



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

Mandatory CPD 2015

Case Studies and Compliance Exercises

Real Estate

Sales Representatives

MODULE TWO:
Distance Learning Edition
Participant Workbook



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

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Instructions for Participants

This session is comprised of a series of case studies.

The aim of the case studies session is to get you to apply knowledge gained in the earlier parts of the 2015 CPD session in relation to the law, best practice and industry practice in real estate.

Case studies will allow you to apply this knowledge in a practical, real-world way, with the aim of enhancing your understanding of the topics covered.

You are required to read all of the notes and case studies, and then answer the questions. All of the questions can be answered quite easily provided you have read the notes and the accompanying case studies. There are also some additional discussion notes that relate specifically to each case study.

Please note your work will be marked to ensure your understanding, so it is in your best interest to read all of the notes before attempting to answer the questions.

Please complete the separate evaluation quiz and return it to the provider as per the instructions provided with this Distance Learning Pack.

PART ONE: Negotiating Multiple Offers

Introduction

Where there is more than one interested party in a property the sales representative may be faced with the situation of dealing with multiple offers. This could be as simple as two offers from two different parties or it could be a larger number of offers from a multitude of parties. There is really no limit on how many offers can be presented at one time, though when an unusual level of interest exists, the sales representative should probably be questioning whether the price on the property is a reflection of its true market value.

Issues to consider in a multiple offer scenario

1) All offering parties should be advised of the existence of the other offers.

Under Section 4 of the *Code of Conduct for Agents and Sales Representatives 2011* (the Code), sales representatives are required to act in the best interest of the principal. Generally speaking, principals want to achieve the highest price possible. It is common sense that where more than one party wants to buy something and competition is created, the competition is likely to put upwards pressure on the price.

2) Details of offers should not be disclosed to other parties

In accordance with Section 13 of the Code, sales representatives should not disclose details of offers to other offerors, including price, finance particulars, dates or special conditions. These details are private and confidential for the individual offering parties. It can be tempting to believe that by disclosing details of a higher offer, the disclosure will serve as motivation for a buyer to increase their offer. However this simplistic approach does not take into account the savvy negotiator who starts low with the intention of going much higher. They may well have intended going much higher than the now disclosed other offer, but the information about what others are prepared to pay may well stop them from going to the price they originally intended to pay. This is clearly not in the best interest of the principal.

Best practice approach for multiple offers

If we assume a busy home open where three different parties are interested in writing an offer on a property, we can step through a best practice procedure in terms of writing, presenting and dealing with multiple offers.

Writing multiple offers – Best Practice

1) Make an appointment with the interested parties

Firstly an appointment should be made with each of the interested parties, advising each that multiple offers will be written and presented to the seller.

2) Encourage each party to put their best offer forward

When writing the offers, each party should be advised to put forward their best offer, as they may not get a second chance. It should be explained that the seller can only counter-offer on one offer at a time and will therefore be obliged to *choose* the offer they wish to deal with. If the offeror's offer is not the seller's first choice to deal on, then it may come to an end without opportunity for counter offer.

3) Have the offerors sign an acknowledgement form

It has become common practice in some offices to have buyers sign a simple form to acknowledge that they have been advised that their offer is one of many offers to be presented. While not a legal requirement, such a form could be described as best practice for a number of reasons;

- Having a buyer sign an acknowledgement of multiple offers ensures they take the matter seriously and ask questions if they don't understand. It is not uncommon for a buyer to not believe the sales representative when told there are multiple offers. Signing a document to acknowledge this information can add credibility to the information.
- The buyer's acknowledgement of the existence of multiple offers protects the agency from any accusation that the situation was not explained to them or that the sales representative has misled them by failing to disclose information.

Presenting multiple offers

1) Present all the offers to the principal on the one occasion

Multiple offers should be presented to the principal at the same time as a group of offers. The sales representative should go through each offer with the seller, explaining all aspects of each, including price, dates, finance requirements and special conditions.

2) Explain each offer and its particular circumstances in detail to the principal

The sales representative should be able to explain the implications of each offer to the principal. For example, cash versus finance, long settlement versus short, difficult special conditions versus simple and higher prices versus lower.

The principal may have a special set of circumstances that make a slightly lower price more appealing because of the simplicity of the conditions or the time frame of the settlement. The sales representative must never make assumptions about what is best for the seller, but should discuss all aspects of all of the offers to assist the seller in making their decision.

