



Articles

Taking the bait — price ranges and related unfair tactics in real estate advertising

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*The real estate industry in Australia has not been immune from criticism about tactics utilised by some real estate agents to promote the sale of real property.¹ While misleading statements in relation to the selling prices of property are not a recent phenomenon, the arguably widespread utilisation of practices described as 'bait advertising' has attracted the attention of various state legislatures² and tribunals³ and the Australian Competition and Consumer Commission (ACCC).⁴ Unease about such practices has recently culminated in a landmark decision of the Federal Court in **Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd**⁵ where a real estate agent was found to have contravened several provisions of the Trade Practices Act 1974 (Cth).*

Bait advertising may describe a variety of practices when promoting the sale of real estate. For the purposes of this article, attention will be focussed on three, sometimes related practices; those of over-quoting the value of properties to vendors to secure listings, under-quoting of estimated selling prices to entice prospective purchasers and the use of price ranges in real estate advertising.

This article will discuss objections to these practices. In so doing, the article will examine the common law, relevant provisions of the Trade Practices Act 1974 (Cth) and the Fair Trading Acts and other present and pending state legislation which may be contravened where bait advertising is utilised in real estate transactions. The recent decision of *Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd*⁶ will also be discussed.

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1 Media releases, The Hon Margaret Keech, Minister for Fair Trading (Qld), *Bait Advertising must be stopped*, Monday 11 October 2004; *Bait Advertising Practices Targeted*, 26 November 2004; *Keech move to punish misrepresentation*, 10 October 2004; K O'Meara *Make real estate valuations accurate, agents told*, Propertyreview.com.au, 17 November 2004.

2 See the discussion below in relation to the measures adopted by the various states and territories.

3 'Real Estate Agent fined for deceptive conduct', *Sydney Morning Herald*, 7 February 2005, www.smh.com.au.

4 The ACCC's interest in a variety of misleading practices in the real estate industry has recently been underscored by its pursuit of an agent for misleading advertising practices in *Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd* (2005) 142 FCR 506; 65 IPR 1; [2005] FCA 404 and the publication in May 2005 of *Fair and Square — A Guide to the Trade Practices Act for the Real Estate Industry*.

5 Above n 4.

6 Above n 4.

Price ranges and other ‘baiting’ practices — why is there cause for concern?

Real estate agents utilise a variety of strategies when advertising the selling price of a property. Clearly the simplest method is to state in the advertisement the actual price the vendor will accept. The drawback for a vendor is that if he or she ‘shows their hand’ in this way, a vendor may be precluded from gaining a higher price. The interested party knows that it is unnecessary to offer more than the asking price because the vendor has announced that is the maximum to be asked.⁷ Also, purchasers may make offers at less than the asking price and negotiate upwards. There is often a perception that the price stated is the maximum price and therefore it is anticipated that offers would be lower. Therefore, a vendor could have little prospect of realising his or her desired price.

This strategy may be effective where there are multiple parties interested in the property at the stated price at the same time. In such a case, offers for the property will increase as the competing parties try to outbid the other. However, this may result in the creation of other dilemmas, for example those associated with multiple offers and ‘dutch’ auctions, practices recently criticised in relation to the sale of real estate.⁸

Another method an agent may utilise is to state that the price is ‘around’ a particular figure. This will provide a purchaser with a guide to the price as it suggests, presumably, the price will be at, just above or just below that stated. Similarly, the use of the term ‘from’⁹ or ‘plus’ suggests that the figure quoted is a starting point, that the vendor is unlikely to want to consider offers below this amount, but will certainly look at those above that price. Clearly this does not preclude a person making a lower offer but they cannot complain if the offer is refused. Problems may arise, however, when the agent knows that the vendor of the property does not intend to sell the property at, or anywhere near, this price. If the price of the property is understated, usually for the purpose of attracting more potential purchasers, the agent could be accused of bait advertising.

Overpricing — representations to vendors

The first concern with bait advertising and real estate transactions involves vendors. An agent may ‘buy’ a listing by representing to a vendor that the agent can achieve a higher, but ultimately unrealistic, price higher than other agents or persuading the vendor they will maximise their price at auction. In such cases an overvalued property is unlikely to sell quickly thus disadvantaging the vendor. Homes which are slow to sell also raise suspicion among potential buyers further disadvantaging a vendor.

⁷ *Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd*, above n 4, per Sundberg J at [70].

⁸ The Government of South Australia — Office of Consumer and Business Affairs, *Final Report of the Real Estate Working Party*, July 2003 at 19.

⁹ Such statements are often used in the sale of multiple dwellings, for example units. The price of the lowest priced unit may be stated with the word ‘from’. There is nothing inherently wrong with this practice in such circumstances.

Under-pricing — representations to potential purchasers

Bait advertising in real estate transactions may also occur where an agent makes representations regarding price to prospective purchasers. In this case, the agent may represent to the purchaser that the vendor may/will accept a price lower than market expectations or the price the vendor expects. Such representations may take the form of direct representations to the purchaser or through the use of the tactics discussed above in relation to price ranges. For example, a statement of a lower figure with the words 'plus' or 'from' where, to the agent's knowledge, the vendor has no intention of selling at the lower price, or price ranges where the lower end of the range bears no resemblance to the figure the vendor is prepared to accept.

Price ranges

Until recently,¹⁰ price ranges have been commonly employed in advertisements for the sale of real estate. Real estate agents suggest that such a strategy seeks to inform potential purchasers and directs eligible buyers towards properties within their particular price ranges. In this way, buyers who cannot afford to purchase within a particular range will not waste time by inspecting properties they cannot afford. On the other hand, such tactics may also have the effect of increasing the pool of potential purchasers. Prospective purchasers who may doubt their capacity to purchase in a particular area, may be pleasantly surprised to find that their spending capacity may fall within the lower end of the pricing range. This may encourage purchasers to consider a property they would not have otherwise contemplated and perhaps stretch their resources further to ensure they successfully purchase the property.

Price ranges commonly take two forms:

- (a) A price range indicating the lower and upper limits of the anticipated price; or
- (b) A statement of a price accompanied by words such as 'plus'.

