What to do in a multiple offer scenario

WORDS BY CARTER NEWELL SENIOR ASSOCIATE, ANDREW PERSIJN

It is not uncommon for agents to find themselves in a situation where a seller has verbally agreed to sell their property to one potential buyer, only to have a second potential buyer offer to purchase the property for a higher amount before the seller has signed the written Contract of Sale from the first potential buyer.

Agents will of course be aware that in Queensland, a Contract of Sale must be in writing and executed by both the buyer and seller.

Agents caught in the middle of a multiple offer situation, like the one discussed above, must ensure that they comply with their obligations to both their seller client and the potential buyers.

In this article, we take the opportunity to examine a real estate agent’s obligations in a multiple offer situation and provide some best practice tips to assist agents in their dealings with their seller clients and potential buyers in a multiple offer situation.

Prior to the commencement of the Property Occupations Act 2014 (Qld) (PO Act) on 1 December 2014, the Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001 (Qld) (the Code of Conduct) provided a number of conduct provisions regarding an agent’s obligations to both their seller client and potential buyers.

However, the commencement of the PO Act saw the end of the Code of Conduct. Whilst the Code of Conduct was not replaced, the Property Occupations Regulation 2014 (Qld) (PO Regulation) encompasses some of the principles and rules that were contained within the Code of Conduct.

Section 22 of the PO Regulation provides that an agent must act in accordance with their seller client’s instructions unless it is contrary to the conduct provisions of the PO Regulation or otherwise unlawful to do so.

In addition to this, there are numerous provisions of the REIQ Standards of Business Practice which are relevant in a multiple offer situation. Article 4 provides that Members must:

“...(b) act in the best interests of their Client and act in accordance with their instructions except where to do so would be contrary to Statute Law;

(c) act ethically, fairly and honestly when dealing with all parties so as to minimise controversy and to not prejudice the reputation of the Institute and/or the Members;…

...(f) act in a manner that is professional and courteous, and that does not disadvantage existing negotiations;...”.

Article 9(a) prohibits Members from making false or misleading representations or statements about properties or businesses, or from engaging in any conduct which is likely to mislead or deceive; whilst Article 9(b) states that Members must not participate in any harsh or unconscionable conduct with respect to the marketing, sale, rent or leasing of properties or business.
Further, the *Australian Consumer Law (ACL)* prohibits conduct, in trade or commerce, which is misleading or deceptive, or is likely to mislead or deceive. Agents must, therefore, exercise a degree of caution insofar as ensuring that any representations which they make in the course of marketing a property are accurate and not likely to mislead or deceive.

Failure to comply with their obligations could potentially lead to a claim against an agent for misleading and deceptive conduct, prosecution for a breach of the PO Act and PO Regulation and/or an appearance before the REIQ Professionals Standards Tribunal for breaching the REIQ Standards of Business Practice.

**Practical advice for agents**

Given the competing obligations faced by an agent, it is often difficult to know the best course of action to take when confronted with a multiple offer situation.

On the one hand, agents have an obligation to immediately inform their seller clients of all offers, act in accordance with instructions from their seller clients and to obtain the maximum sale price for the property. However, in obtaining the maximum sale price for the property, agents must treat potential buyers honestly and fairly and not engage in misleading or deceptive conduct and/or unconscionable conduct.

Conduct which may be considered misleading or deceptive and/or unconscionable can include, but is not limited to:

- an agent playing potential buyers off against each other in an attempt to draw out further offers and drive up the sale price; and
- an agent advising a buyer of the existence of a higher offer in circumstances where a higher offer does not exist, has lapsed or has previously been rejected by the seller.

It is important that agents are aware that if either of these scenarios were investigated by the Office of Fair Trading following a complaint from a potential buyer, the agent would have to produce evidence of the existence of the other potential buyers and higher offer.

If an agent receives multiple offers to purchase a particular property, the agent should inform the potential buyers that multiple offers have been received and obtain a written acknowledgement from the potential buyers that they have been advised of that fact. In this regard, an Acknowledgement of Multiple Offers Form is available via Realworks.

This approach alerts the potential buyers to the existence of other offers and provides them with an opportunity to make an increased offer to purchase the property if they wish. In this situation, agents should ensure that no pressure is exerted on potential buyers to increase their offer as this may be considered to be high pressure tactics, harassment or unconscionable conduct.

If an agent does find themselves in the situation where the seller has verbally accepted an offer but is yet to execute the written Contract of Sale, the agent should carefully consider what information is passed on to the potential buyer until such time as the agent has received a copy of the fully executed Contract of Sale. The agent should also remind their seller client that the offer has not been accepted until the seller has executed the written Contract of Sale.

In circumstances where an agent has received multiple offers from potential buyers, before the seller had executed the written Contract of Sale, it is recommended that the agent advise their seller client of the offers and discuss the following course of action as one method to handle a multiple offer scenario:

1. Advise the potential buyers that the seller has received other offers before they have executed the written Contract of Sale;

2. Approach the potential buyers and provide them with a timeframe within which to provide their best and final offer to purchase the property;

3. The offers are to be sealed and presented to the seller; and

4. If the agent has been instructed to advise the potential buyers to submit their best and final offer, it should be stressed to the seller that these offers should not be used as a means to commence further negotiations with the potential buyers; and

5. A written acknowledgement should also be obtained from the potential buyers that they have been informed of the multiple offers.

If the seller considers this course of action to be appropriate, the agent should ensure that they obtain instructions from their seller client in writing. Agents should also ensure that they keep detailed file notes of their conversations with their seller clients and all potential buyers. All documents relating to a property transaction should be kept secure for a minimum of six years.

It remains the seller’s prerogative to provide instructions to an agent regarding the course of action he or she wishes to take in a multiple offer situation however, agents should always remember that whilst they must act in accordance with their seller clients’ instructions, they ought not to do so if those instructions are contrary to the PO Regulation or are otherwise unlawful.

**Conclusion**

It is a daily occurrence for real estate agents to balance the interests of, and duties owed to, their seller clients, whilst at the same time providing assistance to third party buyers.

While the scope of agents’ duties is not always clearly defined, we hope this article serves to reinforce the importance for agents to be aware of the extent of their duties and has provided useful best practice advice for dealing with their seller clients and potential buyers in a multiple offer situation.