Dealing with multiple offers

1) The seller can only deal with one offer at a time

It must be explained to the seller that he/she can only *deal* on one offer at a time. To clarify, if the seller chooses to counter offer, they must choose just one offer to counter. Quite simply this is because if he/she were to counter on three offers 'just to see who is willing to pay the price', the possibility exists that all three would accept the counter offer resulting in multiple sales of the same property, which is clearly not possible and certainly not legal. A property can only be sold to one buyer.

2) Buyers can choose to withdraw an offer at any time

It must also be explained to the seller, that at any time up until acceptance, any or all of the buyers can withdraw their offer. It is not uncommon to go from a situation of multiple offers to a situation of no offers because of a failure to respond and communicate by either the seller or the sales representative.

3) Acceptance of an offer (no counter offer)

It may be that the seller is happy to accept one of the offers without a counter offer. In this case, the seller would simply sign their acceptance of the offer and the sales representative would communicate the acceptance to the buyer in the normal way. Once the acceptance has been communicated to the successful buyer, the sales representative would advise the other offering parties that their offers had been unsuccessful.

4) The principal may counter offer

Where the seller chooses to counter offer, the sales representative would have the seller sign the counter offer. The counter offer would then be presented to the appropriate buyer for a decision. Where the decision is a quick one, the acceptance is communicated and the unsuccessful offerors are advised.

5) Keep the offerors informed of progress

Where the decision is not a quick one because of delays, time differences due to distance or in the situation where an offer/counter offer tennis match ensues, it is good practice to advise the other offerors that the seller is currently dealing on an offer other than theirs. The sales representative should advise these other offerors that whilst they have the right to withdraw their offer at any time, it may be in their interest to leave their offer 'on the table'. If the negotiations with the first offer are not successful, the seller will then choose a second offer to deal on. If a buyer has chosen to withdraw their offer, then they will not get an opportunity in this second round.

The sales representative must be aware that the buyer may not actually understand the process so should be advised that if they decide to purchase elsewhere, they should advise the sales representative that they are withdrawing this offer. This will protect the buyer from purchasing two properties if the first seller suddenly decides to accept their offer.

All buyers have the right to be kept informed of proceedings. Treating buyers with respect, communicating in an open and transparent way and working in the best interest of the principal (seller) are all essential elements of negotiating multiple offers.

Case Study One – Presenting Multiple Offers

The property market is booming with offers coming in thick and fast!

Alice and Bob are a husband & wife sales team who are reaping rewards in this buoyant market. They have just conducted a home open with record numbers of people in attendance. They have three appointments to write offers so have decided to split up to get the job done quicker. Alice heads off to meet Mr & Mrs Smith, whilst Bob is on his way to meet up with the Jones's. They agree to message each other when their appointment is done so that whoever finishes first can contact the third couple, Mr and Mrs Brown.

Despite the three appointments, the enquiries continue. Before the evening is done they have received a further message from somebody wishing to write an offer on the property.

Alice finishes her appointments first and messages Bob to suggest that she will go and see the seller with her two offers. Alice rationalises that the quicker they can get the seller to accept an offer, the quicker they can stop making more appointments.

The text message to Bob reads:

“As long as we get a good price and the seller is happy! If he accepts one, I will message you and you can just let the other two know the property is now under offer and theirs was not accepted.”

Bob is not keen on Alice's suggestion and insists that she not see the seller at all until they have written all the offers and have them all together. He suggests that they meet up at the seller's house and present the offers together. Bob wins the texting debate and a couple of hours later they are in discussion on the seller's driveway, comparing offers before going inside. Between them, they have a pretty strong opinion on which offer is the best one for the seller. They agree to push the best one and distract from, make light of, or diminish the value of the others

Note: Questions 10 – 12 in the quiz relate to case study one above.

Case Study One: Issues to consider....

Legal requirements when presenting multiple offers

The biggest consideration for a sales representative faced with the prospect of multiple offers on a property has to be “*acting in the best interests of the principal*”. (The principal is the owner of the property). The following sections of the Code might be applicable.

4. General duty to principal

An agent must act in the best interests of his or her principal except where it would be unreasonable or improper to do so.

9. Standard of service

An agent must exercise due skill, care and diligence.

