

WEEK 2 PRE-CONTRACTUAL DISCLOSURE

Property Occupations Act 2014 (QLD)

- **Form 7** Disclosure of Beneficial Interest to Seller
If agent is selling property that they will have interest in, disclose!
- **s153** - What is a beneficial interest? Examples:
 - Property purchased for the licensee or the licensee's associate
 - Option to purchase is held by licensee or licensee's associate
 - **Property purchased by company (with less than 100 members)** of which licensee or licensee's associate is a member
 - **Option to purchase is held by company (with less than 100 members) of which licensee or licensee's associate is a member**
 - Purchase is made by a corporation of which licensee or licensee's associate is an executive officer
 - Option to purchase is held by a corporation of which licensee or licensee's associate is an executive officer
 - For corporate licensee:
 - Property purchased for an executive officer of licensee or associate of executive officer; or
 - Option to purchase held by executive officer of licensee or associate of executive officer
 - Purchase made for a member of a firm or partnership of which licensee or licensee's associate is a member
 - Purchase made for a person carrying on a business and the licensee or licensee's associate has a direct or indirect right to share in the profit of the business/purchase/sale of the property
- **Sch 2 Dictionary** of the **Property Occupations Act 2014**- Who is an **associate** of the agent?
 - Conjuncting agent: Agents getting together from different real estate agencies and act together on behalf of a client.
 - Spouse or de facto
 - Parent

- Sibling
- Child or step-child (child of the real-estate agent's spouse)
- Beneficial interest disclosure applies to Real estate agent & Real estate salesperson (see Sch 2 definitions)
- Is relevant when:
 - Agent is acting for a client on the sale of property; and
 - Obtains a beneficial interest in the property
- **s 155** - If **seller does not sign** the **Form 7** before contract signed and agent obtains a beneficial interest then **agent commits an offence**. Agent HAS to ask seller to sign Form 7 before the contract is signed.
 - **VISSER & ORS V ELDRIDGE & ORS:**
Facts: Visser was a real estate agent who listed a property for sale for Mr and Mrs Eldridge. The property was auctioned, it did not sale but it passed on. Later that day, a colleague of the agent, King's de facto partner ended up signing the contract to the property. Mr King worked for the real estate agency, and was bound under the statute to disclose to the seller that he wanted to buy the real property. The contract was terminated under the statutory 5-business days cooling off period because what they were doing was renegotiating the purchase price of the property so that the commission that would have otherwise been paid on the sale would be deducted from \$755,000 (purchase price). The agent's commission was \$21,257 so it was deducted to \$733,743. They told the clients that regardless of whether it was \$755,000 or \$733,742.50 that was paid, client would have been paying the net price. Here, there was a **misrepresentation of the true sale price of the true value** (\$755,000). You cannot defraud the government.
Ask: If the buyer in any way related or associated with the selling agent? If yes, you want to know whether the disclosure requirement was complied with.

- **s 156** – If a real estate agent has kept commission acting on behalf of a client in regards to selling the property that they have a beneficial interest in, they will not be entitled to retain any amount of that commission upon conviction of offences under **s155(2) or (3)**. **Refund of commission if offence committed.**
- **Form 8** Selling Agent's Disclosure to Buyer
- **ss 157-8** - Must be given to buyer before contract is entered into
- Provides disclosure of
 - Referrals made to buyer for services
 - Relationships (personal or commercial) with referred entities
 - Any consideration expected or received from referrals
 - Does not need to be monetary consideration. Just needs to be valuable consideration.

NOTE: If uncertain, disclose. There will be a statutory penalty if not disclosed.

Body Corporate

- **Body Corporate and Community Management Act 1997 (Qld)** – **s206** provides requirements for disclosure. *Refer to Body Corporate Disclosure Statement.
 - Requires sellers of lots to **give disclosure** to prospective buyers
 - **(s213)** contains equivalent provision for proposed lots)
 - Disclosure **Statement provided to buyer prior to entering into contract**
 - Must be **signed by seller**
 - Must be **substantially complete**
 - There is no rule to define "substantially complete". It would usually mean that there is enough information for you to contact the body corporate, or have enough information on the fees that need to be paid to the body corporate. If it **does not have details of the levy (imposed tax, fees or fine), it is not substantially complete**. You have to look at each disclosure statements

- o to see whether it satisfies the requirement.
- o **s206(5)** - **Failure to disclose** will entitle buyer to **terminate** the contract (if it has not yet settled).
 - No limitations on the buyer's time to terminate.
- o **s207** - Disclosure Statement and all material accompanying it forms part of the contract.
- o **s208** – Buyer can rely on information contained in Disclosure Statement as accurate.
- o **s209** – Buyer may terminate if not already settled AND:
 - Disclosure inaccurate and buyer materially prejudiced if forced to complete; or
 - Despite reasonable attempts, buyer has been unable to verify information contained in Disclosure Statement
 - Onus on buyer to prove reasonable attempts made
- o BUT - RIGHT OF TERMINATION IS LIMITED!
 - Must terminate within **14 days** after buyer receives contract.