In relation to (a), a vendor may be seeking \$270,000 for his or her property. A price range may state that offers are invited on the property 'between \$250,000 and \$275,000'. The impression given is that the vendor will accept offers between those figures (which is correct, the vendor wants \$270,000). However, if a potential purchaser made an offer at the lower end of range, at \$250,000, the offer would be in all likelihood refused.

In relation to (b), the impression given is that offers will be considered from the lower figure upwards. No upper limit is set.

There has been a significant amount of criticism regarding the use of price ranges. A purchaser seeing the lowest price will naturally gravitate towards making an offer at the lowest price, or even lower. Also, while more buyers may be attracted to the property because of a price range, the additional 'purchasers' may only be able to make offers at the lower end. More buyers, in such circumstances, will not necessarily equate to achieving the desired price. Problems arise too when the price stated at the lower end of the range bears little or no resemblance to a price which a vendor is prepared to take. In

¹⁰ This practice remains prevalent in several jurisdictions.

this way, prospective purchasers are being 'baited' into inspecting a property in the belief the property may be within their financial means.

Such advertisements clearly have the potential to mislead prospective purchasers if the vendor has no intention of selling the property at the lower end of the scale. As well as the natural disappointment felt on missing out on a desirable property, there may be significant financial consequences for potential purchasers. For example, where the property is to be sold by auction, the auction will be conducted on the basis of an unconditional contract for sale. Therefore, all inspections and finance applications have to be completed prior to the auction. If a potential purchaser has been led to believe that they have a chance of securing the property at around a particular price, and then are unsuccessful at the auction when the property is sold or passed in at a price much higher than the potential buyer could have contemplated, they will be out of pocket for inspections and applications performed on a home they never had any real prospect of purchasing.¹¹

The use of price ranges can also have a detrimental effect on a vendor. As discussed above, although price ranging may attract more inspections, this does not necessarily equate to buyers who are prepared to pay the vendor's desired price. Then, when offers come in at the lower end of the range, an agent may persuade the vendor that is all the 'market' is prepared to pay.

Such conduct has been the subject of considerable disquiet. Fair Trading authorities in various states have been quick to condemn the practice and several states have already introduced¹² or are proposing the introduction¹³ of legislation to address the problem of bait advertising and price ranges. The Real Estate Institute of Australia (REIA) has released guidelines critical of price ranging and unfair practices such as 'buying' a listing or underquoting to attract more people to inspect the property or bid at auction. These guidelines were prepared in collaboration with the ACCC.¹⁴ The ACCC have been investigating several real estate agencies and pursuing offenders administratively¹⁵ and in the courts. After the decision in *Australian*

11 For example, recently a Sydney real estate agency was fined over \$14,000 for understating the estimated selling price of a property to potential purchasers. The estimated selling price of the property, in Lane Cove, was recorded on the sales inspection report and auction agency agreement was around \$1.5 million. Despite this, the real estate agency stated prices to potential buyers ranging from \$1.1 million to \$1.4 million. The property eventually sold at auction for \$1.535 million. 'Real estate agency fined for deceptive conduct', *Sydney Morning Herald*, 7 February 2005, www.smh.com.au.

12 Estate Agents Act 1980 (Vic), Property, Stock and Business Agents Act 2002 (NSW).

13 Amendments are proposed to the Property Agents and Motor Dealers Act 2000 (Qld) and Land Agents Act 1994 (SA).

14 Real Estate Institute of Australia, *Practice makes perfect — new guidelines for real estate agents on the Trade Practices Act*, 20 August 2004.

15 In Brisbane, two properties were advertised for auction with a price (\$300,000) followed by a plus sign (+). The houses were passed in at \$380,000 and \$395,000. An ACCC investigation led to the agents being required to provide certain administrative undertakings. The agency network was required to bring to the attention of all its offices the concerns of the ACCC about bait pricing and conduct training sessions for all its managers and salespeople in order to ensure compliance with the law. It was also required to convene a specifically designed training program and amend all training manuals to include mention of the laws about bait pricing. The network was also required to 'issue a formal policy that all of its offices must comply with the specific provisions of the Act as they relate to

*Competition and Consumer Commission v Gary Peer & Associates Pty Ltd*¹⁶
 ACCC Chairman Graeme Samuels noted:

The Court's decision is a timely reminder that the real estate industry has to be ever vigilant and compliant with the Trade Practices Act in respect of its advertising practices.¹⁷

So, given this background, what is the law with respect to bait advertising in real estate transactions?

The common law

Misrepresentation

Stating a price or setting a price range which, to the agent's knowledge, the vendor will not accept, could amount to an actionable misrepresentation. Statements of price made recklessly or without belief in their truth could provide the basis for a negligent or fraudulent misrepresentation. An initial consideration is whether such statements are regarded as a representation or a mere puff. Flamboyant statements about the quality of the subject matter which would not be understood to be literally true are not actionable.¹⁸ Therefore, it may be contended that the statement of a lower price or a price range where the prospect of a sale at the lower end is nugatory, is merely advertising chatter. Alternatively, it may be argued that the statements were merely introductory and should not take on the mantle of a representation.¹⁹ However, clearly in some circumstances advertising puffs can amount to representations with the potential to lead a recipient into error.²⁰ In relation to stating a lower price or price ranging, a person seeing an advertisement would, it would seem, expect the price to be around the price stated or anywhere within the price range, including the lower end. This situation can clearly be distinguished from circumstances where the puffery is self evident.

In relation to introductory statements, it would appear that a statement as to price is fundamental to the transaction as a whole and is directly referable to the selling price of the property.²¹

State of mind

Statements involving the state of mind of a person are a contentious issue under the law of misrepresentation, especially where the state of mind relates to a future matter. It is trite law to state that it is a less daunting task to establish a misrepresentation as to past or present fact than establish a

"indicative" or "bait pricing". B Jenman, *Major network to cease bait pricing*, Promoting Ethics in Real Estate, www.ethicsinrealestate.com.au, 25 January 2005; ACCC News Release, *ACCC accepts Ray White Real Estate administrative undertakings*, 28 January 2005.