14. Communicating offers to principal

An agent must communicate all written offers to his or her principal as soon as practicable.

In meeting these requirements of the Code, the sales representative would need to make all potential buyers aware of the fact that multiple offers will be presented and that there may not be an opportunity for a counter offer. Each buyer should be advised to make their best offer if they are serious about buying this particular property. Each of the offers must be treated with absolute confidentiality, meaning that none of the details and particulars of any offers should be shared with any other party.

It is not uncommon for a sales representative to feel that by disclosing an existing higher offer, this might encourage another person to pay more. The problem with this line of thinking is that it assumes all buyers are making a full disclosure of their intentions. A buyer may be testing the water with a figure, whilst actually having a willingness to pay considerably more. When the sales representative discloses the highest figure currently on the table, a ceiling is created then no other buyer is willing to push through that ceiling by more than a few dollars. Clearly this is not acting in the best interest of the principal, nor is it exercising due skill, care and diligence.

At no stage should an agent or sales representative ‘choose’ which offer is best for a seller. The seller is the principal and must be provided with all of the information in order to allow them to make informed decisions. The sales representative’s role is act in the best interests of the seller, not to make decisions on their behalf. All offers must be presented.

Best Practice when presenting multiple offers

A best practice step that could be utilised when presenting multiple offers is to have all buyers sign a separate form that states that multiple offers will be presented. This ensures that the buyer understands and acknowledges the implications of the situation. It is also probable that they will take the information more seriously, rather than just reading it as a sales representative trying to manipulate them into paying more. As an aside, the document will serve as an example of due skill, care and diligence on the sales representative’s part in the event of any dispute in relation to the presentation of multiple offers.

In the above scenario, Alice and Bob are not acting in the best interests of their principal (the sellers) in electing to not be completely upfront and transparent with the sellers about all the offers they have received. Sales representatives have an obligation under section 14 of the Code to submit all written offers to the principal as soon as practicable (seller). It is then up to the principal how they wish to proceed.

The seller has the following options once the buyers' best offers have been presented:

1. Accept any one offer
2. Negotiate with one offer – counter offer until negotiations are exhausted.
3. Reject all offers

The seller might choose to review all the offers that have been presented and decide that they only want to negotiate with one of the buyers. This offer may not necessarily be the highest offer but it may be favourable to the seller for other reasons. For example, a seller may need to sell quickly and would therefore prefer to negotiate with a straightforward offer for a lesser amount as opposed to a higher offer that is conditional to the sale of another property. It is important to bear in mind that all offers are not equal and what is important to one seller may not be important to another.

The sales representative should ensure the buyer is aware that they can only deal with one offeror at a time. Therefore, if they wish to counter offer, they can only counter one offer at a time. Negotiations on that offer must be exhausted before the seller can commence negotiations with another buyer.

In this scenario, Alice and Bob need to be mindful of their responsibilities under the Code to act in the best interests of their principal (section 4) and to act fairly and honestly (section 7). Alice and Bob should provide guidance to their principal on the process and legal requirements with regard to dealing with multiple offers, however ultimately the decision of which offer to choose (or not choose), rests with the principal (seller).

Often a sales representative will base their view on which offers feel strongest and what the seller has told them of his/her circumstances and expectations.

It is important for the sales representative to realise that the decision of which offer to accept or negotiate on lies fairly with the seller. Section 14 of the Code requires all written offers to be presented to the seller as soon as possible. A seller's circumstances may change over the time their property is on the market. All offers should be presented to the seller so that they can make a decision consistent with their circumstances at that time. For example, where a property is on the market for some time, a seller may be willing to accept a price lower than initially discussed with their sales representative. However, if an offer is not presented to the seller, they are not afforded the opportunity to consider it. In this case, the sales representative would not be acting in their principal's best interests.

Sadly, sometimes the sales representative will base their thoughts around what is best for the sales representative! Clearly this is never appropriate.

What if the sales representative thinks they know what is best for the seller

The problem here is that, as alluded to in the previous question, circumstances and expectations change over time. What the seller told the sales representative 6 weeks ago about their circumstances and motivations could have varied significantly as time has passed. Most sales representatives will relate to an unmotivated seller becoming suddenly desperate because of a change in circumstances. Always let the seller make the decisions.

What if the seller thinks they know best and wants to 'counter offer on all the offers at the same price and the same time'.

