



Disclosure of material facts to buyers and tenants

Obtaining and communicating all available material facts to the parties in a transaction is an essential part of the real estate process. It is a direct requirement under the Code of Conduct for Agents and Sales Representatives 2011 (the Code). An agent must make reasonable efforts to ascertain or verify the facts which are material to that transaction which a prudent agent would have ascertained and communicate those facts to any person affected by it. Similarly the Australian Consumer Law (the ACL) has provisions that make it an offence to mislead or deceive parties to a contract - this can be by omission.

While there is no specific definition as to what constitutes a material fact, it could include what would be important to a reasonable person in deciding whether or not to proceed with a particular transaction. These are facts that are generally related to issues of market value and a person's decision on purchasing a property.

Material facts may be known to an agent through their prior knowledge of the property or the area in which it is located. An agent should make their own enquiries about material facts which relate to the period where the seller was the owner and which may affect the transaction, especially for factors which may not be readily apparent. While these enquiries may not require the agent to undertake research of the property per se, it may include the agent discussing and seeking instructions from their principal (client) of any market-sensitive matters that could be the subject of statements or representations in marketing the property, as well as the existence of any material facts.

When determining the types of things that may be material facts, agents may wish to ascertain information about:

- building approvals (ie for sheds, pergolas, etc);
- the existence of non-visual damage or structural issues of the property;
- recent history of use or activity in the dwelling, if that activity would be relevant to a purchaser's decision to proceed with a purchase (eg production of drugs and any residual effects that may affect the health of occupants);
- vehicular access;
- aspects of the area surrounding the property such as proposed developments (eg a mine site, high-rise building, major road infrastructure, airport changes); or
- potential psychological stigma attached to the property which may be known only by those who live in the area or by agents who specialise in an area and may otherwise be something a prospective owner may not enquire about (eg a murder occurring in the house).

The agent will need to exercise their judgement in assessing individual circumstances as to the enquiries they make and when and how to communicate any material facts they identify.

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Facts of a non-sensitive nature such as the dimensions of the land for sale may form part of the standard marketing material whereas facts of a sensitive nature may be more appropriately disclosed when there are indications that the buyer is seriously considering purchasing the property or prior to the tenant signing the tenancy agreement.

Major factors, however, that are likely to be material to the purchaser should be disclosed early in the process or as soon as ascertained by the agent. If an agent's failure to disclose material facts causes loss or damage to be incurred, civil action may be undertaken by the affected party to recover losses or to seek termination of the contract.

An agent is required to act in the best interest of its principal except where it is unreasonable or improper to do so. However it is important to note that an agent's obligation to act fairly and honestly and to inform other parties of the material facts to a transaction overrides any conflicting duty for the agent to act in their principal's best interests in circumstances where this might involve misleading or deceiving any party in negotiations or a transaction.

For example if it is commonly known in the local area that there is a development or change being planned that would influence a prospective buyer's decision to buy, then an agent should actively consider if the buyer would know this and if not, disclose such information.

The Department may investigate a complaint regarding the failure to disclose material facts to determine whether a breach has occurred in relation to the agent's obligations under the *Real Estate and Business Agents Act 1978*, the Code and the provisions of the ACL.

Agents may wish to seek legal advice if they are unsure about whether a material fact should be disclosed in certain circumstances.

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