¹⁶ Above n 4.

¹⁷ ACCC News release, *Gary Peer & Associates found to have misled buyers*, 13 April 2005.

¹⁸ N C Seddon, M P Ellinghaus, *Cheshire and Fifoot's, Law of Contract*, 8th ed, LexisNexis Butterworths, Sydney, 2002, para 11.11.

¹⁹ The real estate agent in the *Gary Peer* case argued along these lines.

²⁰ *Senanayake v Cheng* [1966] AC 63.

²¹ *Gary Peers* per Sundberg J at [75].

misrepresentation involving an opinion, promise or prediction. A representation must be one of past or existing fact. A person's opinion cannot be described as a matter of fact.²² Also, the correctness of a promise or prediction cannot be currently true or false because their accuracy can only be determined at a future time. However, a misrepresentation may have occurred where it can be established that the statement was in the circumstances a statement or fact,²³ an opinion was not actually held by the maker of a statement at the time the opinion was expressed²⁴ or there was no honest belief on the part of the person making the statement that the promise or prediction could be fulfilled. Therefore, where a real estate agent states a price range for a property, and the agent knows the vendor will not sell for less than the higher end of the range, the agent cannot actually be of the opinion that the property could be sold within the totality of the range provided to potential buyers. Similarly, it could be said that there was no honest belief on the part of the agent that the projected selling price was accurate.

Vendors

By over-pricing to ensure a listing, an agent would appear to have engaged in a misrepresentation. In such circumstances a contention of puffery would be flimsy and the introductory statements argument would clearly fail as the higher price seems to have been the catalyst for the vendor listing with that agent. Clearly the opinion is one that was not reasonably held, or at the least reckless.

Statute

Under the Trade Practices Act and the equivalent Fair Trading legislation, over or under quoting selling prices and utilising price ranges could result in contraventions of provisions dealing with misleading or deceptive conduct²⁵ and false representations in relation to land.²⁶ It will fall to be considered whether the conduct contravenes provisions dealing with false representations generally²⁷ and the specific bait advertising provisions.²⁸

22 *Bisset v Wilkinson* [1927] AC 177.

23 *Smith v Land and House Property Corporation* (1884) 28 Ch D 7.

24 *Field v Shoalhaven Transport* [1970] 3 NSW 96, *Ritter v North Side Enterprises Pty Ltd* (1975) 132 CLR 301; 6 ALR 125.

25 Section 52 equivalents: ACT, Fair Trading Act 1992 s 12; NSW, Fair Trading Act 1987 s 42; Vic, Fair Trading Act 1999 s 9; Qld, Fair Trading Act 1989 s 38; Tas, Fair Trading Act 1990 s 15; SA, Fair Trading Act 1987 s 56; WA, Fair Trading Act 1987 s 10; NT, Consumer Affairs and Fair Trading Act 1990 s 42.

26 Section 53A equivalents: ACT, Fair Trading Act 1992 s 15; NSW, Fair Trading Act 1987 s 46; Vic, Fair Trading Act 1999 s 12; Qld, Fair Trading Act 1989 s 40A; Tas, Fair Trading Act 1990 s 17; SA, Fair Trading Act 1987 s 59; WA, Fair Trading Act 1987 s 12; NT, Consumer Affairs and Fair Trading Act 1990 s 45.

27 Section 53 equivalents: ACT, Fair Trading Act 1992 s 14; NSW, Fair Trading Act 1987 s 44; Vic, Fair Trading Act 1999 s 12; Qld, Fair Trading Act 1989 s 40; Tas, Fair Trading Act 1990 s 16; SA, Fair Trading Act 1987 s 58; WA, Fair Trading Act 1987 s 12; NT, Consumer Affairs and Fair Trading Act 1990 s 44. Note that the argument relating to s 53(e) was unsuccessful in the *Gary Peers* case.

28 Section 56 equivalents: ACT, Fair Trading Act 1992 s 21; NSW, Fair Trading Act 1987 s 51;

Section 52

Pursuant to s 52, a corporation²⁹ in trade or commerce is prohibited from engaging in conduct which is misleading or deceptive or likely to mislead or deceive. Several cases have established that representations made by real estate agents can offend s 52.³⁰ Clearly, the use of bait advertising of the type discussed in this article would have the potential to contravene the provision where the agent has misled prospective vendors and purchasers in relation to statements of selling price.

The term 'misleading' has been defined as conduct which is inconsistent with the truth or which leads or is likely to lead the person to whom it is directed into error.³¹ The term deceptive has been said to carry a connotation of craft or overreaching.³² The issue to be determined is whether the impugned conduct, of its nature, constitutes misleading or deceptive conduct.³³ It is unnecessary to prove that the conduct actually misled anyone³⁴ or that there was intention to mislead.

Whether conduct is misleading or deceptive or likely to mislead or deceive is a question of fact to be determined in the context of evidence of the alleged conduct and the relevant surrounding facts and circumstances. The courts have stated that the overall effect of the conduct is the major consideration.³⁵

Decided cases note that the first step in determining whether conduct is misleading or deceptive is to identify the class of persons to which the representation was addressed³⁶ and then ask whether an ordinary or

Vic, Fair Trading Act 1999 s 17; Qld, Fair Trading Act 1989 s 46; Tas, Fair Trading Act 1990 s 22; SA, Fair Trading Act 1987 s 65; WA, Fair Trading Act 1987 s 19; NT, Consumer Affairs and Fair Trading Act 1990 s 52.

²⁹ Or person pursuant to the Fair Trading Acts.

³⁰ For example, *Pemberton Australia Pty Ltd v CPS Services Pty Ltd* (1990) 5 BPR 11,277; ATPR 41-034; *G Lowe & Sze Tu Holdings Pty Ltd v Cudal Nominees* (1990) ATPR (Digest) 46-074; *Benlist Pty Ltd v Olivetti Australia Pty Ltd* (1990) ATPR 41-043; *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715; (1987) ATPR 40-760; *Henderson v Pioneer Homes Pty Ltd* (1980) 29 ALR 597; ATPR 40-159; *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31; 110 ALR 608.

