

by Peter Mackey

The property industry has undergone rapid free-market changes, but administratively, dog-fights occur because of the current legislation. The position is that the marketing and processing of real estate sales is now highly regulated.

This presentation has been prepared from a lawyer's perspective and the best way to approach the subject is to give you a practical tool kit for avoiding some of the problems which have been created by the legislation.

I have dealt with the task in the following way:

- Overview
- Examination of the Act / identification of inherent problems
- Significant reference to the Court of Appeal decision in *MNM Developments Pty Ltd v Gerrard* [2005] QCA 230

To start, we need to understand where the legislation came from and where it is going.

Primarily, the marketing and sale of real property and motor vehicles was dealt with by the *Auctioneers and Agents Act 1971* (174 sections). The area is now regulated by the *Property Agents and Motor Dealers Act 2000* ('PAMD', 636 sections). Most of the provisions commenced on July 1, 2001.

We are now up to 'strike four'. There have been three substantial amendments of the Act and since the last of those, in December, 2002, further necessary work has stalled. There are also regulations and mandatory practice codes of conduct for each of the categories of licensees. The Property Agents and Motor Dealers Tribunal, which was established by the Act, was abolished on July 1, 2003 and replaced by the Commercial and Consumer Tribunal.

There can be many reasons for change, but I have observed that where a commercial sector of the community can afford to pay the costs of regulation – that is, a high level of surveillance by an increased number of public servants – then that sector will be targeted for a review of legislation which will encompass all of the trimmings. The real estate property industry has been identified as such a sector.

A social or consumer protection agenda is normally identified as the reason justifying the "urgently required" changes and in this area you will all recall the adverse publicity which was focused on the slick information session marketing of Gold Coast units to purchasers who later learned that they had purchased property at well above market values.

It is sad to recognise that no legislation has yet been effective in protecting people against their own stupidity. It is also sad to recognise that in every sector of the community, including the professions, there are a small number of people who bring those sectors into disrepute as a consequence of their actions and disregard for their professional ethics.

It appears that the 'marketeers' who were supposedly the principal targets of the current legislation have adopted two-tier marketing techniques and building investment debenture procedures outside the ambit of the legislation (as one might expect them to do), leaving the legacy of the new legislation

Property Agents and Motor Dealers Act – An update

and regulations with the mainstream community sectors.

Where are we going with this legislation? That will depend on us as a profession to some extent, and it will require people with, above all, practical experience, legal knowledge, drafting skills and good foresight to be involved in constructively managing the further changes which are necessary.

The stated purpose of the Act is to comprehensively provide for the regulation of the activities, licensing and conduct of restricted letting agents, real estate agents, pastoral houses, auctioneers, property developers, motor dealers and commercial agents and their employees, to protect consumers against particular undesirable practices and for other purposes. The Act defines 'marketeer' and establishes judicial processes for 'marketeer' proceedings for misleading conduct, unconscionable conduct and false representations by marketeers.

Those elements in this legislation have been comprehensively dealt with in other state and Commonwealth Acts. 'Marketeer' – "includes a person who provides advisory, management, legal, accounting, administrative or other services in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of residential property" (Schedule 2).

You may not think that "marketeer" has a negative connotation, but I won't be putting it on my CV and my assessment is that we as lawyers are all now 'marketeers'.

'Marketeering' should be discussed further because it and related subjects are repeatedly raised at Queensland Law Society property law conferences and risk management sessions, and it is relevant to the future direction of legislation in Queensland.

Section 162 states that:



(1) A real estate agent must not act for more than 1 party to a transaction. Maximum penalty – 200 penalty units (\$15,000.00)

(2) If a real estate agent acts for more than 1 party to a transaction, an appointment to act for a party to the transaction is ineffective from the time it is made.

(3)...

(4)...

The Act clearly defines the position. When claims are made against lawyers who act for more than one party to a transaction, the judicial response is consistently:

- It is obvious you can't do it;
- We have said so time and again but the profession keeps ignoring it;
- Continue the practice at your peril.

In respect of a lawyer's duty to disclose information, please note comments by Megarry J in *Spector v Ageda* (1973) (1Ch 30, 48):

"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is act for the client and at the same time withhold from him any relevant knowledge that he has."

