

# Take Note!

- Sellers
- Buyers
- Landlords
- Tenants
- Everyone Else...



## How the Property Practitioners Act Affects You as a Property Seller, Buyer, Landlord or Tenant from 1 February

"... a property is an asset to enhance economic activity, growth and development..." (extract from preamble to the Property Practitioners Act)

The Property Practitioners Act ("PPA") finally comes into effect on 1 February 2022. It has major ramifications for everyone involved in the property industry, but in this article we'll concentrate only on aspects of particular importance to property sellers and buyers, and to landlords and tenants.

The PPA's full definition of "property practitioner" is long and complex with some grey areas still to be clarified, but for our purposes let's just note that estate agents and agencies, property auctioneers, property managers, bond originators and the like all fall into the definition.

We turn now to some of the more important changes which will impact on you from a practical perspective from 1 February -

### New mandatory disclosures by sellers and landlords

It has always been best practice for sellers and landlords to make full written disclosures of any property defects or deficiencies known to them to prospective sellers and tenants, and to attach a list to the agreement of sale/lease. As regards residential leases, the Rental Housing Act already provides for both incoming and outgoing joint inspections.

Now for both sale and leasing the PPA provides that no PP can accept a mandate without a "mandatory disclosure form" which must be provided to any prospective buyer or tenant, signed by both parties and attached to the sale agreement/lease. The form published in the new Regulations refers to sellers only so it is unclear (at date of writing) what form landlords are supposed to use but the form requires sellers to answer a series of questions (and certify the answers as correct) relating to defects (structural and other), to disclose any boundary line disputes/encroachments/encumbrances, to certify that the necessary consents and permits were obtained for any additions/improvements etc, and to disclose any historical structure/heritage site issues. There is also a catch-all "Additional Information" section.

The form specifically states that it is not a substitute for any inspections or warranties so buyers/tenants should still insist on these in their agreements, but it does provide proof of any disclosure or non-disclosure of defects or deficiencies (there is a presumption against disclosure if no form is supplied).

**Sellers and landlords will want to tread with care here and, importantly, they are not the only ones at risk of being sued here - a buyer/tenant can hold the PP liable for not complying with these requirements.**

### When commission isn't payable (and can be clawed back if already paid)

Commission is normally payable to a PP by the seller in a sale, or by the landlord in a letting arrangement. The PPA provides for two situations in which a PP cannot earn commission or any other payment, and in which you can claim repayment (on pain of prosecution for failure to repay) if you have already made payment -

- Estate agents have always had to hold a Fidelity Fund Certificate (FFC) in order to trade, and the PPA clarifies that in order to act as a PP, it is not enough for just the agency itself to hold an FFC - FFCs must also be held by all employed PPs and (if the agency is not a sole proprietorship) also all directors (if a company), members (if a close corporation), trustees (if a trust) and partners (if a partnership). Another safeguard is that the conveyancer handling the transfer is now obliged to obtain a certified copy of the PP's FFC before making any commission or other payment.
- Another situation in which a PP cannot claim commission is if there is any breach of the requirement not to "enter into any arrangement, formally or informally, whereby a consumer is obliged or encouraged to use a particular service provider including an attorney to render any service or ancillary services in respect of any transaction of which that property practitioner was the effective cause." This is presumably an attempt to curb the paying of referral fees to PPs for recommending or requiring use of a particular service provider, such as perhaps a particular transferring attorney, bond originator, compliance certification service etc, but at the end of the day as a seller or landlord your best interests are served if you insist on using your own professional advisors - **the choice is yours and yours alone.**

### Other things to know about

- The Property Practitioners Regulatory Authority ("PPRA") which replaces the Estate Agency Affairs Board, will enforce a Code of Conduct applicable to all PPs, and will provide mediation and adjudication services in the event of any disputes arising.
- As regards costs of documentation - sale agreements, leases and mandatory disclosure forms "must be drafted by the developer or seller, as the case may be, for his, her or its own account" (there is no specific mention of landlords).

As always with property transactions, there is just no substitute for specific professional advice and assistance here!

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