³¹ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546; 79 ALR 83; *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1978) 140 CLR 216; 18 ALR 639; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191; 42 ALR 1.

³² *Parkdale Custom Built Furniture Pty Ltd*, above n 31.

³³ *Henjo Investments Pty Ltd*, above n 31; *Rhone-Poulenc Agrochimie SA v UIM Chemical Services Pty Ltd* (1986) 12 FCR 477; 68 ALR 77.

³⁴ *Parkdale*, above n 31; *McWilliam's Wines Pty Ltd v McDonald's System of Australia Pty Ltd* (1980) 33 ALR 394; 49 FLR 455.

³⁵ In *Parkdale* Gibbs CJ noted at p 199.

The conduct of the defendant must be viewed as a whole. It would be wrong to select some words or acts, which, alone, would be likely to mislead if those words or acts, when viewed in their context, were not capable of misleading. It is obvious that where the conduct complained of consists of words it would not be right to select some words only and to ignore others which provided the context which gave meaning to the particular words.

³⁶ *Taco Co of Australia v Taco Bell Pty Ltd* (1982) 42 ALR 177.

reasonable member of that class would have been misled or deceived.³⁷ However, as is apparent from the decisions of the High Court in *Campomar Sociedad Limitada v Nike International Ltd*³⁸ and *Butcher v Lachlan Elder Realty Pty Ltd*³⁹ it is only necessary to consider the response of ordinary or reasonable members of a class of persons to conduct that is alleged to be misleading or deceptive when that conduct is directed to the public at large. That approach has been held to be inappropriate in cases where relief is sought by a plaintiff who alleges that a particular representation was made to identified persons, of whom the plaintiff was one.⁴⁰ In such circumstance the proper approach has been held to involve an inquiry into what 'a reasonable person in the position of the [representees], taking into account what they knew, would make of the [representor]'s behaviour'.⁴¹

Section 53A

Section 53A(1) targets false representations and other false and misleading conduct in relation to land. The provision extends to conduct in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land. There is specific reference in s 53A(1)(b) to false and misleading statements in relation to, inter alia, the price payable for land.

Section 53

Pursuant to s 53 TPA, a corporation in trade or commerce is prohibited, in connection with the supply or possible supply of goods or services or in connection with the promotion by means of the supply of goods or services, from engaging in certain specified types of conduct. Section 53(e) addresses false or misleading representations as to the price of goods or services. As the definition of services in s 4(1) refers to 'any rights (including rights in relation to and interests in real and personal property) . . .',⁴² it has been mooted that s 53 may be applicable in instances of bait advertising.⁴³

Section 56

Finally, s 56 deals specifically with bait advertising. Interestingly, the provision has not been specifically utilised with regard to bait advertising with regard to representations involving the price of real estate. It would appear the difficulty with utilising the section is that there is reference to a 'specified

³⁷ *Australian Competition and Coinsumer Commission v Henry Kaye and National Investment Institute Pty Ltd* [2004] FCA 1363; *Medical Benefits Fund of Australia v Cassidy* (2003) 135 FCR 1; 205 ALR 402.

Note the recent High Court decision in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592; 212 ALR 357 and *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 (10 June 2005) (*Downey*). It remains to be seen whether the scope of s 52 has been narrowed.

³⁸ (2000) 202 CLR 45 at 85.

³⁹ (2004) 212 ALR 357 at 366.

⁴⁰ *Butcher*, above n 37 at ALR 366.

⁴¹ *Downey*, above n 37 at [69] citing *Butcher* at p 370.

⁴² *Henderson v Pioneer Homes Pty Ltd (No 3)* (1980) 43 FLR 276.

⁴³ However, note this contention failed in the *Gary Peers* case.

price'. In circumstances involving price ranges a price is not specified. Although a degree of approximation can be involved,⁴⁴ this would not appear to extend to the practice of price ranges.

Several provisions of the Trade Practices Act were recently considered in relation to price ranges by Sundberg J in *Australian Competition and Consumer Commission v Gary Peer & Associates Pty Ltd*.⁴⁵

The Gary Peer case

A Melbourne real estate agent was successfully prosecuted by the ACCC for advertising a property for significantly less than the agent thought it was worth and at a price much lower than the vendors were prepared to accept. Gary Peer & Associates Pty Ltd (Gary Peer) was engaged pursuant to an exclusive auction authority to auction a property in North Caulfield in Victoria. On 6 August 2003 the vendors told the agent, a Mr Joske, that they would not sell for less than \$780,000. In late August, after a firm offer for \$750,000, the vendors told Mr Joske that they would not accept less than \$800,000 for the property.

Despite these instructions, the agent placed a number of advertisements in the real estate sections of two prominent newspapers. The August advertisements stated:

PRICE GUIDE: \$600,000 plus buyers should inspect.

The September advertisements (advertised after the vendors raised their price to \$800,000) stated:

PRICE GUIDE: \$650,000 plus buyers should inspect.

It should be noted that this was what appeared to be a common practice in the real estate industry at that time. Indeed, Sundberg J stated:

Mr Joske said the respondent's usual practice was to set the minimum amount in buyer inspection price guides at approximately 10 to 15 per cent less than the amount for which the respondent expected the property to sell. This was a common practice in the industry.⁴⁶

Mr Joske did not expect the house to sell for the vendor's desired sum and he was of the opinion the property would sell for around \$700,000. This was despite the fact that a neighbouring property had recently sold for \$741,000.⁴⁷

On 27 September a Mr Kolsky made an offer in writing of \$750,000 for the property. This offer was taken to the vendors but rejected. It must have been clear to Mr Joske from this point that under no circumstances could the property be purchased in the \$600,000's. Despite this, the September advertisements, where the 'price guide' was increased to \$650,000, were submitted for publication. The property was passed in at auction at \$782,000. The vendors then refused to sell the property at any price.

⁴⁴ *Trade Practices Commission v Penfolds Wines Pty Ltd* (1991) 104 ALR 601.

⁴⁵ Above n 4.