Safety Switch – Will not invalidate contract

- Applies to:
 - o Contracts entered into **on or after 1 September 2002**.
 - o Sellers of:
 - Residential houses
 - Leasehold interest in land containing a residential house
 - Lot in a community titles plan
- **Reg 81** - Does not apply to temporary accommodation (boarding houses, motels)
- Failure to disclose will:
 - o **Will not** affect validity of contract at common law
 - o If the seller's statement contains false or misleading information = 15 penalty units
 - o **Will have no impact** on the obligation of the buyer to install a safety switch within 3 months

- o of possession if one not already installed (**Reg 84**)
 - o Failure by buyer to install safety switch = 15 penalty units
- **Reg 83** - Seller must give notice to the chief executive within 90 days of the date of possession.
- Can be done by way of **Form 24** Property Transfer Information
 - o Titles Office then passes on the relevant information to the chief executive
- Failure to advise chief executive = 15 penalty units

Smoke Alarms – Will not invalidate contract

- **Fire and Emergency Services Act 1990 (Qld)**
 - o Applies to contracts entered into after **1 July 2007**
 - o Owner must install smoke alarm – **s104RB & RBA**
 - o Seller must notify buyer before the date of possession whether smoke alarm installed – **s104RK**
 - o Seller must give written notice to Commissioner within 90 days after the date of possession of details of parties and property and whether compliant smoke alarm installed – **s 104RL**
 - o Failure to give notice to CE= 5 penalty units
 - o Failure to disclose = 5 penalty units
 - o False and misleading notice = 5 penalty units

Neighbourhood Disputes – Will invalidate contract

- **Neighbourhood Disputes (Dividing Fences and Trees) Act 2011 (Qld)**
 - o Copy of application or order about tree must be given to buyer before contract entered into – **s83**
 - o If seller gives buyer copy of application and buyer enters into contract, buyer becomes a party to QCAT proceeding – **s84**
 - o If seller gives buyer copy of order under **s83** and buyer enters into contract, if seller has not

- o carried out work then buyer becomes bound by order – **s85**
- Consequences of non-disclosure – **s86**
 - o If application or order exists before contract and notice not given to buyer before entry into contract **buyer can terminate any time before settlement**.
 - o Notice of termination must state that it is pursuant to this section of the Act.
 - o **Seller must then refund all monies** to buyer within 14 days.
 - o Seller (and whoever prepared contract) liable to buyer for reasonable legal and other expenses incurred after contract signed by buyer
 - Recoverable as a debt
- Consequences of non-disclosure – **s87**
 - o If order exists before contract and copy of order not given to buyer before entry into contract
 - o If seller has not completed work specified in order **Seller is liable to carry out the work** despite ownership of the land being transferred to the buyer.

Pool Safety – Will invalidate contract, possible offence

- Reference Schedule
 - o **Q1** – is there a pool on the land?
 - **Sch 2 Building Act 1975 (Qld)** – Definition of “swimming pool”
 - o **Q2** – if **yes to Q1**, is there a Compliance or Exemption Certificate for the pool at the time of contract?
 - If **yes** - **Clause 5.3(1)(f)** applies
 - **s246ATF Building Act 1975 (Qld)** – seller must give copy of a current Compliance or Exemption Certificate to buyer before settlement. Failure to do so is an

offence and fines may apply.

- If **no** – Go to Q3. **Clause 4.2** applies.
- **Q3** – if **no to Q2**, has a Notice of no pool safety certificate (**Form 36**) been given prior to contract?
 - **s246ATM Building Act 1975 (Qld)**
 - **r16 Building Regulation 2006 (Qld)**
 - **Form 36** available at:
<https://www.qbcc.qld.gov.au/buyers-sellers>
 - If **yes** – all ok for seller.
 - If **no** – offence under **r 16**. Regulation
 - **Clause 4.2** still applies regardless of answer to Q3.

Clause 4.2 REIQ – Pool Safety

- **Clause 4.2** REIQ Contract:
 - Applies if Q2 in reference schedule is not completed or answered with “No” and not a sale by auction
 - Provides for a Pool Safety Inspection Date.
 - Time is of the essence
- **Clause 4.2(2)** Makes contract conditional upon issuance of **(a)** Pool Safety Certificate; OR **(b)** pool safety inspector issuing a Notice of nonconformity listing works required to be done to obtain a safety certificate by Pool Safety Inspection Date.

Buyer's obligations under clause 4.2

1. **(3)(a)** Arrange inspection at its cost
2. **(4)** Must act reasonably

Buyer's Rights under Clause 4.2

Clause 4.2(4) If no Pool Safety Certificate issued by inspection date, then buyer may:
(a) terminate; or
(b) waive benefit of clause

Seller's Rights under Clause 4.2

1. **Clause 4.2(5)** May terminate by notice, if notice under **Clause 4.2(4)** not received from buyer by 5pm on Pool Safety Inspection Date (**Clause 4.2(6)** subject to buyer's continuing right to terminate or waive benefit of clause).
2. If buyer terminates and seller has not received a copy of the Notice of nonconformity, seller may request copy from buyer and buyer must provide it without delay.

Limitation on right to terminate – Clause 4.2(7)

- The right of a party to terminate ceases when that party receives a copy of a current Pool Safety Certificate
- **Clause 5.3(1)(f)** REIQ Contract
 - a. If Q2 in Reference Schedule is answered “Yes”, seller must provide to buyer (on or before settlement) a copy of a current Compliance or Exemption Certificate
 - b. Failure to do so is an offence under **s246ATF Building Act 1975 (Qld)**
- If no Compliance or Exemption Certificate at settlement and contract settles:
 - Buyer becomes responsible, at its cost, to obtain one
 - Within 90 days of settlement
 - Buyer can also become liable to pay costs of rectification necessary to comply with Pool Safety Requirements and obtain Pool Safety Certificate.
 - Failure to comply is an offence under **s246ATJ Building Act 1975 (Qld)**