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# Prosecution and Charging Policy

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**Updated:** July 2022

**Next Review Date:** July 2024

**Number:** 1.6



## Background

The Real Estate Authority (**REA**)<sup>1</sup> was established as a Crown Entity under the Real Estate Agents Act 2008 Act (the **Act**). It is New Zealand's primary independent regulator of the New Zealand real estate industry with its main purpose being to promote and protect the interests of consumers buying and selling real estate and to promote public confidence in the performance of real estate work.

The Act and other legislation, including the Real Estate (Audit) Regulations 2009 (the **Regulations**), assists REA to achieve its purpose by providing a range of enforcement tools including prosecution, professional disciplinary actions and other compliance mechanisms for use by REA, the Registrar, investigators, Complaint Assessment Committees (**CACs**), the District Court and the Real Estate Agents Disciplinary Tribunal (**READT**).

For REA prosecutions, this policy must be read in conjunction with the Solicitor-General's Prosecution Guidelines<sup>2</sup> (**Crown Guidelines**). Under the Crown Guidelines, REA prosecutions are "public prosecutions" as REA is considered a Government Agency and an enforcement agency. The Crown Guidelines ensure that public prosecutions are underpinned by core prosecution values. The Crown Guidelines are applied by analogy, and on the balance of probabilities, to the CAC function and charges laid before the READT, as these are disciplinary charges as opposed to criminal offences.

## Purpose and scope

This policy applies to all REA staff and contractors, Board members, CAC members, and any external counsel working on behalf of REA.

This policy sets out the procedures and expectations of REA staff, external counsel and CACs when dealing with either potential prosecutions or laying charges. It outlines principles for consideration when assessing a prosecution file, or when deciding whether to lay a charge, and how to advise the appropriate decision maker whether to proceed with a prosecution.

Under the Act, REA has the power to<sup>3</sup> "investigate and initiate proceedings in relation to offences under this Act and any other enactment", and one of the CACs functions is to<sup>4</sup> "lay, and prosecute, charges before the Disciplinary Tribunal". Accordingly, this policy establishes the principles and approach applied when:

- (i) REA is considering potential prosecutions; and
- (ii) a CAC is considering laying disciplinary charges.

This policy is set out in two parts to reflect (i) and (ii) above.

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<sup>1</sup> Real Estate Authority is the operating name of the Real Estate Agents Authority.

<sup>2</sup> <http://www.crownlaw.govt.nz/assets/Uploads/Prosecution-Guidelines/prosecution-guidelines-2013.pdf>

<sup>3</sup> s 12(1)(j) of the Act

<sup>4</sup> s78(e) of the Act

## Objectives

The objective of REA prosecutions, and CACs laying disciplinary charges, in accordance with the purpose of the Act, is to:

- promote and protect the interests of consumers in respect of transactions that relate to real estate;
- to promote public confidence in the performance of real estate agency work; and
- to deter behavior and conduct of licensees and others that does not protect consumers engaged in real estate transactions.

The objective of this policy is to ensure that licensees and others with compliance duties (such as Auditors) under the Act, Regulations, and other legislation, take their responsibilities seriously. Any prosecution and charging response should be credible and proportionate to the situation the action is intended to address.

## Part A: Prosecution of Offences

### When will REA prosecute an offence?

In compliance with the Crown Guidelines, prosecutions are initiated and continued when REA is satisfied that the following tests are met:

- (i) *The Evidential Test*: the evidence which can be adduced in court is sufficient to provide a realistic prospect of conviction; and
- (ii) *The Public Interest Test*: where the prosecution of the offending is required in the public interest, in accordance with the purpose of the Act, and REA's regulatory priorities<sup>5</sup>.

### Process for making a prosecution decision

Decisions on whether or not to proceed with a prosecution are made by REA General Counsel or the Chief Executive. Any matters considered non-routine or unusual, involving sensitive public relations issues, or the reputation of REA must be decided by the Chief Executive and/or the Board.

Prosecution decisions are based on legal advice and consideration of the public interest test and REA's regulatory objectives. The legal advice will assess whether the above tests, for evidential sufficiency and public interest, have been met. Before a decision is made, the General Counsel will engage with the Head of Regulatory Services to consider the regulatory objectives of a potential prosecution.