⁴⁶ At [40].

⁴⁷ The home next door was a Federation style house with high ceilings and suitable for renovation. Arguably, according to the agent, the house had more character and appeal to purchasers than the subject property.

The ACCC commenced an action against the real estate agent. It is useful to itemise the representations in relation to price as alleged by the ACCC.

The ACCC claimed that having regard to the make-up and overall content of the August advertisements, the price guide statement contained implied representations by the respondent that, as at the time of publication that:

- (a) *the vendors would sell* the Property for a price that was approximately, or was not substantially more than, \$600,000;
- (b) *the vendors were prepared to sell* the Property for a price that was approximately, or was not substantially more than, \$600,000;
- (c) *the vendors had instructed the respondent to sell* the Property for a price that was approximately, or was not substantially more than, \$600,000;
- (d) *the respondent in fact believed and held the opinion* that the Property would be sold at a price that was approximately, or was not substantially more than, \$600,000;
- (e) *the respondent had reasonable grounds for believing and holding the opinion* that the Property would be sold at a price that was approximately, or was not substantially more than, \$600,000; and
- (f) *the market value of the Property was approximately, or not substantially more than, \$600,000.*

The ACCC made the same contentions about the September advertisements, though by reference to \$650,000.

In making the aforesaid representations it was alleged that the estate agent contravened ss 52, 53A and 53(e) of the Trade Practices Act 1974 (Cth). As some of the representations referred to a future matter, it was claimed that s 51A should be utilised.

The judgment can be discussed by examining the following questions:

- (1) Despite the ACCC's contentions, did the advertisements convey the alleged representations?
- (2) If the statements were representations:
 - (a) was s 51A applicable, given that some of the statements were arguably statements as to the maker's present state of mind although referring to the future?
 - (b) were the advertisements misleading or deceptive in these circumstances?
 - (c) were the advertisements false representations made in relation to land?
- (3) Was s 53(e) applicable to these circumstances?

Re (1): Did the advertisements convey the alleged representations?

All the representations relied on by the ACCC focussed on the selling price of the property. The agent contended that the representations, as alleged, had not been made in the first place. Rather than representations in relation to the sale price, the advertisements, read as a whole, were merely introductory, providing preliminary information and issuing an invitation to buyers with a certain amount of buying power, upwards of \$600,000 and later \$650,000, to inspect the property.

Sundberg J was not persuaded by this argument. His Honour noted that the use of the term ‘price guide’ was visually dominant and has a natural meaning, that of a guide to the price at which the property would be sold. The advertisement, ‘\$600,000/\$650,000 buyers should inspect’, did not merely identify a group of purchasers, as claimed by the agent, but identified a group of people the principle characteristic of which was their spending capacity. This, in Sundberg J’s view was closely connected to selling price.⁴⁸

The agent also argued that the introductory comments were not of their nature representations going to the ultimate subject matter of the negotiations and it was inappropriate that these statements were to be elevated to the status of a representation.⁴⁹ The agent sought to draw a distinction between introductory comments for the purpose of stimulating interest in a property and the ultimate subject matter of the negotiation. Therefore, the subject matter of the information in the advertisement (namely an inspection) was argued to be remote from the subject matter of the ultimate transaction (namely the price at which it was sold).⁵⁰ His Honour was of the view that the advertisement could not be regarded as merely introductory.⁵¹

In support of this argument, the agent argued that the alleged representation should be examined in context and therefore the court should consider that the sale was by auction rather than by private sale. It was submitted that the nature of an auction, as opposed to a private sale, meant that a representation as to the selling price of the property would not be made in an advertisement. In private sales, prices are disclosed in some form. However an auction relies on the market to set the price. Neither reserve prices nor the vendor’s likely selling price are disclosed. Indeed, such an occurrence was suggested to be unnatural to the auction process.⁵²

In Sundberg J’s view, the distinction between auctions and private sales was also unconvincing. It was noted that there was a significant amount of overlap in the types of advertising adopted and that in many cases, a significant amount of information about the anticipated selling price is revealed.⁵³

Re (2)(a) If the statements were representations, was s 51A applicable?

Section 51A states that for the purposes of Pt V Div 1, where a corporation makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the corporation does not have reasonable grounds for making the representation, the representation shall be taken to be

48 At [75].

49 In supporting this argument the agent (at [72] relied on the decision in *Pappas v Soulac Pty Ltd* (1983) 50 ALR 231 at 234 where Fisher J noted:

Many of the statements . . . were also essentially the types of introductory comments, in the nature of puffery, made at the start of negotiations, for the purpose of attracting the interest of a possible purchaser . . . To the extent that they are essentially puffery, it is proper to be reluctant to elevate them to the status of potentially misleading conduct.

50 Per Sundberg J at [75]–[77].

51 At [77].

52 At [71].

53 At [76].

misleading.⁵⁴ Such a representation made by a corporation shall, unless it adduces evidence to the contrary, be deemed not to have had reasonable grounds for making the representation.⁵⁵

In Sundberg J's view, submissions (a) and (e) involved representations in relation to future matters. Therefore, the onus was on the agent to satisfy the court that there were reasonable grounds for making the statements set out in submissions (a) and (e) in relation to both the August and September statements. In default the agent's comments would be regarded as misleading pursuant to ss 52 and 53A.

The first three advertisements were lodged before the genuine offer made by the Mr Kolsky. However, the court noted that the vendors had already told the agent that they would not take less than \$780,000. Also, there had been an appraisal by an independent valuer of \$700,000 and an assessment by the agent that the vendors may get \$741,000 (in light of a neighbouring property that had recently sold) but that the agent was not optimistic. Clearly, there were no reasonable grounds for making the prediction that the property may sell for \$600,000.

