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Property Seller Beware

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Introduction

Selling a property? Scroll down to read information about:-

- Selling a property without using an agent.
- There may be an indemnity clause attached to the agency agreement between a property seller and an estate agent that could make the seller liable for an agent's losses caused by any other person.

Disclaimer: This article contains hearsay and opinions as well as facts. Nothing in this article should be construed as legal advice. The author is not a solicitor and does not offer legal advice. Anybody who wishes to make decisions about the sale of real estate should seek legal advice from a qualified legal practitioner.

Selling a Property Without Using an Agent

Property sellers can easily do their own selling. Everything that an estate agent does can be done either by the seller or by the seller's conveyancer.

Why not save thousands of dollars by selling a property without using an agent? It costs little compared with the cost of an agent's commission.

Costs Compared

According to statistics published by [whichrealestateagent.com.au](#), the average commission payable to a selling agent for a property sale in Queensland is 2.45% of the sale price. There is a tiered system of calculating commissions, but 2.45% is the overall average. Applying 2.45% to a sale price of \$1 million results in a commission of \$24,500. Add 10% GST that the seller also has to pay to arrive at a total cost to the seller for the commission of \$26,950.

\$26,950 is equivalent to \$500 every week for one year. Property sellers who think that using an agent is unnecessary might interpret this as throwing \$500 down the drain every week for a year, except that the whole amount is paid in one hit.

In some areas of southeast Queensland, property prices have doubled in recent years. Agents' commissions are based on percentages. Percentages haven't fallen, so commissions have risen dramatically. Meanwhile, the amount of work that an agent does to sell a property has not changed much. Commissions will continue to rise if property prices continue to rise.

Apart from the agent's commission, another cost to a property seller of using an

agent is a solicitor's fee for legal advice about the agency agreement. Before signing an agency agreement, a property seller should obtain legal advice from a qualified legal practitioner to ensure that the seller understands the agreement, including all the attached terms and conditions.

A property seller who uses an agent could become liable for unpredictable costs that are beyond the control of the seller, if the seller accepts an agency agreement that has an attached indemnity clause that includes the phrase "*or any other person*". See the article below for more information about this issue.

If a property seller is selling without using an agent then the seller will have to engage a sale-by-owner business that can act as an intermediary between the seller and popular property advertisement websites that allow only estate agents to place advertisements. Sale-by-owner businesses are nominally real estate agents, so they are able to place property owners' adverts onto restrictive websites.

Sale-by-owner businesses offer an assortment of packages designed to assist an owner to sell their property without having to pay an agent's commission. They make their money by offering selling services to property owners. Their prices are trivial compared with the cost of an agent's commission.

Other expenses for all sellers are the cost of preparing a Seller Disclosure Statement, conveyancing fees which are typically about a thousand dollars, and marketing expenses which could be as high as a few thousand dollars or as low as a few hundred dollars. Marketing expenses don't need to be high unless a seller goes overboard with advertising. If using an agent, marketing expenses are sometimes paid for by the agent, who can easily afford it due to the high commissions that agents receive.

If not using an agent, the seller's conveyancer will draw up the contract of sale. If using an agent, the agent will draw up the contract of sale. Agents like to prepare contracts of sale because then they can put their details into the contract, which helps to ensure that they will receive their commission.

There are many good conveyancers who will always be helpful and will take great care to ensure that nothing goes wrong. Sellers can talk to several conveyancers and obtain quotes before choosing one. Conveyancing fees for a seller who is not using an agent will be slightly higher than if using an agent, because of the extra work of drawing up the contract of sale.

The cost of preparing a Seller Disclosure Statement which is mandatory in Queensland, or the cost of preparing its equivalent in states other than Queensland, depends on whether the seller prepares it or pays somebody else to prepare it. An agent may assist with preparing it. Some agents may charge a fee while others may include it as part of the service.

The costs of certificates and search fees are the same whether or not an agent is involved.

The contents of contracts and disclosure statements should be the same whether or not an agent is involved, except that if an agent is involved then the agent's details may be included in the contract of sale.

Selling Without Using an Agent - Setting the Price

If the asking price is realistic then any property will sell quickly, particularly in a sellers' market. If the price is set too high then the price can always be lowered.

It is suspected that some estate agents may encourage a seller to price their property too low, because this makes it easy for the agent to sell the property quickly. On the other hand, it is suspected that other agents may try to make a seller think that the agent can get them a very high price, to encourage the seller to give the listing to that agent. How can a seller know what to believe?

If a seller does their own research into local property prices then they won't need an agent to tell them what their property is worth.

If a seller does not wish to rely on their own research then they can pay a property valuer to perform a valuation.