It is general knowledge in the real estate industry that a seller can only deal on one offer at a time. Why? Because if more than one buyer accepts a counter offer then the property is sold more than one time, which is clearly not possible, therefore not legal.

Dealing on one offer really means getting the seller to prioritise the offers. Which of the offers is closest to what the seller wants? (Not just price, but dates, security and other factors including conveniences such as willingness to compromise and accommodate).

If one offer stands out, then this is the first to be dealt on. Once an offer has been exhausted and it is apparent that a meeting of the minds of the buyer and seller will not occur, move onto the next one. Keep in mind at all times that either party can withdraw an offer before it has been accepted. It is most important that sales representatives communicate this fact to all parties involved in the presentation of multiple offers.

What if the seller wants to counter offer one and reject all the others?

Dealing on one offer does not mean that all others are excluded from future negotiations. It just means that they cannot be dealt with at the same time. By rejecting offers the seller risks ending up with no offers at all. This could occur in the situation above where only one is counter offered, if this particular buyer then chooses to reject the counter offer. The result would then be one offer rejected by the buyer, all other offers rejected by the seller – net result, no offers at all!

A more appropriate process would be to communicate with the other potential buyers and seek their permission to leave their offers 'on the table', pending acceptance or rejection of the offer currently being dealt with. It is stressed that this requires open, honest and transparent communication on the part of the sales representative in accordance with the requirements of section 9 of the Code.

PART TWO - Off the Plan Sales

Introduction

An off the plan sale generally involves a buyer signing a contract with a developer before the developer has obtained final approval for subdivision of land or where a building is involved, before the building has been completed or sometimes even commenced.

The focus of this subtopic on selling off-the-plan is to recognise the legislative responsibilities that sales representatives have in the transaction they have with a buyer of an off-the-plan development.

What is an off-the-plan contract?

An off the plan sales contract is generally an agreement where a developer promises to deliver land or a property to a buyer, at an agreed price, at a future date, subject to the developer obtaining all approvals and satisfying any conditions necessary to complete the development. Completion of a development can take a long time. It is not unusual for settlement to occur one to two years after the signing of a contract.

Legislative responsibilities when selling off-the-plan

A sales representative may be employed directly by the developer [section 54(2) of the REBA Act] or by a real estate agency [section 54(1) of the REBA Act] which is authorised to sell on behalf of the owner (the developer). In either case, under section 4 of the Code, a sales representative is required to act in the best interest of their principal (the developer). However, the sales representative also has responsibilities with respect to their dealings with buyers and potential buyers of developments.

An off-the-plan contract is a very lengthy, legally binding document that includes detailed specifications. It is often pre-prepared by the developer's lawyers on their behalf to principally protect the developer's interests. In some cases, the developer may choose to use the Joint Form of General Conditions for the Sale of Land which is part of the standard offer and acceptance contract produced jointly by the Real Estate Institute of Western Australia and the Law Society of Western Australia. However, the developer could also choose to have their own special terms and conditions written into the contract by their lawyer/s. Needless to say an off-the-plan contract is a difficult document for those in the industry to completely understand, never mind a potentially inexperienced buyer!

By taking appropriate steps to make sure that buyers and potential buyers understand what they are agreeing to when they sign an off-the-plan contract, sales representatives reduce the risk of a buyer potentially challenging their conduct in the transaction, should the development not proceed or the eventual finished product not meet the buyer's expectations.

There are several pieces of the legislation that sales representatives need to consider and comply with when selling off-the-plan:

- *Real Estate and Business Agents Act 1978* (REBA Act)
- *Code of Conduct for Agents and Sales Representatives 2011*
- *Real Estate and Business Agents (General) Regulations 1979* (the Regulations)
- *Australian Consumer Law* (ACL)

For a look at the particular provisions of the legislation and how they might apply to the conduct of a sales representative when selling off-the-plan – refer to **Appendix A**.

Quick Check Scenario# 1

You are a sales representative for a small boutique real estate agency in the outskirts of the Perth CBD. You are approached by a developer to become involved in selling a new mixed use development in East Perth. You are keen to get involved as you consider this would be a positive career move for you and could also be advantageous for the agency for which you are employed.

Note: Question 13 in the quiz relates to the Quick Scenario above.

