



The use of 'drones' in marketing a property for sale

WORDS BY CARTER NEWELL SENIOR ASSOCIATE, HEIDI BAYLES

Introduction

Photographs are critical in an effective marketing campaign to sell a property, and with current technology, we are seeing an increasing number of real estate agents using 'drones' or remotely piloted aircraft systems (**RPAS**) in their marketing of properties for sale. In this article we will explore the legal requirements associated with the use of RPAS and corresponding privacy issues for real estate agents.

Legal requirements

The Civil Aviation Safety Authority (**CASA**) is charged with the oversight of safety with respect to the use of RPAS in Australia. CASA does so in accordance with the *Civil Aviation Safety Regulations 1998* (Cth) (**CASR**) which sets out the rules governing the use of RPAS.

The Australian Government recently introduced legislative changes applicable to hobbyists wishing to operate a remotely piloted aircraft (**RPA**) for reasons other than commercial gain. Under these changes, very small RPAs (that is a RPA under 2 kg) may be operated without the need for certification where the following operational conditions are met:

1. Standard RPAS operating conditions require RPAs to be operated:
 - a) within visual line of sight;
 - b) below 400ft above ground level;
 - c) during the day; and
 - d) more than 30m away from anyone who is not directly associated with the operation (people being filmed are not considered to be directly associated with the RPA's operation).
2. Very Small RPAs are subject to the following additional limitations and may NOT be operated:
 - a) over a populous area;¹
 - b) within 3 nautical miles of the movement area of a controlled aerodrome;
 - c) in a prohibited area;
 - d) in a restricted area that is classified as RA3;
 - e) in a restricted area that is classified as RA2 or RA1 otherwise than in accordance with the CASR; and
 - f) over an area where a fire, police or other public safety or emergency operation is being conducted without the approval of a person in charge of the operation.

Where a very small RPA is used for commercial gain (referred to in the legislation as '*Hire or Reward*'), or any of the operating conditions set out above cannot be conformed to, then the operator of a RPA may only legally operate where certified to do so². It is important to be aware that '*commercial gain*' can include flights for advertising purposes or even uploading videos to YouTube; there does not have to be a direct payment involved. For these reasons, photographers engaged by real estate agents will not typically be able to conform with all the above conditions, and will therefore require a UAV Operator Certificate, to operate a RPA legally.

To ensure real estate agents' interests are best protected (in the event that the RPA injures someone or damages property), our best practice recommendations are for all real estate agents considering the use of RPAs for capturing advertising materials, to engage the services of a commercial RPA operator who can provide, upon request, copies of the following:

- All CASA licencing approvals including any pilot or contract pilot licencing approval; and

- Their insurance policy schedule evidencing the currency and extent of their third party liability cover for RPAS operations. If real estate agents are unsure of whether a RPA operator holds the requisite licences, the CASA database provides an up-to-date list of certified operators, which can be found at the following link: <https://www.casa.gov.au/aircraft/standard-page/uas-certificate-holders>.

If real estate agents fail to engage appropriately licensed and insured operators who comply with the relevant regulations, they may expose themselves and their agencies to compensation claims in the event of an RPA failure causing damage to persons or property on the ground.

Privacy issues

One of the most concerning issues in regards to the use of RPAs is the intentional or inadvertent breach of a person or business's privacy.

There is a range of Federal, State and Territory statutes and common law principles which govern privacy, however, there is presently no single uniform approach to regulation in this area.

The *Privacy Act 1988* (Cth) (**Privacy Act**) sets out thirteen privacy principles (**APPs**) which govern how organisations should collect information, manage information and the circumstances applicable for distribution. The Privacy Act applies to agencies with a turnover of more than \$3 million per annum, as well as smaller agencies who:

- Disclose personal information to others, including other real estate agencies, for a monetary or other benefit; or
- Obtain personal information from others by providing a monetary or other benefit to those others (for example, tenancy databases).

A failure to adhere to the APPs can result in sanctions. A person who feels that they have had their personal privacy interfered with may lodge a complaint with the Office of Australian Information Commissioner (**OAIC**). The OAIC

has a broad range of powers available to it including:

- Declaring that the organisation has engaged in conduct constituting an inference with the privacy of an individual and that it must not repeat or continue such conduct;
- Declaring that the organisation redress the loss or damage suffered by the individual; and
- Declaring that the complainant is entitled to monetary compensation.

However, the Privacy Act is limited by the fact it does not apply to behavioural privacy protection and is instead focused on data protection only. Accordingly, there are a number of situations in which the Privacy Act may not protect individuals or businesses against the invasive use of RPAs.

There are alternative pathways for redress for those who claim to have had their privacy invaded by RPAs, depending on the circumstances, including claims for trespass, nuisance or breach of confidence. Accordingly, real estate agents should ensure that any RPA operators they engage do not monitor, record or disclose individuals' private activities

without their consent; it may be useful to consider including a clause in the engagement contract which expressly confirms the real estate agent does not require, nor authorise the monitoring, recording or disclosure of any individuals' private activities unless it is done so with the express consent of the individual.

In addition to the above, where the property being sold is tenanted, it is important that agents comply with their obligations under the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RTRA Act**).

Section 203 of the RTRA Act provides that unless a lessor or lessor's agent has the tenant's written consent, the lessor or agent must not use a photograph or other image of the premises in an advertisement if the photograph or image shows something belonging to the tenant.

This applies to the tenant's possessions outside the property including cars, boats and furniture. The Residential Tenancies Authority has the power to investigate an alleged breach of section 203 of the RTRA Act, which can lead to a fine of up to \$2,438 (20 penalty units).





Finally, if the adjoining owners have not given their consent to the publication of the photograph, any identifying particulars in those properties should be deleted.

Conclusion

If any complaints are made regarding a real estate agent's marketing techniques, the onus will be on the agent to prove that they have complied with all the relevant industry, State and Federal laws. Accordingly, we recommend that real estate agents engage appropriately qualified, licensed and insured RPA operators and execute clear terms of engagement or a contract for RPA services, so as to minimise the risk of any liability exposure in the event of privacy breaches, someone is injured, or there is property damage, as a result of the RPA operator's negligence.

¹ An area with a sufficient population density that if a fault in, or failure of, the RPA poses an unreasonable risk to the life, safety or property of a person in the area who is not connected with the operation. Refer to CASR101.025.

² An operator of a sub-2kg RPA may operate commercially, providing they notify CASA of the flight and can comply with all of the standard operating conditions set out in paragraph 1 of this article.

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641 ANN STREET, FORTITUDE VALLEY, QLD, 4006 | PH: 07 3872 6600
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