Selling Without Using an Agent - How the System Works

First, a property seller must engage the services of a sale-by-owner intermediary who is able to place advertisements on all property websites. Then the seller prepares text and photos for an advert and uploads them to the intermediary who places the advert.

Initial enquiries from potential buyers are received by the intermediary who forwards them to the seller. The seller then makes contact with each potential buyer. The seller communicates directly with each buyer and handles all inspections and negotiations.

The property owner is in complete control of events and can see how the ball is rolling at all times, which can be a different experience from using an agent.

The seller's conveyancer will draw up a contract of sale when the seller accepts an offer to buy the property.

When the contract of sale is sent by the seller's conveyancer to the buyer's conveyancer, from this point onwards the remaining steps of the selling process are the same as if an agent was involved. Except of course that at settlement there is no agent's commission to be paid.

If not using an agent, there are no time limits. If a property does not sell quickly, then a seller who is not using an agent can hold out until the right buyer shows up. Which is much the same situation as for sellers who are using an agent.

To Pay or Not To Pay

That is the commission, and the question.

There will always be a need for estate agents. Most people are probably capable of selling a property without using an agent, but some people have no choice. For example, an owner may be deceased, or may not be available, or may feel intimidated by strangers, or may be challenged in some way that impacts their ability to interact with others, or may be too lazy to do it themselves.

Some agents possess valuable expert knowledge about the property market. Some agents possess valuable interpersonal skills that are far above average. Some agents possess valuable sales and marketing experience and abilities.

The right agent could make a big difference.

Much depends on the preferences of the seller. For example, for some sellers an agent can take much of the stress out of the selling process, whereas some other sellers may distrust agents.

Perhaps the decision about whether or not to use an agent boils down to whether a seller thinks that an agent's services are good value for money.

An agent's motivations may be quite different from what a seller would prefer. It is suspected that some agents tend to put their own interests first. For example, it may not be in a seller's best interests to use an agent who tries to pressure a seller into accepting whatever price is currently on offer.

On the minus side for needing an agent, many potential buyers may prefer to discuss a property with a seller who knows nearly everything there is to know about the property, rather than discuss it with an agent whose main and perhaps only interest in the property is to get somebody to buy it.

On the plus side for needing an agent, particularly if a property has defects, a seller may think that it is worth paying a skilled agent to do all the talking.

Most buyers have a clear idea of what they are looking for. If a property is well-presented and of good quality, it seems unlikely that an agent could have much influence over how much a buyer likes it.

Buyers have minds of their own. If a buyer does not like a property enough to buy it, it is unrealistic to expect that an agent could persuade the buyer to buy it. Price is often more persuasive than an agent. By not using an agent, a seller has more scope for reducing the price because of the commission that is saved.

If a buyer likes a property enough then they will make an offer. If the offer is not high enough then there might be negotiations. A seller may have chosen to use an agent if the seller has no confidence in their own negotiating abilities. On the other hand, if a buyer makes an acceptable offer then the lack of quality of the seller's negotiating skills will have been irrelevant.

In any case, negotiations about price are usually simple enough for most people to be able to manage on their own.

Negotiations may be more complex if there are special conditions to be included in the contract of sale. But even if a seller is using an agent, the seller will still have to deal with whatever complexities arise, because the seller will still have to make decisions and give instructions to the agent.

A conveyancer may be able to provide better advice about special conditions than an agent. Apart from conveyancers probably having a broader knowledge of property contracts than agents do, it is difficult to see how an agent can give independent advice to a seller when an agent has such a large stake in the outcome.

A seller should consult a qualified legal practitioner if there is anything related to the sale of a property that they do not understand or are unsure about.

Overall, choosing to employ an agent can have advantages, but it could turn out to be expensive in ways other than the cost of the agent's commission.

In the modern age of technology, buyers flock to property advertisement websites rather than to estate agents. For many properties, there appears to be no compelling reason why a seller would need to pay the high cost of using an agent.

Yet, only a small proportion of property sellers in Queensland choose to sell their property without using an agent.

Indemnity Clause Attached to an Agency Agreement

The Phrase "*or any other person*" may be in an Indemnity Clause

If a property seller is using the services of an estate agent, then there may be a condition attached to the agency agreement that a prudent seller might not accept.

In past years, and probably still ongoing, REIQ (Real Estate Institute of Queensland) had an indemnity clause containing the phrase "*or any other person*" in the "*Essential Terms and Conditions*" that it attached to agency agreements.

Although this information relates to Queensland, it is possible that estate agents in other states may be using a similar indemnity clause.

Property Occupations Form 6

"*Property Occupations Form 6*", which governs the "*Appointment and reappointment of a property agent, resident letting agent or property auctioneer*" must be used for all selling agency agreements in Queensland. The form is six pages long and is divided into ten parts.