Quick Check Scenario# 1 - Important points to consider

1) Refer the appointment to act and the off-the-plan contract to the licensee.

Section 8(2) of the Code requires the person in bona-fide control of the agency business to properly supervise the business of the agency and to ensure that sales representatives employed by the agency are complying with the provisions of the REBA Act, Regulations and the Code.

The sales representative and the person in bona-fide control should ensure that the authority to act on behalf of the developer contains all the elements of a valid appointment to act in accordance with section 60 of the REBA Act and Regulation 6BA of the Regulations. The specific elements of a valid appointment to act are at **Appendix B**.

Before deciding to act on behalf of a developer in selling property or land off-the-plan, a sales representative should provide their licensee with a copy of the off-the-plan contract for their review and ultimate approval. This practice of the sales representative referring the contract to their licensee is also consistent with the requirement under section 9 of the Code to act with due skill, care and diligence.

2) Make sure you understand the terms and conditions of the off-the-plan contract you are dealing with.

It would be a good practice for agencies to seek independent legal advice on the particular terms, conditions and specifications of a contract before deciding to act for a developer in an off-the-plan project. However, this is the responsibility of the licensee in bona-fide control of the agency, not the sales representative.

Sales representatives dealing with off-the-plan developments need to make sure they understand the terms and conditions of contract that are dealing with. Sections 7, 9 and 10 of the Code are all relevant with respect to a sales representative's responsibility to disclose material facts to a real estate transaction to a potential buyer.

Section 7:

- (1) An agent must act fairly and honestly.*
- (2) An agent must not knowingly mislead or deceive any parties in negotiations or a transaction.*
- (3) An agent must not engage in harsh or unconscionable conduct.*

Section 9:

An agent must exercise due skill, care and diligence.

Section 10:

- (1) Prior to the execution by the agent's principal of any contract relating to the sale or lease of any real estate or business the agent must make all reasonable efforts to ascertain or verify the facts which are material to that transaction which a prudent agent would have ascertained.*
- (2) If an agent ascertains a fact which is material to a transaction in which the agent's principal is involved the agent must promptly communicate that fact to any person who may be affected by it unless it is clear that person was already aware of that fact.*

Failure to mention 'material' facts about a property offered for sale can also be misleading or deceptive conduct under section 18 of the ACL even if there is no intention to mislead.

If a sales representative has not done their own due diligence in reviewing an off-the-plan contract and seeking clarification from the developer where required, then they are unlikely to be in a good position to explain the contract to a potential buyer or to disclose material facts to that buyer. In this circumstance, a sales representative could be vulnerable to providing a potential buyer with misleading information and making false representations about the development and the contract which would put them in breach of Consumer Protection legislation.

Off-the-Plan Case Studies

Below are two case studies involving the sale of off-the-plan developments by a sale representative.

Case Study Two

The prospect of literally getting in on the ground floor was attractive. Buying at a lower price and hopefully making a good capital gain before even moving in was an exciting prospect.

Bill and Julie had signed on the dotted line some time ago and had been watching the building go up for the past 18 months. They had been able to save more money by living with relatives and now were in a good position to move into their 2 bedroom executive apartment. They had also purchased a small 80sqm commercial unit on the ground floor of the same building. This was doubly exciting as it would be perfect for Julie to set up her physio rooms. She had been working for some friends as their senior physiotherapist but would now be able to go to work downstairs from where she lived very soon. The building was due for completion within the next 4 weeks, finishing touches were happening everywhere.

They met the sales representative as arranged, to conduct a final inspection of the apartment. The commercial unit final inspection would be next week.

Excitement turned very quickly to nausea as they inspected their 'executive' apartment. They had been promised stone bench tops, these were clearly some sort of pseudo stone, the dishwasher space had no dishwasher, the appliances that were there, were anything but European, the 'quality window treatments' were the cheapest, nastiest vertical blinds they had ever seen in their lives, but the carpets and tiles really won the prize for biggest disappointment of the year! They turned to the sales representative and noticed she was looking as shocked as they felt.

"I wonder what the commercial unit looks like" said Julie.

Note: Question 14 in the quiz relates to case study two.

Case Study Two - Points to consider

a) Review the terms of the contract with the buyer

This of course, should happen before the buyer signs the contract, however it would also be prudent to do this again in the event of a dispute.

b) Consult with the seller for an explanation and clarification on the reasons for the variations and missing items.