I am reluctant to say that there can never be any exceptions, but there should be no excuse for the

practice of acting for more than one party to any transaction in city and provincial areas where alternative legal advice and representation is readily available.

The wider community expects that a lawyer will be fiercely independent and protective of a consumer's rights when engaged by that person. Section 363(c) states that the purpose of the chapter (Residential Property Sales) is to enhance consumer protection for buyers of residential property by ensuring, as far as practicable, the independence of lawyers acting for buyers.

While we tolerate the non-independence of lawyers or excuse lawyers from disclosing to their clients relationships with associated parties which may be perceived by clients as affecting their independence, we will continue to see provisions like Section 365 B of the Act.

The section states:

(1) This section applies if a buyer or prospective buyer ("buyer") engages a lawyer in relation to the purchase or proposed purchase of a residential property under a relevant contract.

(2) The lawyer must give the buyer a lawyer's certificate in the approved form and explain to the buyer the purpose and nature of the certificate. The lawyer's certificate must be signed and dated by the lawyer and must state—

- (a) whether the lawyer is independent of the seller, the seller's agents and anyone else involved in the sale, or promotion of the sale, or provision of a service in connection with the sale, of the property and whether the lawyer has a

business, family or other relationship with any of those persons; and

(b) whether the lawyer has received, is receiving, or expects to receive a benefit in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the property, other than professional costs and disbursements payable by the buyer; and

(c) the lawyer has explained to the buyer the purpose and nature of the certificate.

The form referred to is PAMD Form 32a. Version 3 is current at the time of writing. As the form draws a buyer's attention to the cooling-off period provisions, it should be sent to a buyer as soon as possible with a remark that the "purpose" in providing the certificate is to meet the requirements of the Act.

The form is an affront to any ethical lawyer and is a method of regulating the discharge of a lawyer's basic obligation to disclose to a client:

1. Any relationship with an associated person or transaction.

2. The expectation of any benefit (other than professional costs and disbursements payable by the buyer) from other sources.

There is a further prohibition upon a non-independent lawyer certifying the waiving or the shortening of a cooling-off period.

Section 10 of the Act states that the main object is to provide a system of licensing and regulation that achieves an appropriate balance between:

(a) The need to regulate for the protection of consumers; and

(b) the need to promote freedom of enterprise in the marketplace.

The other significant stated object is to provide a way of protecting consumers against particular undesirable practices associated with the promotion of residential property. The objects are to be achieved mainly by:

(a)(i) ensuring only suitable persons with appropriate qualifications are licensed or registered;...

(b)(i) providing protection for consumers in their dealings with licensees and their employees;...

(c) regulating fees and commissions that can be charged for particular transactions;

(d) providing protection for consumers in their dealings with marketeers;

(e) promoting administrative efficiency by providing that—

(i) responsibility for licensing rests with the chief executive;

(ii) responsibility for minor claims against the fund rests with the chief executive;

(iii) responsibility for claims, other than minor claims, against the fund rests with the tribunal;

(iv) responsibility for reviewing particular decisions of the chief executive rests with the tribunal; and

(v) responsibility for disciplinary matters rests with the tribunal.

(f) establishing a claim fund to provide compensation in particular circumstances for persons who suffer financial loss because of their dealings with persons, other than property developers and their employees, regulated under this Act;

(g) providing for the enforcement of matters involving marketeers by the tribunal and the District Court; and

As the form draws a buyer's attention to the cooling-off period provisions, it should be sent to a buyer as soon as possible with a remark that the "purpose" in providing the certificate is to meet the requirements of the Act.

(h) providing increased flexibility in enforcement measures through codes of conduct, injunctions, undertakings, and, for contraventions by marketeers, preservation of assets and civil penalties.

It is necessary to focus on Sections 365 and 366 of the Act.

One of the biggest dangers which has become more prominent since the explosion of mandatory CLE and specialist accreditation is that, when you attend presentations or read prepared material, you will believe what is being presented. As you have observed in the court environment, opinions will often differ and it becomes a matter of who you listen to and who has the last say. Although you can expect sterile advice, all presenters should be able to justify their opinions.

Please operate in surveillance mode and continue to scan for inconsistent or unverified information.