About REIQ's Indemnity Clause

The Queensland Government's Form 6 appears to be the only ingredient that is essential for an agency agreement to be valid.

In agency agreements that REIQ has used, there is the mandatory Form 6, plus an attached assortment of tick boxes and blank fields for the seller to complete, plus an attached raft of REIQ's own "*Essential Terms and Conditions*". It is possible that REIQ has more than one version of its attachments for Form 6.

Although REIQ's attachments for Form 6 are readily available to law firms and to those who work in the property sales profession, the attachments do not appear to be readily available to mere mortals, except to property sellers who have been given an agency agreement to sign. Internet searches have not been able to find a recent example of REIQ's attachments for Form 6. Another thing that cannot be found is a good reason for the secrecy.

In the most recent version of REIQ's *"Essential Terms and Conditions"* that Oldtreeland has seen, which is from circa 2023, most of the terms and conditions appear to be reasonable and make good sense. However, in Oldtreeland's opinion, the wide scope of a clause titled "Indemnity" is questionable.

Without access to a 2026 version of the indemnity clause, it cannot be confirmed for certain that the phrase *"or any other person"* is still being included in the indemnity clause, but it seems probable that the phrase is still there because it can be theorised that agents are unlikely to ever want the indemnity clause to be watered down.

In Oldtreeland's opinion, some effort appears to have gone into giving the indemnity clause a wide range of applicability, apparently to ensure that if during the course of an agent's work the agent suffers losses that the agent did not cause, then as much of the costs as possible would expediently become a liability for a property seller or the seller's insurers instead of being a liability for the agent or the agent's insurers. By the inclusion of the phrase *"or any other person"* in the indemnity clause, a seller's potential liabilities would appear to be considerably expanded.

The phrase *"or any other person"* is the only detail of the indemnity clause that is examined in this article. In Oldtreeland's opinion, the wide scope of the liability that this phrase appears to create, at the expense of an innocent party, is against the public interest. In Oldtreeland's opinion, businesses should be prohibited from making a client liable for losses that the client did not cause.

One of the reasons for sharing Oldtreeland's opinions here is that a phrase such as *"or any other person"* in an indemnity clause is a matter of public interest, because such a high proportion of property sellers use the services of an agent. Another reason is to encourage property sellers to seek proper legal advice that they can rely on, rather than relying on whatever an agent might say to them to encourage them to sign an agency agreement. Oldtreeland's opinions are not legal advice and should certainly not be relied on where matters of law are concerned.

If an agent gives a property seller an agency agreement then the seller should consult a qualified legal practitioner for legal advice about the agency agreement and any attached terms and conditions, paying particular attention to the meaning of whatever words may be in any indemnity clause, before deciding whether to sign the agreement.

Potential Consequences of the Phrase *"or any other person"*

In relation to an agent's appointment to sell a property, it is easy to imagine many types of event in which a person other than the property seller could potentially cause a loss to the agent.

It probably does not happen often that an agent suffers a loss caused by any other person, but it could occasionally happen.

It is unlikely that a property seller's typical insurance policies would cover all possible types of such losses.

For example, a loss suffered as a result of an event that takes place outside the boundary of a property might not be covered by public liability insurance for the property. Also, for example, the theft of an agent's vehicle while the agent is attending to matters at a property might not be covered by any of the property seller's insurance policies. There are many other potential examples.

A property seller who is considering signing an agency agreement should consult a

qualified legal practitioner for legal advice about whether an indemnity clause in the agency agreement could potentially enable any other person to cause a financial disaster for the seller.

Do Agents Always Refuse to Alter Indemnity Clauses?

It appears that it can be difficult to find an agent who is willing to alter an indemnity clause in an agency agreement.

It would be useful for a property seller to know if agents always refuse to alter indemnity clauses, because if this is the case then there would be no point in a seller wasting any time looking for an agent who is willing to alter an indemnity clause.

Oldtreeland would be interested to hear from property sellers about the results of any negotiations that they have had with agents in relation to indemnity clauses.

Conclusions

Estate agents are sometimes criticised for a variety of reasons, but it is politicians who are responsible for making the rules that allow agents to operate in the ways that they do. In the public interest, there appears to be a need for legislative reform of how businesses are allowed to manage their risks. It would be in the public interest if businesses were prohibited from making a client liable for losses that the client did not cause.

An agency agreement between a property seller and an estate agent may have attached terms and conditions that may include an indemnity clause.

Before signing an agency agreement, a property seller should obtain legal advice from a qualified legal practitioner to ensure that the seller understands the agreement, including all the attached terms and conditions.

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