Regarding the September representations, clearly the agent was aware that the property could be sold for at least \$750,000. An offer at this price had been rejected by the vendors and the vendors had made it clear they would not accept less.⁵⁶

The court also considered whether a representation can amount to a representation as to the future for the purposes of s 51A even if it implies a representation as to a present state of mind. The answer was an emphatic yes. Sundberg J referred to several decided cases⁵⁷ involving s 51A and to the recent decision in *Australian Competition and Consumer Commission v Henry Kaye and National Investment Institute Pty Ltd*.⁵⁸ Sundberg J quoted from the judgment of Kenny J who stated:

Counsel for Mr Kaye contended that, although the representations referred to in [124] above contained 'futuristic' elements, they were properly characterised as statements of Mr Kaye's present intention to teach ordinary Australians how to become property millionaires. I reject this submission. Whilst these representations imply that Kaye had a particular state of mind as to some future conduct or event, they are substantially representations by him as to what he would demonstrate in the future and how he would demonstrate it and, as such, they are representations as to future matters.

54 Section 51A(1).

55 Section 51A(2), (3) Subsection (1) shall be deemed not to limit by implication the meaning of a reference in this Division to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

56 A fortiori he could not have believed that the vendors had instructed him to sell for \$600,000 or for a sum that was not substantially more than that. Per Sundberg J at para [84].

57 *Ting v Blanche* (1993) 118 ALR 543 at 552-3; *ACCC v Henry Kaye*, above n 37 at [125]-[126].

58 Above n 37.

Re (2)(b) Were the representations misleading or deceptive?

The ACCC argued that having regard to the make up and overall content of the advertisements the alleged representations were implied by the representations in relation to the price guide.

Sundberg J discussed the context in which the statements were made and noted that there there was no dispute about the applicable law. In determining whether the advertisements implied the allegations alleged, the meaning of the words used must be assessed in their context and setting.⁵⁹ The context is also relevant in determining whether the representation is false or misleading.

His Honour noted that there is a contravention of s 52 is determined by reference to whether an ordinary or reasonable member of the class to which the advertisements were directed was or is likely to be misled or deceived by them.⁶⁰ Intention or the effect of the conduct was not determinative.

Representations (b) and (c) were not representations as to future matters. However, Sundberg J held that the statements contravened s 52 because at the time of the first three advertisements the agent was aware the property (in his own estimation) would fetch at least \$700,000 and he knew the vendor was not prepared to sell the property for less than \$780,000. With regard to the September advertisements, the agent knew the statements were misleading because the vendors had rejected the Kolsky offer and that the vendor had increased the price to \$800,000.

Re (2)(c) Were the advertisements false representations made in relation to land?

Section 53A prohibits representations made in connection with the promotion of a sale or possible sale of an interest in land or price payable. Sundberg J found that the advertisements falsely or misleadingly represented the price payable for the property. There was an argument that the representation was not in relation to the price payable as it was claimed that s 53A operates only after the contract is formed. Sundberg J rejected this contention claiming that the provision clearly contemplates pre-sale activities.⁶¹

Re (3) Was s 53(e) applicable to these circumstances?

Interestingly, the only provision under which the ACCC did not succeed was pursuant to s 53(e). As discussed, s 53(e) prohibits false and misleading representations with respect to the price of goods or services. The court examined the term price and concluded that price does not have to refer to a precise figure. There could be a range or some approximation involved. However, the court examined the definition of 'services' under s 4(1). This provision states that services are 'rights in relation to and interests in real or personal property'. This has been held to include the sale of houses.⁶²

⁵⁹ As per Gibbs CJ in *Parkdale*, above n 31.

⁶⁰ *ACCC v Henry Kaye*, above n 37; *Medical Benefits Fund of Australia*, above n 37.

⁶¹ At [101].

⁶² *Henderson*, above n 30.

However, the stumbling block for the ACCC proved to be the fact that the provision (s 4(1)) also refers to such services as being 'in trade or commerce'. The only people who could deal with the rights and interests in relation to the real property were the owners. Decided cases have established that the sale of a private home not in the course of trade or commerce does not come within the operation of the Act.⁶³ The sale here was the sale of a private residence by the owners and was therefore not in trade or commerce. Such a transaction could not satisfy the definition of a supply of services within 4(1) and therefore s 53(e) could not be contravened in these circumstances.

The Court decided that it would issue declarations as sought by the ACCC that the agent had contravened ss 52 and 53A of the Act in relation to representations (a)–(e) made in both August and September. Representation (f), regarding market price, was not made out.

Sundberg J declined to issue an injunction preventing the agent from advertising in this way again⁶⁴ and also refused to order a compliance program.

Other relevant legislation

While clearly provisions of the Trade Practices Act and Fair Trading Acts will be applicable to bait advertising and price ranges, several states have proposed legislation to prohibit or at least restrain the practice. Two strategies have been adopted or proposed:

- (a) False and/or misleading representations to prospective sellers or purchasers are prohibited. It appears by implication, this would also prohibit bait advertising or price ranges; or
- (b) False and/or misleading representations are prohibited, however, the use of price ranges is permissible in some circumstances within particular limits.

Accreditation procedures have also been introduced where an agent can be compelled to substantiate their estimates in relation to the selling price of a property.

New South Wales

The Property, Stock and Business Agents Act (NSW) 2002 creates offences in relation to real estate agents making false representations to sellers or prospective sellers and buyers or prospective buyers. Pursuant to s 72, it is an offence for a real estate agent⁶⁵ to make a false representation to a seller or prospective seller of residential property as to the agent's true estimate of the selling price of the property. This provision combats practices such as 'buying' a listing by estimating a price which higher than the market value with a view to obtaining the listing. The section would also arguably cover circumstances where an agent quoted a vendor a price lower than market value in order to ensure a quick sale.

63 *O'Brien v Smolonogov* (1983) 53 ALR 107; *Argy v Blunts & Lane Cove Real Estate Pty Ltd* (1990) 26 FCR 112; 94 ALR 719; *Franich v Swannell* (1993) 10 WAR 459.

64 *Australian Competition and Consumer Commission v Oceana Commercial Pty Ltd* [2004] FCAFC 174.