As a sales representative, appointed to act for a developer, it is important that you understand the terms and features of contracts you are signing buyers up to. The contract should stipulate the required features of the property and there should be sufficient detail specified in the contract, including timeframes and standards of quality and workmanship.

For example, if the benchtops were to be stone, this should be specified in the contract. It may also be prudent to include the quality of fixtures and fittings, including the brand name of major products.

c) Attempt to resolve the issues and disputed representations amicably.

If specifications and features of an off-the-plan property have not been delivered as promised, the buyer is open to taking legal action against the developer, however it might be that through effective negotiation, a dispute such as this can be resolved with effective communication between all parties. The sales representative in this case may have a role to play in facilitating this process.

d) Suggest the buyer seeks legal advice.

If this dispute could not be resolved amicably, the sales representative should suggest the buyer seek their own independent legal advice on the options available to them.

When purchasing a property off-the-plan, the buyer is relying on the information in the contract and what they have been told by the developer and selling agent about the completed development.

With respect to the circumstances of this case study, the sales representative may have potentially breached section 18 of the ACL if they were found to have deceived or misled Bill and Julie.

Section 18 prohibits a person, in trade or commerce, from engaging in misleading or deceptive conduct. This prohibition is not limited to the supply of goods or services and creates a broad, economy-wide standard of conduct.

Under Section 4 of the ACL, if a person makes a representation with respect to any future matter and they do not have reasonable grounds for making the representation, it is taken to be misleading. A promise, prediction or opinion as to a future matter given in the course of business by a sales representative is an 'implied representation'. If it turns out to be untrue and to have been made without reasonable basis, it may be a misleading or deceptive representation.

In this case, a number of false and misleading representations appear to have been made to the buyers about the quality of the appliances to be included in breach of section 29 of the ACL. They have been led to believe they are purchasing an 'executive' apartment when this does not appear to be the case. When a real estate sales representative makes a statement relating to the future in the course of business, the other person is entitled under the law to assume that the sales representative:

- believes what they say is true; and
- has the expertise to make a well-founded prediction (or the ability to make good a promise or commitment).

If either of these is not true, there may be misleading or deceptive conduct.

Sales representatives are consistently held by courts to be experts under the law. Consumers are legally entitled to assume that opinions given by real estate practitioners are honestly held and based on rational grounds. Agencies are at risk when opinions are given without due care - for instance if an opinion about value is given off the cuff, without a market analysis process.

Ultimately, in the case, the recourse available to Bill and Julie will depend on the wording in the specifications of the contract. If the developer is found to have not delivered on a promise that has been written into the contract, Bill and Julie would likely have ground to take legal action against the developer. They may also take action against the sales representative if they were alleged to have made false or misleading verbal representations about the quality and brand of fittings and fixtures, particularly if samples of fittings and fixtures were shown to Bill and Julie and these were not delivered as part of the final product at settlement.

Case Study Three

Sam and Anita had bought an investment property off the plan. It was now three years since they had signed the contract and it was finally nearing completion. The couple had just returned from two years working overseas where they had been fortunate enough to score a great work contract. They had been able to save lots of money but were now devastated to learn that local property values had gone down considerably while they had been away. They were shocked to learn that their 'investment' was worth about \$60,000 - \$70,000 less than the contracted price that they were about to settle on.

Sam and Anita are of the view that somebody must be to blame for this so they call the sales representative who sold it to them.

Note: Question 15 in the quiz relates to case study three above.

Case Study Two – Points to consider

The liability for the agency will largely depend on the verbal and written representations made by the selling agency and the sales representative. For example, has the sales representative made any promises, forecasts and / or predictions to the buyer with respect to what the property may be worth at the time of settlement?

If the sales representative did provide Sam and Anita with information pertaining to the future market value of the property, was it backed up by sufficient evidence and documented.

In this case, if the sales representative had provided Sam and Anita with speculative and unsubstantiated information about the future value of the property, they could potentially be breaching section 18 and 30 of the ACL as outlined in the previous case study.

The best course of action the sale representative could have taken in this circumstance is to recommend to Sam and Anita that they seek independent financial and legal advice prior to signing the contract. In addition, it would have been a good idea for the sales representative to suggest that Sam and Anita conduct their own due diligence including sales in the suburb and surrounding location over time.