The provisions of Section 365 have created an ongoing problem for property lawyers and clarity is required. Not only did the draftsmen displace the common law relating to the formation of contracts, but there is still confusion about the contract date, which is a primary issue because it affects contract compliance dates, particularly when contracts reference those dates to the contract date as, for example, "30 days from Contract Date".

The consequences of course for any error can be claims for default, repudiation and breach of contract.

I use the term "formation of contract" loosely because it has been used in journal articles when discussing this topic.

Many facets of commercial law are artificial, but rules have been developed for commercial convenience and certainty. You will all be aware that at common law the formation of most contracts required an offer, an acceptance and a communication of that acceptance by the offeree to the offeror. Rules were developed for determining if 'communication' had occurred. In relation to postal communication, there were three commercially acceptable options which could have been adopted by the court as the time when communication occurred:

1. As soon as the advice of acceptance was posted;
2. When the notice of acceptance was delivered to the offeror's address; or
3. When the offeror actually received the notice of acceptance.

Our courts initially adopted the first option, but it is interesting to note that the German system adopted the second, although there was a general rule that the offer was to remain open for a reasonable time.¹

Provisions of the *Property Law Act* (s347) and the *Acts Interpretation Act* (s39A) in respect of the service of notices and documents now provide that such documents will be deemed to be served at the time when they would be delivered in the ordinary course of post.

Section 365 indeed changed the common law and made it clear that the communication of acceptance of an offer to an offeror is not sufficient but rather the buyer or the buyer's agent must receive a copy of the contract signed by all parties. Subsection 1 introduced a new concept which also purportedly allows a seller to change his or her mind even after communicating acceptance so long as a copy of the fully exe-

cuted contract has not at that time been given to the buyer or the buyer's agent.

The suggestion which is supported by at least one presenter is that because the buyer is not bound by the contract until the provisions of Section 365 have been satisfied, the important 'contract date' should be the day the buyer receives a copy of the contract signed by all parties, and not the date the seller or the last party executing the instrument signs the contract.

You must not confuse:

1. the date of a contract or an instrument which is the date of attestation of the instrument by the last party to it; with
2. the date when parties are bound by the provisions of that instrument which historically involved an analysis of the communication of the acceptance and which now pursuant to Section 365 is when the buyer or the buyer's agent receives a copy of the fully attested instrument.

In 2004, the Supreme Court considered the phrase "**the date of this Deed**" in respect of a put and call option. The date was relevant because settlement of the sale of residential lots was required "not later than 120 days from the date of this Deed". The date of execution of the deed by the final executing party was determined to be the date of the deed rather than the subsequent delivery date. (*JLF Corporation Pty Ltd v Mount Petrie Developments Pty Ltd* [2004] QSC 044).

The decision followed the principle in *Styles v Wardle* (1825) 4B. & C. 908, which has also been accepted as authoritative by the NSW Court of Appeal in *Glebe Administration Board v Tifan* [1968] 3 NSW 455. The judgement in *Tifan* established that the ordinary rule of construction will apply unless the evident intention of the parties to the contract would be defeated by the application of the rule.

Section 490 of the *Duties Act* 2001 states that an agreement made by acceptance of an offer contained in an instrument is "**first signed** when the offer is accepted".

There is no mention of communication of acceptance or of the provision of a copy of a signed contract to the buyer. The Act defines "instrument" as a written document in hardcopy form.

In summary, contracts should be dated, as they have been traditionally when the last party to the instrument signs the contract. There are analogies in other legal documents where the date of the instrument is quite different to the operative date, such as in wills.

I should mention that section 472A (3) PAMD referring to the time limit for making claims defines "contract date" with a very loose set of words. It is defined as "the day on which the contract for the purchase was entered into".

Cooling-off period

"Cooling-off period", for a relevant contract, means a period of five business days –

- (a) starting on the day the buyer under the contract is bound by the contract or, if the buyer is bound by the contract on a day other than a business day, the first business day after the day the buyer is bound by the contract; and
- (b) ending at 5pm on the fifth business day (Section 364).

¹ 'Cheshire & Fifoot' 7th Aust. Ed. page 124.



As an example, the cooling-off period for a buyer who receives a copy of the contract signed by the buyer and the seller on Friday would finish at 5pm on Thursday of the following week (assuming that there are no intervening non-business days).