### Conduct of prosecutions

**All prosecutions will be conducted by suitably qualified legal counsel, who will undertake the prosecution in consultation with REA.**

REA prosecutions will be undertaken in accordance with the Crown Guidelines, this includes:

- deal with prosecution promptly, efficiently and without causing unnecessary delays or expense;
- act consistently and even-handedly;
- consider the possibilities for, and initiate where appropriate, alternative means of avoiding prosecution or resolving prosecution;
- not seek to take inappropriate advantage of a defendant who lacks resources; and
- not require the defendant to prove a matter which REA knows to be true or seek to take unmeritorious points for tactical reasons.

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<sup>5</sup> Prosecution Guidelines, note 2 above at paragraph 5.10.

## Sentencing or penalty options

Where a prosecution results in a finding of guilt, REA will seek sentences or penalties that:

- take into account the circumstances of each case;
- are proportionate to the offending;
- are consistent with precedent; and
- are aimed at promoting the purpose of the Act.

## Part B: Disciplinary charges laid by CAC

### Role of the CAC

The functions of CACs are set out at section 78 of the Act, and one of the functions is to inquire into complaints. This may include conducting a hearing on the matter at hand. CACs are also required to make a final determination on a complaint, inquiry or investigation. CACs are quasi-judicial bodies and must approach complaints in an open, transparent and non-biased manner.

CACs must be aware that their decisions will affect peoples' lives or livelihoods. CACs must apply principles of natural justice when they are inquiring into a complaint, parties are given an opportunity to comment on allegations and are provided with relevant evidence to effectively participate in the process.

### CAC approach when considering laying charges

CACs must consider the facts and evidence of a matter before them, and make one of the following decisions:

- to take no further action;<sup>6</sup>
- that there has been unsatisfactory conduct;<sup>7</sup> or
- that the complaint be considered by the READT.<sup>8</sup>

The CAC must refer a matter to the READT when it considers that there has been misconduct either by a subject of a complaint, or as a result of an inquiry into a matter by the CAC's own motion. The READT in *Maketu*,<sup>9</sup> made clear that it is for the Tribunal and not CACs to decide if there is misconduct in a matter. In the first instance, the CAC will advise REA that it considers the matter is at a level of misconduct and request that charging documents are drafted.

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<sup>6</sup> s89(2)(c) of the Act

<sup>7</sup> s89(2)(b) of the Act, when an agent's behavior falls short of the expected standard.

<sup>8</sup> s89(2)(a) of the Act

<sup>9</sup> *Maketu Estates Ltd v Real Estate Agents Authority* [2016] NZREADT 48.

As charges laid by a CAC are disciplinary, not criminal, the Crown Guidelines are not directly applicable to CAC matters. However, the Crown Guidelines are applied by analogy as a matter of good practice.

Although CACs do not need to be certain that a charge of misconduct will be proved before referring a matter to the READT, they ought to seek legal advice to help determine whether there is sufficient evidential foundation, as a matter of law and on the balance of probabilities, to lay charges and what form those charges will take. Evidential sufficiency advice is provided either by the REA legal team or external counsel.

Charges are then laid with the READT by the CACs, with copies of the charge sent to the complainant and the person or agency who the complaint or inquiry relates to.<sup>10</sup>

### **Withdrawal of charges**

At times the CAC, having decided to lay misconduct charges, may receive additional information and/or evidence and/or further legal advice that materially affects the CAC's decision to lay charges in the Tribunal. In these situations, further legal advice will be prepared for the CAC to consider the options of the action it may take. That advice may include information about REA's statutory objectives and regulatory objectives. The advice should be prepared in consultation with the Head of Regulatory Services, or their delegate, and the investigator who was appointed to the case.

The CAC makes the decision whether or not to withdraw charges. However, in sensitive, non-routine or unusual cases General Counsel and/or the Chief Executive must be advised of the possible withdrawal of charges with General Counsel approving the advice to the CAC. This approach is consistent with the approach in REA's Litigation Management Policy.

Unless it is entirely inappropriate to do so, the complainant will be advised of the new information and provide an opportunity to respond, before the CAC makes a decision. It is noted that time may be of the essence and therefore a short but reasonable period of time should be given.

### **Authorisation**



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Denese Bates QC  
Board Chair

Date: 16 August 2022

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<sup>10</sup> s91 of the Act