Do the buyers have any right to withdraw or cancel their offer?

The answer to this question will depend upon whether the contract includes a withdrawal clause and if so, what it provides for.

Withdrawal clauses are those that allow either the developer or buyer to withdraw from the contract if particular conditions are not met. Prior to signing an off-the-plan contract, buyers should review the contract closely with respect to the following matters:

- What are the obligations of the developer to progress the project within an agreed time frame?
- Does the contract require the developer to use their '*best endeavours*' to obtain the necessary approvals for the project to ensure timely completion? In this case, '*best endeavours*' means that the developer is taking all reasonable steps required to secure such approvals.
- Does the contract include clear milestones/actions to ensure that the project progresses in a timely manner?
- What recourse is provided for in the contract for buyers if the development does not progress within the agreed timeframe? Are there any differences between the rights of the buyer and the developer to cancel the contract?
- In the event that the development does not proceed, how soon will the deposit be returned to the buyer?

This question further highlights the importance of the sales representative suggesting to the buyer that they seek legal and financial advice prior to signing the contract. If the contract does not contain a withdrawal clause, depending on the nature of the conduct of the developer and sales representative, the buyer's may find it difficult to withdraw from the contract in this case.

Legislative requirements for sales representatives to consider in selling off-the-plan

The table below details some of the key legislative provisions a sales representative should be aware of dealing with off-the-plan contracts. Please note, depending on the circumstances of a transaction, there may be provisions that are not listed below. This table is to serve as a guide only.

Legislation/Act	Relevant provisions	Legislative requirement and/or information to impart to the buyer
REBA Act and REBA Regulations	Section 54(1)(2) – employment of sales representatives.	Sales representatives must be registered and hold a current triennial certificate to be employed by a developer for the purpose of carrying on business on behalf of that developer.
	Section 60 and Regulation 6BA – Elements of a valid appointment to act.	Sales representatives in consultation with the person in bona-fide control, should make sure the appointment to act contains all the required elements.
	Section 62 - Advertising by agents and developers Section 57 and 58 – Registration of principal place of business by a developer.	Sales representatives may want to be mindful that a developer they are planning to sign an appointment with is abiding by the relevant provisions of the REBA Act.
Code of Conduct	Section 4 – General duty to principal	Sales representative must act in the best interests of his or her principal. With respect to off-the-plan developments, sales representatives should refer to their principal for direction.
	Section 7 – Duty to behave fairly	Sales representatives must act fairly and honestly in their dealings with buyers. This includes not misleading or deceiving parties in negotiations or a transaction and not engaging in harsh or unconscionable conduct.
	Section 9 – Standard of Service	Sales representatives must exercise due skill, care and diligence in their dealings with buyers, potential buyers and their principal.
	Section 10(2) – Duties as to details of the transaction	Sales representatives are required to disclose all material facts ascertained in relation to an off-the-plan sale contract to the buyer.
	Section 16 – Further restriction on reward for service. Section 17 – Claiming expenses from principal.	Any appointment to act signed by a principal must provide that any agreed commission, reward, or other valuable consideration, and any advertising or general expenses, be in writing with a maximum amount specified and initialled on the agreement of the principal.

Legislative Requirements (cont.)

Legislation/Act	Relevant provisions	Legislative requirement and/or information to impart to the buyer
Australian Consumer Law	Section 4 – Misleading representations about future matters	If a sales representative makes a representation concerning an off-the-plan development to a buyer they need to have reasonable grounds for doing so. For example, they should be able to link the representation back to information that is contained in the contract.
	Section 18 – Misleading and deceptive conduct	Sales representatives must not engage in conduct that is likely to mislead or deceive with respect to off-the-plan developments.
	Section 29 - False or misleading representations about goods or services	Sales representatives must not make false or misleading representations to buyers about the quality, standard, style or grade of fittings, fixtures and other inclusions with respect to an off-the-plan contract.
	Section 30 – False or misleading representations about the sale of land	Sales representatives must not make false or misleading representations in relation to the price, nature, location, existence or availability of facilities with respect to the sale of land or make a false or misleading representation that they have a sponsorship approval or affiliation with respect to the sale of land off-the-plan.