65 Or employee of a real estate agent.

Section 73 prohibits a real estate agent,⁶⁶ in the course of marketing residential property,⁶⁷ from falsely understating the estimated selling price of the property. This may occur where an agent states as his or her estimate of that selling price a price that is less than his or her true estimate of that selling price.⁶⁸ Estimate is defined as including opinion or belief.⁶⁹ Therefore, this provision would apply where an agent informs a prospective purchaser that the property will sell for a lower price than the vendor is prepared to sell. Setting a price range where the agent was aware that the vendor would not sell at the lower end of the range would seem to offend this provision.

Pursuant to s 74, the Director-General may by notice in writing to a real estate agent require the agent to provide evidence of the reasonableness of any estimate of the selling price of residential property made by the agent in a statement.⁷⁰ This includes references to price ranges.⁷¹ Therefore, an agent will be required to substantiate his/her estimates in relation to selling price.

Other provisions of this Act which which may be offended by price ranging include s 51, publishing false and misleading advertisements and s 52 misrepresentation by licensee or registered person. The Act does not limit or otherwise affect the exercise of any function under the Fair Trading Act 1987.⁷²

Victoria

In Victoria, ss 47A, 47B and 47C of the Estate Agents Act 1980 (Vic) should be considered in relation to bait advertising and price ranges.

Section 47A states that, before appointment, the real estate agent⁷³ must provide the vendor with an estimated selling price.⁷⁴ The estimate can be a single amount or a price range;⁷⁵ but 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,

66 Or the employee of such an agent.

67 Section 73(3)A statement is considered to be made in the course of marketing residential property if the statement is made:

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

(4) 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.

68 Section 73(2).

69 Section 76.

70 (a) orally or in writing to a seller or prospective seller of the property, or
(b) in an advertisement in respect of the property that is published or caused to be published by the agent, or

- (c) orally or in writing to a person as a prospective purchaser of the property.

(2) A real estate agent who fails to comply with a notice under this section within the period for compliance specified in the notice is guilty of an offence.

71 Section 75 states that the Division extends to estimated price range in the same way as it applies to estimated price and for that purpose a reference in this Division to price is taken to include a reference to price range.

72 Section 223.

73 Or their employee.

74 Section 47A.

75 Section 47A(b).

or in the case of a price range, the range within which that amount is likely to fall.⁷⁶ 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.⁷⁷ Therefore, although price ranges are permissible, they are restricted to within stated limits.

Section 47B makes it an offence for an estate agent to make a false representation to a seller or prospective seller of real estate as to the agent's estimate of the selling price of the real estate.

Therefore, the combined effect of ss 47A and 47B is to ensure that the agent provides the vendor with an estimated selling price which complies with the requirements of s 47A. If a false representation is made in relation to the selling price the agent will have committed an offence under the Act.

Section 47C commenced operation on 1 July 2005⁷⁸ and deals with false representations to a prospective buyer. An agent is prohibited from making any statement while marketing the real estate as to his or her estimate of the selling price of the real estate a price that is less than the estimated selling price, or in the case of a price range, less than the lower limit of that range, stated in the engagement or appointment.⁷⁹ Like in the New South Wales legislation, substantiation of the estimates can be required.⁸⁰

In the *Gary Peer* case, Sundberg J made some comments on the operation of s 47C. The agent had contended that the injunctive relief sought by the ACCC should not be granted on the ground that the conduct that was the subject of the proceeding was now prohibited by s 47C. The provision came into effect after the occurrence of the conduct in *Gary Peer*. While agreeing with the agent to a degree and not granting the injunction,⁸¹ Sunberg J noted:

There is, I think, a serious question as to whether s 47C of the Estate Agents Act as amended would prohibit the conduct in question in this case. However I need not pursue the matter because I am satisfied, for the reasons I have given, that I should exercise my discretion against granting injunctive relief.

⁷⁶ Section 47A(c). The statement must be set out in a manner approved by the Director.

⁷⁷ Section 47(3). Note too (4) Nothing in this section requires the estimated selling price and the seller's reserve price to be the same amount.

⁷⁸ Section 47C inserted by No 41/2003 s 6.

⁷⁹ Section 47C(3) For the purposes of this section, a statement is made while marketing real estate if:

- (a) it is made in an advertisement in respect of the property that is published, or caused to be published, by the agent; or
- (b) it is made (whether orally or in writing) to a person as a prospective purchaser of the real estate.

⁸⁰ Section 47D.

⁸¹ At [107] Sundberg J referred to *ACCC v Oceana*, above n 64 at [185] and noted the equivalent Queensland legislation was introduced in order to deal with fact situations such as that before the Court. In that case, the Full Court said the existence of the legislation was a relevant consideration for the primary judge to take into account in determining whether to grant injunctive relief.

Queensland

In Queensland, significant reforms have been promised by the government to reinforce laws relating to bait advertising.⁸² It appears that the reforms will take the form of amendments to the Property Agents and Motor Dealers Act 2000 (Qld).

The Property Agents and Motor Dealers Act 2000 (PAMDA) regulates the activities of, *inter alia*, real estate agents, auctioneers and property developers to protect consumers against certain undesirable and unfair practices.⁸³ The code of conduct in the schedule is the code of conduct about real estate agency practice prescribed for the Act.⁸⁴

At present, a real estate agent is prohibited from engaging in conduct that is fraudulent or misleading in the conduct of a real estate agency practice.⁸⁵ Agents are also prohibited from soliciting clients or customers through advertisements or other communications the agent knows are false or misleading.⁸⁶ Liability arises under s 574⁸⁷ which states that a licensee or registered employee must not represent in any way to someone else anything that is false or misleading in relation to the letting, exchange or sale of property.⁸⁸ If a person makes a representation in relation to a matter and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading.⁸⁹

Pursuant to s 575 agents can be required to substantiate their estimates.

South Australia

In South Australia the principal real estate legislation is the Land Agents Act (1994) and the Land and Business (Sale and Conveyancing) Act 1995. These Acts are supported by Land Agents Regulations 1994 and the Land and Business (Sale and Conveyancing) Regulations 1995 respectively. In July 2003 the Real Estate Working party released its final report, the Lau Report, which suggested a vast array of changes to real estate practices in South Australia.

