



Fair
Trading

Underquoting Property Prices Guideline

Conduct that may breach the
Property, Stock & Business Agents Act





Introduction

Purchasing a property is the biggest financial investment most people will ever make. While the majority of real estate agents act ethically and in accordance with the laws, it is important that potential risks of consumer harm be appropriately managed. For this reason, agents have the following general responsibilities under NSW's real estate laws when selling or marketing a property:

- to make honest and reasonable estimates of selling prices
- to keep records to demonstrate what information they relied on to make those estimates
- to keep records of any discussions where those estimates are revised.

NSW Fair Trading is concerned with what appears to be a marketing technique where real estate agents and their employees underquote property prices to increase the pool of prospective purchasers.

This document gives further guidance on the applicable laws, and highlights specific conduct in the sale of residential properties that is not considered to be best practice. It also includes general guidance on what type of conduct may be considered best practice.

NSW Fair Trading has made these suggestions to help agents develop their own procedures. They should not be considered 'minimum standards'.

Agents are strongly encouraged to regularly review their operational procedures to ensure they are sufficiently robust and comply with NSW's legislation.



Applicable legislation

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.

Section 72 of the Act prohibits an agent from making false representations about their true estimate of a property's selling price to either a seller or prospective seller of residential property.

Section 73 prohibits an agent, by any statement made in the course of marketing a property pursuant to an agency agreement for the sale of a residential property, falsely understating their estimated selling price of the property.

Section 75 of the Act extends the provisions of sections 72 and 73 to 'estimated price range' in the same way as it applies to 'estimated price'.

The maximum penalty for a breach of the provisions of sections 72 and 73 is 200 penalty units (\$22,000).

These provisions apply to the marketing for sale of a residential property.

NSW Fair Trading considers an agent to be falsely understating the estimated selling price of a property by making or publishing a statement when marketing the property that is less than their true estimate of the selling price.

The Australian Consumer Law (ACL)

Agents should be aware the provisions of the Act co-exist alongside the obligations of an agent or licensee-in-charge, under the ACL, not to engage in unfair practices or misleading or deceptive conduct.

Agents and licensees-in-charge should particularly note it is an offence to make a false or misleading representation about the price, quality or standard of a property.

Courts have held that a statement of opinion by a person in their professional capacity involves an implied assertion that the opinion has a reasonable basis, is the result of the exercise of due care and skill, and is able to be relied upon. To minimise the risk of a claim of false or misleading conduct, agents must provide selling prices and estimates based on reasonable grounds.

Agents must also note the requirements placed upon them by the rules of conduct prescribed in the schedules to the Property, Stock and Business Agents Regulation 2014. These rules must be observed in the course of carrying on business or the exercise of functions under a licence or certificate of registration.



What is considered to be the ‘true estimated selling price’?

NSW Fair Trading considers the estimated selling price recorded in the agency agreement is the agent’s true estimated selling price, at least initially. This view is supported by section 73(4) of the Act which states:

A statement in the agency agreement of the agent’s estimate of the selling price of residential property is evidence for the purposes of this section of the agent’s true estimate of that selling price.

If an agent represents an estimated selling price in the agency agreement that is not consistent with their **own opinion or estimate** of the likely selling price for the property, this may be considered a false or misleading representation which is an offence under sections 51 or 52 of the Act.

What is underquoting?

If an agent or their employee makes a statement in the course of advertising a residential property for sale that is less than the agent’s true estimated selling price as recorded on the agency agreement, an offence may have been committed.

What is a statement made in the course of marketing a property?

NSW Fair Trading considers a statement made in the course of marketing a property is:

- any statement made in an advertisement in respect of the property that is published or caused to be published by an agent; or
- any representation made to a prospective purchaser (whether in writing or orally).

Will the eventual sale price be considered?

When considering underquoting behaviour, NSW Fair Trading is primarily concerned with the marketed selling price.

However, the property’s ultimate sale price may be considered when determining enforcement action, particularly regarding whether the representation was false under section 72 of the Act.

Real estate agents and their employees must be seen to act fairly and responsibly in their dealings with buyers and sellers.



Potential methods for an agent to estimate the selling price

When determining or updating their estimate of the selling price of a property, an agent should have regard to the following matters:

- the factors the agent may have specifically considered in arriving at the estimate in the agency agreement
- any sales of comparable properties
- any representations made to the vendor by the agent, including representations about the price (or range) to be used when advertising the property for sale
- the vendor's expectations (any reserve bid and/or the price or range at which the vendor is willing to consider offers)
- 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 and is not exhaustive. Agents are expected to act honestly, fairly and professionally with all parties in a transaction. They must exercise reasonable skill and care in providing their estimate, considering all information that is likely to be relevant.

NSW Fair Trading may consider enforcement action, including penalty infringement notices and prosecution, against any agent who markets a property at an estimated selling price less than the agency agreement estimated selling price.