Because there is no qualifying time restraint, the provision of the requisite copy at two minutes to midnight on Friday (if it is a business day) will be the first day of the five business day cooling-off period.

“Business day” means a day other than a Saturday, Sunday or public holiday. Business days are not locality or area qualified, so when you have a Townsville property buyer in Brisbane and the Brisbane Show public holiday intervenes, it is reasonable to ask, when does the cooling-off period end?

Recovery of termination penalty

Section 368(3) requires the refund of a deposit less the amount of the termination penalty (0.25 percent of the contract purchase price) to a buyer if a buyer elects to terminate a contract using the cooling-off period provisions. Section 366(3)(e) requires the warning statement to state the amount or the percentage of the purchase price that will not be refunded from the deposit if the contract is terminated before the cooling-off period ends.

Because there is no provision for recovery of the termination penalty other than from a deposit, it is a practical imperative that a deposit should not be less than the termination penalty amount.

Strict compliance with format of forms.

You are aware that the Act introduces a regime of warnings and procedures. If your client is faced with a challenge that an incorrect version of a form has been used, be aware of Section 49 of the *Acts Interpretation Act*.

Section 49(1) of the *Acts Interpretation Act* states that strict compliance is not necessary and substantial compliance

is sufficient. Section 49(2) of the Act, however, is relevant where an Act requires a form to be completed in a specified way, such as Section 366(4) PAMD requires.

Warning statements

Be aware of Section 366(4) PAMD, which states:

A statement purporting to be a warning statement is of no effect unless—

- (a) before the contract is signed by the buyer, the statement is signed and dated by the buyer; and
- (b) the words on the statement are presented in substantially the same way as the words are presented on the approved form.

Example for paragraph (b) –

If words on the approved form are presented in 14 point font, the words on the warning statement must also be presented in 14 point font.

Section 43 of the *Hire Purchase Act* also prescribes

a minimum size type for documents.

With respect to the use of “the approved form” required by Section 366 (1) PAMD, refer to the Supreme Court decision in *Devine Ltd v Timbs* [2004] QSC 024. The action involved put and call options associated with the River City Apartments development. In early 2002 the prospective buyer signed documents comprising, in each case, the PAMD warning statement, the *Body Corporate and Community Management Act* 1997 information sheet and the contract, and those documents were held in escrow. The seller was prohibited from signing the documents until either option was exercised, and the seller’s right to exercise its option was conditional.

When the contracts were signed by the seller in late 2003, it was claimed by the buyer that the versions of the PAMD warning statement and the BCCM information sheet were no longer the approved forms. The court held that the date of signature by the buyer was the relevant date in determining the currency of the approved form.

In *Celik Developments Pty Ltd v Mayes* [2005] QSC 224 the Supreme Court declared that a contract for the purchase of an “off the plan” unit in the Q1 residential apartment complex at Surfers Paradise had been lawfully terminated. The court examined the meaning of “approved form” in the analogous consumer protection provisions of the *Body Corporate and Community Management Act* 1997. It was held that the correct version of the required form was “the approved form” and an earlier version was not the “approved” form.

New versions of forms are often gazetted and the revocation date of earlier versions is often also gazetted. If the revocation of an earlier version of a form has not been gazetted, it will not be the “approved” form if there are material differences when compared with the current version of the form or if it has the potential to mislead a consumer.

The warning statement includes a notice that, if it is not attached to the front of the contract and signed by the buyer before the attached contract is signed, then the buyer may terminate the contract.

An initial Supreme Court decision in *MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320 has been strengthened by the recent unanimous decision on June 24, 2005, of the Court of Appeal in *MNM Developments Pty Ltd v Gerrard* [2005] QCA 230, an appeal from the District Court at Southport. The Court of Appeal was constituted by de Jersey CJ, Williams JA and McMurdo J.

The respondent sought to sell to the appellant a \$1.25m residential property on the Gold Coast. Although the appeal was dismissed primarily because factual and legal issues could not be dealt with appropriately by summary judgement procedures, the judgements have soundly and thankfully provided a level of certainty to this area.