ELEMENTS OF A VALID APPOINTMENT TO ACT

The following is a summary of the requirements under the *Real Estate and Business Agents Act 1978* ("the Act"), *Real Estate and Business Agents (General) Regulations 1979* and *Code of Conduct for Agents and Sales Representatives 2011*, which an agent must comply with in order to have a valid appointment to act. A valid appointment to act enables the agent to receive remuneration and or recover expenses as agreed with the principal for the services provided.

Section 60(1)(a)

An agent must be licensed and the holder of a current triennial certificate.

Section 60(1)(b)

An agent must have a valid appointment to act in writing signed by the person for whom the services are being provided or his lawfully authorised agent.

Section 60(2)(a)

The appointment must be contained in a document

Broome Real Estate Pty Ltd vs Howard [1999] WADC 73

Section 60(2)(a)(i)

The appointment must clearly set out the services to be rendered, eg Appointment to Sell, Auction, etc.

Section 60(2)(a)(ii)

Where specific property is to be the subject of those services the appointment must clearly identify the property; eg address of property, title details; business etc.

Section 60(2)(a)(iia)

Clearly set out a method by which the amount of remuneration is calculated.

Section 60(2)(c)

The person obtaining the signature of the principal(s) on the appointment must give a true copy of the appointment to the signatories immediately after the appointment is signed.

PENALTY \$5,000

Applies to a person who demands or receives any commission, reward or other valuable consideration in contravention of the applicable legislation (s.60(3) of the Act).

Additionally, the State Administrative Tribunal can order repayment of commission, reward or other valuable consideration held in contravention of the Act or Regulations (Section 103(1)(d)).

The material provided by the Department of Commerce is provided voluntarily as a public service. The information and advice provided is made available in good faith and is derived from sources believed to be reliable and accurate at the time of publication. However the information is provided solely on the basis that readers will be responsible for making their own assessment of the matters discussed herein and are advised to verify all relevant representations, statements and information. Changes in circumstances after a document has been published may impact on the accuracy of the information. No assurance is given as to the accuracy of any information or advice contained after publication.

Requirements under the Regulations

Regulation 6BA(2)

The appointment must contain a statement to the effect that commission charges are not pursuant to any scale fixed by law and are to be agreed upon between the parties. This statement must be placed immediately before any statement outlining the commission charges agreed to.

Regulation 6BA(1)(a)

Where the agreed commission, reward or other valuable consideration is expressed in percentage terms, it must also be expressed in monetary amounts (e.g. 3 percent of \$450,000 equals \$13,500)

Regulation 6BA(1)(b)(ii)

Where the agreed commission, reward or other valuable consideration to be received for services rendered (i.e. sales, as defined in s.61(4a) of the Act) is expressed as an hourly, weekly or other periodic rate, the maximum sum payable must also be specified in monetary terms (e.g. \$500 per week to the maximum \$3,000)

Regulation 6BA(1)(c)

Where the calculation of remuneration is dependant upon the use of certain services (e.g. property management and services) the appointment shall provide an explanation of the charges (e.g. gross rent, gross collections, letting fee) on which the fee for those services is based.

Regulation 6BA(1)(d)

Where any expenses are to be recovered by the agent, the agent must specify the nature of those expenses and clearly set out the method by which those expenses will be calculated.

Regulation 6BA(3)

The appointment to act must contain a statement in plain language to the effect that clients may seek assistance from the Commissioner if they have a dispute in relation to fees.

Code of Conduct Articles: 16 & 17

Any appointment to act signed by a principal (Seller / Landlord) must provide that any agreed commission, reward, or other valuable consideration, and any advertising or general expenses, be in writing with a maximum amount specified and initialled on the agreement by the principal.

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Resources

Buying off the plan:

The Department has recently published a brochure entitled “*Buying land or property off-the-plan*” which may be of assistance in the development of training material on this subtopic. The brochure can be downloaded from the Department’s website.

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/buyinglandorpropertyofftheplan.pdf>

Consumer Advice for Buying Off-the-Plan – e-bulletin, issue 60, 9 May 2014

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/issue60consumeradviceforbuyingpropertyofftheplan.pdf>

Elements of a valid appointment to act:

<http://www.commerce.wa.gov.au/search/site/elements%20of%20a%20valid%20appointment>

References

"Buying Off the Plan", Department of Commerce, April 2014. [ONLINE] Available at: <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/buyinglandorpropertyofftheplan.pdf>. [Accessed 5 November 2014]

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