Australian Law Reform Commission

Elder Abuse Inquiry

Financial abuse arising from deregulation of real estate agent commissions

The elderly frequently engage in the largest financial transaction of their life when they sell their home in order to move to accommodation more suited to their age and health. Many have never sold a home previously and also they have often not engaged in business or significant investment that would expose them to the perils.

The commissions charged by real estate agents have been deregulated in Victoria since the mid 1990s and I believe this arose from national competition policy and the willing participation of a State government with a strong preference for the free market. My understanding is that deregulation has occurred in other states with Queensland being a very recent example.

Many elderly people, and indeed others, are not aware that commission rates are negotiable, even though the agreements they sign have them acknowledge being informed that rates are negotiable. Also, they typically have no experience of such negotiations whereas the agent has extensive experience, making for a very unbalanced negotiation if in fact one does take place.

A common example of the way in which agents manipulate this situation to exploit the elderly is to have vendors agree to a commission structure along the following lines:

> X% of the sale price to and including the reserve price and Y% of the sale price in excess of the reserve price.

Y will be significantly higher than X, for example 30% compared to 2% and the agent will claim that this structure will motivate them to get a higher price thereby benefiting the vendor.

Normally at the time of signing the agreement, which is a contract with no cooling off right, the vendor has not decided the reserve price and they often don’t understand what a reserve price is. A reserve price is the lowest amount for which the vendor is prepared to sell the property. The agent then sets about during the marketing campaign to get the vendor to reduce their expectation and therefore set a low reserve price. The outcome is that the agent gets an extraordinary reward for getting the vendor to set a low reserve price rather than a reward for and exceptionally high result.

These agreements are usually signed without the vendor seeking independent advice. As the agent is competing for business, getting the vendor's signature is a way of locking out the competition. There is no cooling off right on the agreement which binds the vendor to the agent for the duration of the exclusive authority period.

An additional layer of "agency" has also been created by some agents, and it feeds of the anxiety of some elderly vendors. Some advertise themselves as protecting vendors from the evil of real estate agents without acknowledging they are also real estate agents. They are known as vendor advocates. Some claim they work for the vendor for no cost. Of course they don't work for nothing, but instead get a portion of the fee they negotiate with the selling agent on the vendor's behalf and set out in the agreement under which the selling agent is appointed by the vendor. Therefore the higher the fee "negotiated" by the vendor advocate with the selling agent on behalf of the vendor the higher the payment received by the vendor advocate; hardly an arrangement that works to the benefit of vendor.

Solution

This financial abuse could be stopped by the reregulation of sales commissions payable to real estate agents. Deregulation was driven nationally, so reregulation could be driven in the same way. To say it is up to the states is not a valid excuse.