced, the income returns were inflated, or the promised tax depreciation claims will not be allowed by the ATO, there may be little you can advise your client to do which will improve the situation.

If the purchase was of a residential property in Queensland, your client's options have just improved substantially. The Queensland State Government has amended the *Property Agents and Motor Dealers Act 2000* to outlaw those

unconscionable practices which continue to result in massive consumer detriment and the erosion of public confidence in the benefits of investing in the Queensland property market".
[Explanatory Memorandum]

Armed with an understanding of the key points of the new legislation, you can both assist your clients to make wise property choices and advise them of the opportunity to seek compensation if things turn bad.

The Act In Summary

These provisions of the *Property Agents and Motor Dealers Act 2000* (as amended by the *Property Agents and Motor Dealers Amendment Act 2001*) apply to all purchases of Queensland residential property.

1. Warning statements on residential property contracts

A standard warning statement must be attached as the front page of the contract. Amongst other things, the

Kaylene Arkcoll



warning statement advises buyers:

- a) to obtain independent legal advice prior to signing,
- b) to obtain an independent valuation prior to signing (and gives contact details for the Valuers Registration Board),
- c) how to obtain a property sales history from the Department of Natural Resources, and
- d) of their compensation rights and the five day cooling-off period.

For the contract to be binding, the warning statement must be signed by the buyer prior to the signing of the contract and must also be signed by an independent witness who attests that they have seen the buyer both read and sign the statement.

2. Five day cooling off period

A five day cooling-off period now applies on all contracts of sale for residential property (except property purchased at auction). A buyer who decides not to proceed with a contract must provide written notice of this decision before the cooling-off period ends. The buyer's deposit must be refunded. The vendor is entitled to retain from the deposit an amount equal to 0.25% of the purchase price of the property.

3. Licensing of residential property developers

Property developers who sell more than six residential properties in a year directly to the public must be licensed by the Office of Fair Trading (as must their sales representatives). The Office of Fair Trading will maintain a public register of licensed developers. To obtain a property

developer's licence, the developer must satisfy the Office of Fair Trading that they are a fit and proper person. All licensed developers and salespeople must conduct themselves according to a mandatory code of conduct which includes dispute resolution processes.

4. Mandatory disclosure statements

Before a residential contract is signed, a property developer must disclose any relationships they have (whether personal or commercial) with professional service providers connected with the sale (e.g. valuers, quantity surveyors, lawyers and financiers). They must also disclose the nature of the relationship and whether they will receive any income or benefit from that relationship as a result of the sale.

Agents and their salespeople must also disclose this information as well as making a similar disclosure statement about any relationship they have with, or benefit they may receive from, the people they refer you to (e.g. finance broker, lawyer or valuer). Lawyers engaged by the purchaser in relation to the purchase must provide a certificate stating whether they are independent of the sales process and whether they will obtain any undisclosed benefit.

5. Prohibition of unfair behavior by seller

The Act prohibits unconscionable and misleading conduct or false representations associated with the sale, promotion or marketing of residential property.

Unconscionable conduct is defined by reference to an extensive list of matters which may be taken into account by the Property Agents and Motor Dealers Tribunal or District Court when hearing a complaint. They include the relative strength of the party's bargaining position, the buyer's level of understanding of any documents, whether undue pressure or

unfair tactics were used and any conditions imposed on the buyer which are not necessary to protect the legitimate interests of the marketeer.

Misleading conduct is defined in wide terms and prohibits both representations which "would reasonably tend to lead to a belief in the existence of a state of affairs which does not in fact exist" and those made without reasonable grounds (ss 574 (3)(4)). The definition of false representation is equally wide. If information is provided (e.g. the value of the property at the date of sale, the sales history of the property or similar properties, the property's income producing potential or any tax benefits associated with the property purchase) the party providing the information must be able to substantiate it as factually correct.