Agents should keep the vendor informed in writing of any changes in their opinion of the likely selling price of the property.

Agents should give due consideration to all relevant information before representing the estimated selling price in the agency agreement.



The requirement to substantiate selling price estimates

Section 74 of the Act empowers the Commissioner for Fair Trading to require an agent to substantiate any statements they make with respect to the selling price of a property.

This means the Commissioner may, by notice in writing, require an agent to provide evidence of the reasonableness of any estimate of the selling price of residential property they make in a statement.

The Act provides a maximum penalty of 200 penalty units for failing to comply with such a notice.

Estimates of the selling price in a statement that would be affected by this provision include those given:

- orally or in writing to a seller or prospective seller of the property
- in an advertisement in respect of the property that is published or caused to be published by the agent
- orally or in writing to a person as a prospective purchaser of the property.

Best practice when substantiating selling price estimates

While each agency will operate according to its own practices and procedures, certain information should be retained to substantiate any selling price estimates.

NSW Fair Trading encourages agents to keep file notes and all information relied upon to determine a property's estimated selling price. For example, agents should include 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 property was 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 proximity to services, general condition and location, views, size and features of the land, and any other feature likely to inform the estimated price.
- Vendor information
This may include the vendor's expectations, specific instructions in regards to marketing strategy, preferred method of sale and any instructions or expectations which differ from the advice provided.
- 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 and is not exhaustive. If there are any discussions with the vendor, or if the marketing campaign suggests a need to revise the estimated selling price from that originally set out in the agency agreement, notes should be made and kept on file.

Having robust records will help agents respond to any request by NSW Fair Trading to substantiate the reasonableness of an estimated selling price.

NSW real estate agents are licensed professionals. Agents must have knowledge and understanding of the real estate laws, and be able to demonstrate their compliance where necessary.

Best practice when giving price guides

Careful consideration should be given to the use of price guides when marketing a property. Typical price guides include representations such as:

- a specific range (for example, 'Price guide \$500,000 to \$550,000')
- a non-specific range (for example, 'offers over \$500,000' or 'in the range of \$500,000').

Representations such as these are taken to be estimated selling prices of the property for the purposes of sections 72 and 73 of the Act.

Where a price range is given, NSW Fair Trading considers the lowest price is the agent's representation to prospective purchasers of a realistic potential selling price. For example, a range statement of either '\$500,000+' or 'offers above \$500,000' will be taken to be a price estimate of equal to or above \$500,000.

Agents are encouraged to be specific when giving price guides. Ranges provide strong signals to the market about the likely price at which a sale could be achieved. Agents must factor in the vendor's sales price expectations when determining how a property is marketed. It can be extremely frustrating for potential purchasers if they find that a property is not realistically available at a price within the marketed range.

While an agent's estimated selling price will inform the price guide, the price at which a vendor is reasonably willing to consider offers should also be given due consideration and help set where the price range begins. For example, if a vendor is not willing to consider any offers below \$600,000, it would be prudent to start the price range from this amount.



Best practice when using online advertisements

Many real estate advertisements are now published online. Unlike traditional hardcopy advertisements, online advertisements are published on an ongoing basis.

Agents should ensure any online price representation remains consistent with their estimate of the selling price throughout the period it is available to the public.

During the course of marketing a property, feedback from potential purchasers and/or the vendor may indicate the price guide should be moved from what was originally advertised.

Best practice would involve revising or taking down online advertisements as soon as practicable when the advertised price no longer reflects the agent's current true estimated selling price.

If, in the agent's professional opinion, the advertised price guide no longer reflects the true estimated selling price of the property, it must be amended as soon as possible.



Licensee-in-charge

Agents are responsible for the reasonableness of the estimated selling prices they provide. However, the licensee-in-charge of an agency supervises their staff and is responsible for their conduct at all times. Licensees-in-charge should have management and control mechanisms in place to ensure agents comply with the requirements of the Act.

In order to assist agents with their legal obligations, the Commissioner for Fair Trading has issued enforceable guidelines under section 32 of the Act. They clarify what constitutes proper supervision.

The full text of the enforceable guidelines is not reproduced here. However, they require licensees to have:

- written procedures around banking practices
- written procedures around the requirement for a licensee to conduct a review of trust account cash flow on a monthly basis
- written procedures setting out steps relevant staff must take to substantiate selling price estimates
- the ability to demonstrate that employees use a property sales process checklist, including requirements around advertising material, conflicts of interest, and restrictions on obtaining a beneficial interest in the property
- documented complaint handling procedures
- a review system of the documents required by the guidelines.

A full copy of the Commissioner's enforceable guidelines issued under section 32 of the Act is on the Fair Trading website (www.fairtrading.nsw.gov.au).

The licensee-in-charge of an agency must adequately supervise their staff and is responsible for their conduct at all times.