Pursuant to the Statutes Amendment (Real Estate Industry Reform) Bill 2004, amendments to the principal legislation have been proposed. Specifically, legislative amendments to the Land Agents Act 1994 are mooted to combat a number of practices, including bait advertising.

⁸² Media Release, Bait Advertising must be stopped, Monday 11 October 2004.

⁸³ PAMDA and the Property Agents and Motor Dealers (Real Estate Agency Code of Practice) Regulation 2001 regulates the conduct of real estate agents in Queensland.

⁸⁴ Section 154.

⁸⁵ Section 14.

⁸⁶ Section 18.

⁸⁷ The Property Agents and Motor Dealers Act 2000 and the Property Agents and Motor Dealers (Auctioneering Code of Conduct) Regulation 2001 regulates the conduct of auctions in Queensland. As of 1 July 2005, this legislation has been supplemented by the Property Agents and Motor Dealers (Auctioneering Practices) Act 2005. The Auctioneering Code of Conduct contains identical provisions to those discussed about in relation to the real estate code of practice however have been, naturally, modified for the circumstances of an auctioneer. Action for a contravention could follow again under s 574.

⁸⁸ Section 574(1).

⁸⁹ Section 574(4).

The Bill suggests the implementation of the following measures, which were recommended by the working party:

- agents are prohibited from advertising a property for sale for a price below the agent's genuine estimate of the selling price (which is in turn required to be recorded in the sales agency agreement), or the lower price of a permitted price range;
- agents are prohibited from advertising a property for a price range that exceeds 10% of the lower amount of the range (eg, ranges of \$200,000 to \$220,000; \$500,000 to \$550,000 would be permitted).⁹⁰

In addition, the Land and Business (Sale and Conveyancing) Act offence of making a false representation will be broadened to include misleading representations in a broader set of circumstances.⁹¹

Other states and territories

To date, price ranging is still commonly utilised in real estate advertising in Western Australia and legislation does not directly prohibit such practices. In 2005, the Department of Consumer and Employment Protection (DOCEP) has written to the Real Estate Institute of Western Australia (REIWA) and to principals of real estate agencies throughout the state warning them about bait advertising and price ranges. Similarly, real estate agency legislation in Tasmania, the ACT and Northern Territory does not appear to specifically address bait advertising. While rules of conduct for agents are outlined, these rules do not appear to extend to this practice.

Conclusions

Bait advertising will remain a controversial area in the promotion of real estate and authorities should remain vigilant in discouraging such practices. However, there are a number of issues which should be considered in light of the *Gary Peers* litigation.

Firstly, at times it may be difficult in practice to draw the line as to where promotion ends and bait advertising begins. The lines of communication between vendors and agents may sometimes become blurred where vendor expectation does not meet the market but an agent is still of the belief the vendor wants to sell. Also, where a vendor agrees to a price but later changes their mind without informing the agent that they will only consider a higher price, and agent may, for example, still offend the provisions of s 52 as there has been misleading conduct with regard to the price despite there being no intention on the agent's part to mislead. In relation to representations to purchasers, the very fine line between puffery and representations is likely to remain a contentious issue. However, the decision in *Gary Peers* serves as a caveat to agents to ensure that the price estimates provided to purchasers (and by implication vendors) must be objectively accurate. Agents should ensure that they err on the side of caution when making any representation or estimate about the selling price of a property.

⁹⁰ Note Explanatory memorandum, p 2.

⁹¹ Note Explanatory memorandum, p 3.

Secondly, the decision enhances the position of real estate consumers as, although bait advertising practices have been the subject of many complaints to the various state Fair Trading authorities and to the ACCC, consumers are reluctant to commence an action against an agent due to the expense involved and the fact that they have suffered comparatively little financial loss. The practice is nevertheless irksome and is the source of much consumer disquiet. However, authorities should not fall into a false sense of security. There is a necessity to remain vigilant and be prepared to commence actions against agents engaging in bait advertising practices through the Fair Trading Acts or seek monetary penalties from agents for breaches of other relevant legislation. While real estate consumers may not choose to commence an action individually, the responsibility will fall to Fair Trading authorities to ensure that bait advertising practices are pursued.

Related to this latter point is the effectiveness of such legislation. Although Sunberg J did not pursue the matter, His Honour was of the view in *Gary Peers* that s 47C may not have the desired effect of combating conduct such as that considered in the case. With the pending amendment of the relevant legislation in South Australia and Queensland, authorities in those states should examine their proposed amendments to ensure that concerns such as those expressed by Sunberg J are addressed and that a wide variety of bait advertising practices are prohibited.

Finally, it is clear that the ACCC is pursuing lines of investigation regarding misleading statements in real estate and that the ACCC is willing to pursue real estate agents who engage in misleading advertising. The *Gary Peers* case follows the REIA guidelines which were written in collaboration with the ACCC, a number of enforceable undertakings accepted by real estate agents after ACCC prosecution of such tactics⁹² and the release of a major new publication dealing with conduct involving real estate agencies which may contravene the Trade Practices Act.⁹³

92 On 2 December 2004 the ACCC accepted administrative undertakings from Ray White (Real Estate) Pty Ltd and one of its agencies following allegations of misleading and deceptive advertising. As part of its administrative undertakings, Ray White Pty Ltd and its agent agreed to:

- refrain from engaging in the conduct in question, including 'indicative pricing' or 'bait pricing' when advertising properties in the future;
- bring to the attention of all Queensland Ray White franchisees the details of the conduct in question and the concerns of the ACCC;
- conduct training sessions on a regular basis for Ray White's office principals and salespeople which contain elements pertaining to trade practices compliance, to update Ray White's materials, content and methodology with the specific provisions of the Act pertaining to 'indicative pricing', in particular ss 52, 53(e) and 53A and to convene a specifically designed training program;
- amend manuals to include specific references to the relevant sections of the Act;
- issue a formal policy that all of its offices must comply with the specific provisions of the Act as they relate to 'indicative pricing'.

ACCC News Release 28 January 2005.

93 Fair and Square — A Guide to the Trade Practices Act for the Real Estate Industry, Australian Competition and Consumer Commission, 2005.