6. Enhanced complaints / compensation / penalty system

The Property Agents and Motor Dealers Tribunal and the District Court have the power to hear complaints against any person (licensed or unlicensed) involved in the sale, promotion or marketing of residential property. The tribunal also has the general power to seek substantiation of representations made and to conduct public examinations of a party.

If you lose money or property after dealing with a licensed agent (other than a developer), you can make a claim against the statutory Claim Fund for reimbursement. The party found to be at fault in your claim is liable to reimburse the fund. If you dealt with a developer, you cannot claim against the Claim Fund (as developers do not contribute to it) but must instead ask the tribunal or court to order compensation be paid directly to you by the offending party. The Office of Fair Trading commences all of these proceedings on your behalf. You must lodge your claim with the Office of Fair Trading within the earliest of either, one year from the time you become aware of your loss, or three years of the event that caused the loss.

Claims of no more than \$5,000 against the Claim Fund can be decided internally by the Office of Fair Trading. The District Court can order compensation payments or civil penalties to the state of up to \$250,000 per breach. Where appropriate, individual directors can be held personally liable for corporate offences and monetary orders.

The tribunal can also suspend a party's licence for five years or ban them from

being involved with the sale, promotion or marketing of property in Queensland for a period of up to five years (even if they do not require a licence).

Tips for Queensland Residential Property Purchasers

1. Wherever possible, purchase through a Queensland registered real estate agent to maximise your complaint and compensation options.
2. If you are purchasing from a developer, insist on seeing their licence. A licensed developer is less likely to engage in unlawful behavior. They are also more likely to take action about your concerns before they escalate into a formal complaint. As the legislation has only recently been enacted, there is likely to be a short period of compliance lag. A developer's failure or inability to obtain a licence should ring major warning bells.
3. Keep a copy of all the marketing materials and documents you are given by any party during the sales process. Take records of conversation during any verbal presentations or sales negotiations. If you are given verbal assurances or advice about important points, ask for a copy of that information in writing. The more documentation you have, the simpler it will be if you have to take action later. Remember, in some cases it may be several years before you are aware that action is appropriate (eg after a tax audit).
4. Be proactive, you don't need to have purchased a property in order to report undesirable marketing behaviour. If you spot a potentially shonky operator before you sign on the dotted line, report their behavior to the Office

of Fair Trading. All investment property owners have a vested interest in ensuring public confidence in the property market.

Does the Act Apply to Your Services?

If you, as a professional, are involved directly or indirectly with the marketing of Queensland residential property, we recommend that you review the legislation in detail. While reputable professionals have little to fear, it is important that you determine whether specific disclosure requirements apply to your services. You may also wish to check that any parties you are associated with in the marketing process are fully complying with the legislation.

You do not have to be directly related to the developer or marketers. The legislation applies to any party who

causes or arranges for the sale, promotion of the sale, or provision of a service in relation to the sale of residential property or who provides advisory, management, legal, accounting or administrative or other services in the sale, promotion of the sale, or the provision of a service in relation to the sale of residential property. [Explanatory Memorandum]

The law can apply to almost every conceivable party who may directly or indirectly influence a potential residential property purchaser in their purchase decision.

Want more information?

Copies of the original and amending Acts, as well as additional explanatory material can be obtained from the Queensland Office of Fair Trading's web site at www.fairtrading.qld.gov.au.

Leary & Partners Pty Ltd

ACN 010 134 148

QUANTITY SURVEYORS



Quality Assured to
AS/NZS ISO 9002:1994

Free Call: **1800 808 991**

Free Fax: **1800 808 921**

Postal Address: PO Box 38 Toowong QLD 4066
 E-mail: enquiries@leary.com.au
 On the Web at: www.leary.com.au

Offices • Brisbane • Gold Coast • Sydney • Melbourne
 Associate Offices • Cairns • Mackay • Townsville • Sunshine Coast • North Coast NSW • Perth

Professional services available from Leary & Partners:
 • Taxation Depreciation Schedules • Maintenance Management
 • Sinking Fund Forecasts • Replacement Valuations • Asset Registers
 For information on any of these services, please contact Christina Murray