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# Me whai wāhi koe | Have your say

**Consultation on draft guidelines to determine whether an applicant is a 'fit and proper' person and a 'proper' person under the Real Estate Agents Act 2008 licensing regime**

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**16 May 2022**



## Fit and proper guidance consultation

### Introduction

Tēnā koutou katoa | Greetings,

The Registrar of Te Mana Papawhenua | Real Estate Authority (REA) seeks your views on the draft guidelines on the fit and proper person, and proper person requirements for licensing of real estate professionals.

Under the Real Estate Agents Act 2008 (**Act**), all real estate salespersons, branch managers and agents are required to be licensed. The Act requires that to be licensed the individual must be, among other things, a 'fit and proper' person.<sup>1</sup> Further, a company may be licensed as an agent if at least one officer of the company satisfies the Registrar that they are 'fit and proper'. Any person who will be an officer of the company must also be, because of his or her personal character or financial position, a 'proper' person to be an officer of a licensee company. Although the Act provides a list of people not eligible to hold a licence,<sup>2</sup> 'fit and proper' and 'proper' are not defined in the Act.

Ensuring that individuals granted a licence meet the 'fit and proper' requirements is one of the fundamental principles underpinning the high standards of conduct required of licensed real estate professionals. REA has an important role to make sure that only the people that meet the required standards enter the real estate profession, which in turn helps build trust and confidence in the performance of real estate agency work. Carrying out a 'fit and proper' assessment has therefore always been a part of REA's regulatory framework. The proposed guidelines record factors that are already relevant to this assessment and as such, they do not represent a significant departure from current practice. Rather they provide a single source of relevant information as to factors and principles that will be drawn on when an application is assessed. This is intended to assist in making these determinations, whilst also providing clarity, consistency and transparency for the profession and the public.

The guidelines will apply to new applicants and existing licensees on renewal. They will increase transparency in decision making, which will in turn provide the public with assurance that there is a robust assessment process and protections in place to maintain the high standard of character and conduct expected of the profession.

It should be noted that the guidelines are not exhaustive rules. Instead, they are guidelines that will be used flexibly to help with assessing each licence application under consideration.

The Registrar is pleased to present for industry and public feedback draft guidelines through this consultation document.

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<sup>1</sup> Section 36 of the Act.

<sup>2</sup> Section 37 of the Act.

### Consultation feedback sought

In this document, we set out the draft guidelines that the Registrar will use to determine whether an applicant is a 'fit and proper' person and a 'proper' person, respectively. The Registrar is seeking to provide an opportunity for the sector and the public to contribute to the quality of the guidelines. In particular we invite you to review and provide feedback/submissions on the following:

1. **Rationale for establishing the guidelines.** Do you consider the rationale for the guidelines to be clear?
2. **Accessibility of the proposed guidelines.** Are the guidelines easy to read and understand?
3. **The content of the guidelines.** Do you agree with the content and scope of the guidelines? Do you think the guidelines cover the right factors? Do you think any factors should be added or removed?

Feedback or submissions can be made through [the REA website](#). Any feedback or submission received will be treated as confidential, shared only within REA. An aggregated summary of key feedback themes will be made available publicly.

## The draft guidelines

The draft guidelines are set out below. The draft guidelines first explain why a 'fit and proper' person standard and a 'proper' person standard are necessary. They then set out the principles that guide these assessments and the factors relevant to the assessments.

### **Guidelines to determine whether an applicant is a 'fit and proper' person and a 'proper' person**

This document aims to provide guidance for determining whether an applicant for a real estate licence is a 'fit and proper' person and/or a 'proper' person, under the Real Estate Agents Act 2008 (the "**Guidelines**"). The Guidelines apply to new applicants and existing licensees on renewal.

These Guidelines are intended to increase certainty and transparency within the profession of the high standard expected. These guidelines also provide the public with assurance that there is a robust assessment process and that protections are in place to ensure there is a high standard in the profession.

This document is issued by the Registrar of the Real Estate Authority who is authorised under the Real Estate Agents Act 2008 to determine whether a person is fit and proper to hold a licence.

The purpose of the Real Estate Agents Authority Act 2008 (**Act**) is to promote and protect the interests of consumers buying and selling real estate and to promote public confidence in the performance of real estate agency work.

Section 36 of the Act sets out the eligibility for holding a licence and the Registrar is authorised to make this decision. Under section 36 applicants for a salesperson's licence, agent's licence or branch manager's licence are required to be 'fit and proper' to hold a licence. In addition, a company may be licensed as an agent if at least one officer of the company satisfies the Registrar that they are 'fit and proper'. Any person who will be an officer of the company must also be, because of his or her personal character or financial position, a 'proper person' to be an officer of a licensee company.

Section 37 of the Act provides a list of reasons why an applicant is ineligible to hold a licence but 'fit and proper' and 'proper' are not defined in the Act. In light of this, these Guidelines outline below the principles and factors that will be considered and which will guide the Registrar's assessment of whether an applicant is 'fit and proper' and 'proper'.