Leave to appeal was granted in the words of the Chief Justice “because the construction of the statutory provision has not yet been settled at appellate level, and the determination of this case may have a significant impact on contracts for the sale of residential property”.

Before the primary judge, the seller claimed that his agent had sent the buyer a continuous fax comprising, in this order:

- cover sheet / letter

The warning statement includes a notice that, if it is not attached to the front of the contract and signed by the buyer before the attached contract is signed, then the buyer may terminate the contract.

- PAMD Form 27b (selling agent's disclosure to buyer)
- PAMD Form 30c (warning statement)
- Contract.

The buyer's director signed the disclosure statement, the warning statement and the contract in that order and faxed the executed documents back to the seller's agent. The buyer's director then separately sent the original documents back to the agent and the seller then executed the original contract.

Following a consideration of the primary and related meaning of "attach", and concurrence with Justice Muir's observation in *MP Management (Aust) Pty Ltd v Churven*, that "some form of physical joinder or incorporation" was required, the Chief Justice said:

"My view is that on the factual basis adopted below, this warning statement was not attached to the contract, as its first or top sheet. That 'factual basis' assumed the concluded contract was in the facsimile form discussed by the primary judge, which may or may not prove to be correct. But accepting that assumption for the present, the pages of the warning statement appeared in the midst of a series of pages comprising a different form, the relevant statement, the contract and the directors' guarantee. The legislature intended that a purchaser, picking up the contract, would necessarily have first to confront the warning statement. That is achieved by adopting here the ordinary concept of 'attach', which I am satisfied was plainly the legislature's intent. One could not reasonably say this statement was attached to the contract, as its first or top page, where the only physical relationship between the documents, within the continuous fax, was that where the warning statement ended, the separate contract began."

Section 366(1) states: "A relevant contract must have attached, as its first or top sheet, a statement in the approved form ('warning statement') containing the information mentioned in subsection (3)."

Williams JA stated the obvious when he said the provisions of the Act in question were badly drafted and he noted that the reference in Section 366(1) should not be to a "contract" but to documents submitted to an intending purchaser.

McMurdo J wondered at what point was an offence committed by the seller or a person who prepares a contract that does not comply with Section 366(1).

- Is there an offence if no contract is formed?
- What if the relevant document remains a draft?
- Does an agent commit an offence simply by faxing the draft contract and warning statement?

McMurdo J also considered that, if a document is not "a relevant contract" unless and until it records a contractual relationship, then Section 366(2) does not strongly indicate that the warning statement must be attached before the buyer receives the draft contract. Although McMurdo J said that it would be logical to require the warning statement to be attached when the prospective buyer received the (draft) contract, Her Honour also said an alternative interpretation was that the statement had to be attached by the time the buyer signed the contract, which would make the warning equally effective but would allow for greater convenience and expedition.

It was also noted that contracts are sometimes prepared by buyers.

The buyer may terminate the contract "**at any time before the contract settles**" and those rights are not waived by a buyer who continues to perform the contract with knowledge of the contravention of Section 366 (*MP Management (Aust) Pty Ltd v Churven* [2002] QSC 320). Muir J found that the right to terminate the contract at any time before settlement and the right to continue with the contract were not inconsistent rights and the time of election did not arise until the time of settlement.

A buyer terminating a contract upon the basis of a non-complying warning statement is entitled to recover from the seller and the person acting for the seller who prepared the contract (jointly and severally) reasonable legal and other expenses incurred in relation to the contract after the buyer signed the contract.

We have to be very careful in considering **unsafe** procedures.

My observations as a commercial lawyer are that about 20 percent of contracts at the initial stage are faxed or emailed, and that percentage is rapidly increasing, particularly where interstate and overseas clients' time requirements need to be met. No one can blame the courts for dealing appropriately with this messy legislation.

The two questions yet to be answered are:

1. At what stage does the warning statement have to be attached to the instrument which is loosely referred to as the contract?; and
2. Will the execution of a further warning statement and attached contract by the buyer destroy the buyer's rights provided by Section 367 or nullify the purported offence by the seller or the seller's agent referred to in Section 366(2)?

I don't like your chances arguing the second point for the affirmative, but there is a belief, subject to judicial determination, that a buyer may receive directions to attach the warning statement to the contract before the warning statement and contract are signed.

