

## Estate Agents, underquoting and the Australian Consumer Laws

In early December 2016, Justice Middleton delivered an important judgment in the Federal Court of Australia in the Hocking Stuart Richmond underquoting case (*Director of Consumer Affairs Victoria v Hocking Stuart (Richmond) Pty Ltd (No 2) [2016] FCA 1435*).

It is important to state the opening part of the judgment in full as it indicates some of the elements that need to be proved in any such case (emphasis added):

*“...[Hocking Stuart Richmond], an estate agent licensed under the Estate Agents Act 1980 (Vic) while carrying on the business of an estate agent in trade or commerce, by representing through the Redbook Magazine, Newspaper and Online advertisements and email messages ('the advertisements') it published, or caused to be published, at various times between 1 January 2014 and 30 June 2015 that:*

- (a) *The vendors of the Victorian real estate, identified in Annexure A below ('the properties'), would sell those properties for a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range, in the advertisements relating to those properties;*
- (b) *The vendors were prepared to sell the properties for a price that was in the price range in the advertisements, or was not substantially more than the highest figure in the price range, in the advertisements relating to those properties;*
- (c) *The vendors had instructed the [Hocking Stuart Richmond] to sell the properties for a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range, in the advertisements relating to those properties;*
- (d) *The [Hocking Stuart Richmond] in fact believed and held the opinion that the properties would be sold at a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the range in the advertisements relating to those properties;*
- (e) *The [Hocking Stuart Richmond] had reasonable grounds for believing and holding the opinion that the properties would be sold at a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range in the advertisements relating to the properties; and*

(f) *The likely selling price for the properties was within the price range in the advertisements, or not substantially more than the highest figure in the price range in the advertisements relating to the properties—*

**whereas in fact**, at the time of the advertisements:

(g) *The [Hocking Stuart Richmond] knew that the vendors of the properties would not sell their property for a price that was within the price range in the advertisements or was not substantially more than the highest figure in the price range in the advertisements relating to those properties;*

(h) *Alternatively to (g) above, the [Hocking Stuart Richmond] did not have any or any reasonable grounds for believing that the vendors of the properties would sell them for a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range, in the advertisements relating to the properties;*

(i) *The [Hocking Stuart Richmond] knew that the vendors of the properties were not prepared to sell them for a price that was in the price range in the advertisements, or was not substantially more than the highest figure in the price range, in the advertisements relating to those properties;*

(j) *The vendors had not instructed the [Hocking Stuart Richmond] to sell the properties for a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range in the advertisements relating to the properties;*

(k) *The [Hocking Stuart Richmond] in fact did not believe or hold the opinion that the relevant property would be sold at a price that was within the range provided, or was not substantially more than the highest figure in the range in the advertisements relating to the properties;*

(l) *The [Hocking Stuart Richmond] did not have any or any reasonable grounds for believing or holding the opinion that the properties would be sold at a price that was within the price range in the advertisements, or was not substantially more than the highest figure in the price range in the advertisements relating to those properties; and*

(m) *The likely selling price for the properties was not within the price range in the advertisements, and was substantially more than the*

*highest figure in the price range in the advertisements relating to those properties—*

*[Hocking Stuart Richmond] has, in trade or commerce, engaged in conduct that was misleading and deceptive or likely to mislead and deceive contrary to s 18 of sch 2 to the Competition and Consumer Act 2010 (Cth) ('ACL') and s 18 of the ACL text as it applies as a law of Victoria ('ACL (Vic)') by virtue of s 8 of the Australian Consumer Law and Fair Trading Act 2012 (Vic).*

The judgment further stated Hocking Stuart Richmond's actions meant it had made false or misleading representations in connection with the sale of the relevant property in breach of s 30(1)(c) of the ACL.

The finding against Hocking Stuart Richmond for engaging in misleading and deceptive conduct and false and misleading conduct in breach of the ACL and the *Estate Agents Act 1980* is significant. The total penalty imposed on Hocking Stuart Richmond for the 10 contraventions the Court found was \$330,000.

The findings and penalties are crucial also because it signifies a more aggressive and muscular approach by Consumer Affairs Victoria against certain dubious real estate agents who for a number of years have operated without regard to the consumer laws and on a 'sale at any cost' approach. This minority group's actions have not only been hurting consumers, they may have sullied the reputation of other agents.

Consumer Affairs Victoria provide a useful summary on their website that sets out real estate agents' obligations on property advertising, sellers' reserve prices and underquoting. Please visit [www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property/buying-property/understanding-property-prices](http://www.consumer.vic.gov.au/housing-and-accommodation/buying-and-selling-property/buying-property/understanding-property-prices) for further information.

A vendor of a property needs to be particularly mindful of the conduct of agents as they may get drawn into unwanted litigation by potential purchases (or Consumer Affairs Victoria) for underquoting or generally for misleading and deceptive sales conduct as an estate agent is after all the vendor's agent at law. This means the agent may legally bind the vendor by their conduct as against third parties.

Therefore, for vendors, do a thorough due diligence on agents especially how they conduct their business and the substance therein, their history, their documentation and business practices, what representations they are likely to make on your behalf etc and not get sold merely on the glitzy brochures, the slick marketing spill (and the fancy car they turn up in).

For purchasers, if there are suggestions of improper conduct by agents or vendors, concerns should be discussed in the first instance with a solicitor or Consumer Affairs Victoria.

Please contact our office if you have any concerns about your estate agent or wish to discuss any aspect of a purchase at (03) 8555 3895.

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