### **Guiding Principles**

1. The purpose of the 'fit and proper' person evaluation is to ensure that real estate licensees can be entrusted to meet the duties and obligations imposed on them in the Act and Code of Conduct.
2. When determining whether an applicant is fit and proper, the Registrar must have regard to the purposes of the Act. Put simply, these are to protect consumers and promote public confidence in real estate licensees.

3. The Registrar must also have regard to the real estate licensee's role which includes:
  - a. a close relationship with clients involving a considerable degree of trust and confidence;
  - b. a close relationship with clients and members of the public in which a real estate licensee must act respectfully and in a way that protects the public;
  - c. the sharing and maintenance of confidential information;
  - d. the need to avoid conflicts of interest; and
  - e. the handling of often significant amounts of client funds.
4. The concept of the 'fit and proper' person involves considering whether an applicant is a person of good character.
5. A person is likely to be of 'good character' if they can demonstrate the following:
  - a. trustworthiness, integrity and honesty;
  - b. the ability to comply with professional responsibilities and legal obligations;
  - c. the ability to uphold the public and professional reputation of licensed real estate professionals;
  - d. the ability to conduct themselves in a manner that does not pose a risk to public safety;
  - e. the ability to treat others with respect and courtesy; and
  - f. other matters relevant to the specific applicant.
6. The 'fit and proper' evaluation is a forward-looking exercise. The Registrar must assess the risk to the profession and future misconduct at the time of the application. The evaluation is therefore a protective one. Punishment for past conduct has no place in the evaluation.
7. The evaluation is objective. The focus is on the relevance of the past conduct in relation to professional standards, rather than being influenced by any feelings of sympathy for the applicant's position.
8. When assessing the effect of prior convictions, the inquiry is fact-specific. The Registrar must make a judgement as to the applicant's present ability to meet his or her duties and obligations as a real estate licensee. Three aspects of previous convictions are relevant - the nature of the offence, the time that has elapsed since the offending, and the applicant's age when the offence was committed.
  - a. Some convictions are inherently problematic; namely dishonesty offences, offences involving actual or attempted physical or sexual violence, very serious offences, and failing to comply with disclosure obligations.
  - b. The Registrar must determine whether the previous conviction(s) remains relevant to whether the applicant meets the 'fit and proper' standard. This will involve considering the circumstances

of the offending and any evidence of rehabilitation or reform. The Registrar will consider employment or other activities undertaken since the offending, and where there has been imprisonment, since release.

9. The 'fit and proper' person standard is a high one because of the potential risk to the public and the public confidence in the profession. However, perfection is not required, and the Registrar must not lightly deprive someone who is otherwise qualified of the opportunity to be a real estate licensee.
10. An applicant for an agent or branch manager's licence will be held to a higher standard than an applicant for a salesperson's licence given an agent and branch manager involve supervising employees and greater responsibility in running the business.
11. The burden is on the applicant to show that he or she is a fit and proper person. However, if concerning conduct has occurred after a real estate licensee was licensed, the onus is heavier than on a new applicant.
12. Any person who will be an officer of the company must also be, having regard to his or her personal character or financial position, a 'proper' person to be an officer of a licensee company. The 'fit and proper' person test for licensees is different to the 'proper' person test for officers. However, there will be some overlap in the criteria considered.

### **Factors relevant to the 'fit and proper' person evaluation for salesperson, agent and branch manager licence applications**

If a person is not disqualified from holding a licence under section 37 of the Act, for the purposes of determining whether or not a person is a fit and proper person to hold a licence the Registrar may take into account any factors he or she considers relevant.

When considering the application, the Registrar will follow the principles of natural justice when disclosure of unproven allegations (such as the fact that criminal charges have been laid, or a warning received) is required. This will include applicants having an opportunity to present arguments as to why any disclosed allegation should not preclude licensing (including because it is denied), and the Registrar keeping an open mind until an applicant has had a fair chance to comment.

Factors that may be relevant to the 'fit and proper' person evaluation and which may be taken into account by the Registrar are set out below. It is important to remember that these factors do not form an exhaustive list and there may be other reasons why an applicant is not a fit and proper person to hold a licence.