Of course you cannot contract out of the provisions of the Act and it will remain a matter of fact as to whether or not the requisite attachment occurred.

Beneficial interest

A real estate agent or a real estate salesperson commits an offence if they obtain a beneficial interest in property placed by a client with the agent for sale unless full written disclosure is made in the approved form before the contract is entered into. The maximum penalty is 200 penalty units (\$15,000) or three years' imprisonment (Section 145).

In the event of a sale, no commission or other reward is payable in relation to the sale. A spouse, de facto spouse, parent, brother, sister, child or stepchild of the person, or a child or stepchild of the person's spouse or de facto spouse are included in the pool of restricted transferees, and options to purchase are similarly regulated (Section 13).

Claim fund

A claim fund is established for meeting motor vehicle title claims and claims associated with contraventions of the Act such as the non-notification of beneficial interests.



A claim against the claim fund is currently limited to \$200,000, and the total amount that may be paid from the fund because of, or arising out of, a wrong by a single person is \$2,000,000 (reg 55).

Buyers dealing with property developers

A property developer is a person who completes more than six residential property sales in any 12-month period other than through a real estate agent, pastoral house or auctioneer (Sections 261(2)(a) and 262(2)). A buyer who suffers financial loss buying a property directly from a property developer cannot make a claim for compensation against the claim fund.

Buyers dealing with marketeers

Only buyers of principal places of residence who have claimed stamp duty concessions are eligible for a claim against the claim fund for losses as a result of a contravention by a marketeer and as a consequence the ability of people to make claims has been gutted. Such claims are limited to \$35,000 and will be very difficult to access because of the strict procedural requirements. Because of the wide definition of ‘marketeer’, it would appear that a person suffering loss as a consequence of an agent’s dishonest conversion of trust monies would have no recourse against the claim fund if the relevant transaction was in respect of an investment property!

Lands not lawfully useable for residential purposes

If land cannot, “as at the day of sale”, be lawfully used for residential purposes, then the real estate agent must give a written statement to that effect to a proposed buyer before the buyer signs a contract (Sections 148 and 149).

Agents’ commission

The PAMD Regulations prescribe the maximum commission payable in respect of property sales and rentals. The regulations also prescribe the educational qualifications required for the licensing of specific licensees and applicable fees.

Codes of conduct

Licensees, including real estate agents and salespersons, are subject to the mandatory provisions of a code of conduct. Contraventions of the provisions are grounds for disciplinary proceedings, injunction proceedings or the seeking of undertakings under the Act. Many agents are not yet aware of the provisions of their code and that breaches may adversely affect their businesses. Some of the requirements are common sense, others are unlikely to be followed in practice even though mandatory, and include:

1. A requirement for a real estate agent to immediately communicate to a client each expression of in-

terest, whether written or oral, about the sale, purchase, exchange or lease of a property (reg 11(2));

2. A requirement for a real estate agent to disclose to the client the agent’s policy about conjunction sales, including the percentage apportionment of commission between the agents before accepting an appointment to sell property for a client, and a real estate agent must conduct a sale in conjunction with another real estate agent if the client authorises a conjunction sale (reg 20(1) and (3));

3. A requirement that, if a real estate agent gives a person an opinion about the market price or market rent for a property, the agent must not accept instructions from the person to act as a real estate agent for the property unless the agent has given the person a written statement of the material facts that the agent has taken into account in forming an opinion about the property’s market price or market rent (reg 21(2));

4. A requirement that a real estate agent must inform a client in writing if the time under the contract for payment of the deposit has passed without the deposit being received by the agent (reg 31(a));

5. A requirement that the agent must not accept any late payment of the deposit unless the client has been informed and gives written instructions to accept late payment of the deposit (reg 31(b));

6. A requirement that a real estate agent managing a rental property must accompany a customer on an inspection of the property and that a real estate agent must not give the keys to a property to a customer, even for a short time, unless authorised by the client in writing (reg 33(1) and (2));

7. A requirement that a real estate agent managing a rental property must immediately notify the client in writing if the agent becomes aware of a customer’s breach of the agreement or contract for the property (reg 36);

8. A requirement that, if a real estate agent managing a rental property is aware that the property is listed for sale or the client intends to sell the property by private sale, then the agent must immediately give the customer (tenant) written notice of the intended sale of the property (reg 38(1) and (2));

9. A requirement that a real estate agent must prominently display a notice of the existence and availability of this code in the public area of each of the agent’s offices (reg 42);

10. A requirement that a real estate agent/principal licensee follows the complaint resolution procedures detailed in the code (reg 43).

Investment of deposits

Deposits may only be invested if a sale is to be completed more than 60 days after the amount is received and the licensee is directed to invest the amount by all parties (Section 380). A person who suffers financial loss because of, or arising out of, the stealing, misappropriation or misapplication of an amount that a relevant person was directed to invest cannot make a claim against the claim fund (Section 471(1)).

Disputed trust monies

Sections 388, 389 and 390 prescribe the procedure for the payment into court, disbursement or retention of trust monies in dispute. Trust monies will be “in dispute” if a licensee receives written notice from

Deposits may only be invested if a sale is to be completed more than 60 days after the amount is received and the licensee is directed to invest the amount by all parties.

a party to the transaction that ownership is in dispute (Section 387(1)(b)).

Judicial matters and remedies

A substantial part of the Act deals with structures and procedures associated with investigations, inspections, public examinations, claims, complaints, disciplinary proceedings, reviews and enforcements, and those elements of the Act are, in most cases, logical.

“Inspections” may be conducted by the chief executive or a person appointed by the chief executive. Section 556A allows an inspector to require a marketeer or another person to produce relevant documents immediately unless the person has a reasonable excuse. The Act allows an inspector to enter a place if it is the licensee’s place of business and it is open for entry or if the entry is authorised by warrant (Section 547).

A system of “undertakings” has been introduced which allows the chief executive to seek from a person an undertaking in respect of a contravention of the Act or a code of conduct (Section 569). Undertakings are recorded in a public register (Section 572) which may be accessed through the Office of Fair Trading website: www.fairtrading.qld.gov.au. Undertakings may be enforced by the chief executive applying to the District Court for an order (Section 571).

The Manager of Investigations has advised that there were two successful marketeering prosecutions in the 2004/2005 financial year. In one of those, group members were ordered to pay almost \$310,000 in fines, costs and compensation, and parties were disqualified from holding a licence or engaging in real estate activity for four years.

The chief executive or any person aggrieved by a respondent’s conduct may apply to the District Court for an injunction to restrain a contravention or attempted contravention of the Act or a code of conduct (Sections 564 and 565).

The process for disciplinary proceedings has now changed. Previously, the chief executive filed a complaint notice with the tribunal registrar. Now, Section 497 prescribes that “the chief executive may apply to the tribunal to conduct a proceeding to decide whether grounds exist under section 496 for taking disciplinary action against a licensee or registered employee”. The Act allows a person dissatisfied with a decision of the chief executive to apply to the tribunal to have the decision reviewed.

The tribunal has power to consider applications for summary orders, impose fines of \$15,000 for an individual or \$75,000 for a corporation, and cancel or suspend licences (Section 529). The tribunal is not bound by the rules of evidence and has a discretion whether or not to take evidence on oath.

Proceedings for an indictable offence (one for which the maximum penalty of imprisonment is more than two years) are taken in the usual way by way of summary proceedings under the *Justices Act* or on indictment (Section 589), and the District Court can impose a penalty of \$40,500 for false or misleading information about a property provided by a licensee or registered employee (Section 574).

The abolished Property Agents and Motor Dealers Tribunal gave a right of appearance to a party’s lawyer. Now, except in a narrow range of proceedings,

including disciplinary proceedings, an individual appearing before the Commercial and Consumer Tribunal may only be represented by a person, and then only by a person who is not a lawyer if the tribunal directs that it is appropriate (Section 76 *Commercial and Consumer Tribunal Act 2003*).

Remember that real estate agents and lawyers may be “marketeers”.*

Peter Mackey



Peter Mackey has been principal of Mackey & Wales, Townsville, since 1979. In 1984, he established the first firm in Queensland totally specialising in commercial law services. He was NQLA president in 1993 and arranged the first QLS mediation qualification course for solicitors in north Queensland. He was appointed a QLS Senior Counsellor in 1999.