1. Whether the application is for a salesperson, branch manager, or agent's licence;
2. Whether the person is of good character;
3. Whether the person satisfies the Registrar that he or she can communicate effectively for the purposes of practising as a real estate licensee;

4. Whether the person satisfies the Registrar that his or her ability to communicate is sufficient to protect the public and service the community he or she is operating in;
5. Whether the person satisfies the Registrar that he or she can treat others with respect and courtesy;
6. Whether the person has been convicted of an offence in New Zealand or another country; and, if so,—
  - a. the nature of the offence; and
  - b. the time that has elapsed since the offence was committed; and
  - c. the person's age when the offence was committed;
7. Whether the person –
  - a. is the subject of criminal proceedings in New Zealand or another country, and the Registrar believes on reasonable grounds that those proceedings reflect adversely on his or her fitness to practise as a real estate licensee;
  - b. is the subject of professional disciplinary proceedings in New Zealand or another country, and the Registrar believes on reasonable grounds that those proceedings reflect adversely on his or her fitness to practise as a real estate licensee;
  - c. is subject to a complaint, or is under investigation, in New Zealand or another country, in respect of any matter that may be the subject of professional disciplinary proceedings, and the Registrar believes on reasonable grounds that that investigation reflects adversely on his or her fitness to practise as a real estate licensee;
  - d. is the subject of a complaint, inquiry or investigation undertaken by a training or education entity in New Zealand or another country, and the Registrar believes on reasonable grounds that those proceedings reflect adversely on his or her fitness to practise as a real estate licensee;
  - e. is the subject of a complaint, inquiry or investigation undertaken by another regulatory body in New Zealand or another country, and the Registrar believes on reasonable grounds that those proceedings reflect adversely on his or her fitness to practise as a real estate licensee.
8. Whether the person -
  - a. is subject to an order of a professional disciplinary tribunal (whether in New Zealand or another country) or an order of an authority or of a similar body in another country; and
  - b. the order may reflect adversely on the person's fitness to practice;
9. Whether, because of a mental or physical condition, the person is unable to perform the functions required to be a real estate licensee;
10. Whether the person has, at any time, been declared bankrupt or been a

- director of a company that has been put into receivership or liquidation;
11. Whether the person has been prohibited from acting as a director, promotor, or senior manager of a company in New Zealand or another country;
  12. Whether the person has been the director or senior manager of a body corporate that has been convicted of a criminal offence, or subject to civil penalties, or subject to (successful) regulatory enforcement action, or has received a caution or warning in respect of any such matters in New Zealand or another country;
  13. Whether the person has contravened, in New Zealand or another country, a law about trust money or a trust account;
  14. Whether the person has engaged in real estate agency work in New Zealand or another country when not permitted to do so under this Act or a corresponding law, or while not holding an appropriate New Zealand licence, as required by law;
  15. Whether the person's right of practice as a real estate licensee has been cancelled or suspended in New Zealand or another country;
  16. The extent to which any of the principles (outlined above) are engaged;
  17. The extent to which there is a present risk that the person will not meet the duties and obligations of a real estate licensee; and
  18. Any other factors which may detract from the applicant's ability to perform the real estate licensee role.

### **Factors relevant to the 'proper' person evaluation for proposed officers in a company licence application**

As mentioned above, the 'fit and proper' person test for licensees is different from the 'proper' person test for officers. The officer test requires that, in respect of a company licence, all persons who will be an officer of the company must also be, because of his or her personal character or financial position, a 'proper' person to be an officer of a licensee company.

Although the matters set out in 1-18 above will remain relevant, the weight to be given to the individual factors will be a matter for determination having regard to the different statutory test. In particular, the criteria relating to the applicant's financial position, honesty, trustworthiness and integrity are likely to be given significant weight. The Real Estate Agents Disciplinary Tribunal has outlined this in the following way:<sup>3</sup>

There may be concerns about an individual's background or behaviour that would not warrant preventing him or her from holding the licence as an individual agent, but would mean that it would not be suitable for the person to be a director of a licensed real estate company. It may be that the person's past behaviour reflecting on their honesty or character may have been such that he or she should not be permitted to trade with the protection from personal liability offered by the corporate structure. Any

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<sup>3</sup> *Gollins Commercial Ltd v Registrar of the Real Estate Agents Authority* [2016] NZREADT 16 at [34].

tendency to dishonesty or other forms of misconduct may be better checked if the person knows he or she has to act in their own name and with unlimited personal capacity.

### **Change in circumstances**

It is important that licensees notify the Registrar of any change in circumstances because the Registrar will consider changes in circumstances as part of a licence application. Any change in circumstances that may result in a person no longer being a 'fit and proper' to be licensed as an agent, branch manager or salesperson, or change in circumstances of any officer of a licensed company that may result in that officer, no longer being a 'proper' person to be an officer of a licensee company is considered a change of circumstances.

This requires the person to disclose the change to the Registrar within 10 working days of the change. It is an offence not to notify of a change of circumstances.

## **Have your say | Me whai wāhi koe**

The consultation period commences on 16 May 2022 and will close at 5 pm on 15 June 2022.

If you would like to provide written feedback or submissions on the proposed guidelines, please do so via [the REA website](#). Hard copies of submissions can be sent to:

Real Estate Authority  
PO Box 25 371,  
Customhouse Quay,  
Wellington 6140.

Hard copy submissions must be received by REA by the closing date.

If you need assistance to have your say, please contact the REA team on 0800 367 732.

***Ngā mihi maioha ki a koutou***

***Thank you very much***