

Report on findings from a consultation on Fit and Proper Guidelines

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Confidence in real estate professionals – maintaining high standards of conduct

People rely on the good character of real estate professionals when making significant financial decisions and commitments as part of the real estate transaction process. Good character is determined by assessing whether a person is 'fit and proper'.

Ensuring that individuals granted a licence meet the 'fit and proper' requirements of the licensing regime administered by the Registrar of the Real Estate Authority (REA) | Te Mana Papawhenua is one of the fundamental principles underpinning the high standards of conduct required of licensed real estate professionals.

For people to have confidence that real estate professionals are fit and proper it is important that people understand and trust the regulatory framework the Real Estate Authority uses to assess the character of those professionals. These principles underpin the licensing regime that REA oversees and the importance of the guidelines that REA has prepared and consulted on.

Public and industry input into draft guidelines

The Registrar of the Real Estate Authority grants licences to New Zealand's real estate professionals. In granting a license the Registrar must be satisfied that the applicant meets the requirements for a license set in the Real Estate Agents Act 2008. One of the requirements is that the applicant must be a fit and proper person.

From May to June 2022 REA consulted on draft guidelines that will be used by the Registrar to determine whether someone is 'fit and proper' and a 'proper' person, under the Real Estate Agents Act 2008 licensing regime.

The month-long public consultation by REA on draft 'fit and proper' guidelines were designed to:

- provide greater transparency about how this aspect of the real estate licensing regime operates
- help clarify specific factors, concerns and considerations related to being a 'fit and proper' person in real estate
- increase understanding and certainty for real estate licence applicants, existing licensees, and decision-makers about the criteria for 'fit and proper' conduct and character
- assist applicants and decision-makers in assessing 'fit and proper'
- increase public confidence in licensing decisions
- ensure the guidelines are clear, understandable, and practical
- build on decisions by the Courts and Tribunals on licensing relating to people in the real estate and other professions.

All real estate professionals must be licensed

Under the Real Estate Agents Act 2008 (Act), all real estate salespersons, branch managers and agents are required to be licensed. The Act sets out the requirements that the individual must meet, which includes the requirement to be a 'fit and proper' person.¹

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,² 'fit and proper' and 'proper' are not defined in the Act.

Assessing fitness to hold a real estate licence

Following recent High Court and Tribunal decisions on whether a person is 'fit and proper' to hold a real estate licence, REA and the Registrar have recognised that there may be a gap between public expectation as to what constitutes fitness to hold a real estate licence and what the courts may accept as 'fit and proper' to hold a licence.

To aid the understanding of how the fit and proper requirement applies, the Registrar prepared draft guidelines setting out factors that are considered when undertaking the 'fit and proper' assessment. The draft guidelines build on REA's current practice. The draft guidelines are not a prescriptive list and are intended to be applied flexibly. They are intended to assist the Registrar's licensing decisions, whilst providing clarity, consistency and transparency for the profession and the public.

The draft guidelines, as proposed, were intended to be a single source of relevant information about factors and legal principles that will be drawn on when an application for a licence is assessed. All applications considered by the Registrar are decided on a case-by-case basis in accordance with principles of natural justice and due process, factors that may not be listed in the guidelines can be considered by the Registrar where they are relevant to the assessment of whether someone is fit and proper.

¹ Section 36 of the Act.

² Section 37 of the Act.

Consultation process

In May 2022 REA produced draft guidelines which are designed to:

- provide clarity, consistency and transparency for the profession and the public on the approach the Registrar takes in assessing whether an applicant is fit and proper
- 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.

REA consulted on the draft guidelines with the objective of providing an opportunity for the sector and the public to contribute to the content and quality of the guidelines.

On 16 May 2022 REA opened a public consultation on REA's guidelines for submissions and feedback until 15 June 2022. The consultation was carried out solely by REA with key stakeholders identified for targeted communication.

In the consultation process we invited submitters to review and provide feedback/submissions on the following:

- **Rationale for establishing the guidelines:** Did the submitters consider the rationale for the guidelines to be clear?
- **Accessibility of the proposed guidelines:** Are the guidelines easy to read and understand?
- **The content of the guidelines:** Did submitters agree with the content and scope of the guidelines? Did submitters think the guidelines cover the right factors? Did submitters think any factors should be added or removed?

Proposed guidelines well received

REA received 59 submissions on the draft guidelines. Most submissions were from individual licensees, with one from a member of the public. Five submitters represented organisations: Real Estate Institute of New Zealand (REINZ), Consumer NZ, Building Officials Institute of NZ, Open Polytechnic, and Skills.

Most feedback was positive. Two suggestions for change have been accepted. First, amending the language to be gender-neutral and secondly amending a description of a factor that could be taken into account by the Registrar when considering if a person could perform real estate licensee functions or requirements. The factor now reads as

– *"Whether, because of any condition disclosed, the person is unable to perform the functions or meet the regulatory requirements required to be a real estate licensee."*

Other feedback on the draft guidelines related to explicitly giving greater weight to certain factors over others and proposing that the Registrar take a more punitive approach in assessing applications for a licence such as where the applicant had previous convictions or adverse findings in other disciplinary processes.

This feedback has not been adopted because the guidelines aim for licence applications to be assessed and considered as a whole, taking into account all relevant factors, through a balancing exercise with applicants having the opportunity to respond to questions and put forward their views to the Registrar as part of the assessment process. The guidelines reflect this principle, and so no further change was required.

Summary of submissions

Overall, most submissions supported the Registrar preparing and applying 'fit and proper' guidelines.

No significant factor or principle was identified as missing from the guidelines that could have a material impact on the effectiveness of the guidelines, as follows:

Rationale for establishing the guidelines: *Did the submitters consider the rationale for the guidelines to be clear?*

Fifty-five (55) responses to this question were positive with two stating they were to a degree clear and two disagreeing that the rationale for the need for the guidelines was clear.

Accessibility of the proposed guidelines: *Are the guidelines easy to read and understand?*

On whether the guidelines were easy to understand, REA received a similar response to the rationale question. Five submitters did not find the guidelines easy to read and understand. One of the submitters responded that the document was drafted by and for lawyers, and thought the guidelines were too general and should be more specific.

The content of the guidelines: *Did submitters agree with the content and scope of the guidelines? Did submitters think the guidelines cover the right factors? Did submitters think any factors should be added or removed?*

The responses to this question were slightly more mixed than the previous two, although 10 of the responders submitted additional factors or suggested changes to the guidelines. Set out below is an outline of the key themes raised in that feedback with REA's response to the feedback and records whether any changes, will be made to the guidelines.

FEEDBACK	RESPONSES	ACTION / CHANGE
<p>1. Natural justice and transparency:</p> <p>Submitters raised concerns about whether applicants would have an opportunity to respond to concerns identified by the Registrar.</p> <p>Submitters also suggested extra detail so an applicant could have even more clarity of what will be considered.</p>	<p>The Registrar is committed to ensuring that decision-making accords with principles of natural justice.</p> <p>REA recognises the importance of natural justice and transparency in determining whether an applicant is 'fit and proper' to hold a licence.</p> <p>The guidelines are intended to assist applicants and those seeking to renew their licences.</p> <p>The guidelines will help people to better identify whether there are factors that ought to be disclosed as part of their application process.</p> <p>All applications are considered taking everything into account. The application process is not a simple checklist of criteria to be met, and applications are considered by the Registrar on a case-by-case basis.</p> <p>Determining whether a person is granted a real estate licence is a balanced assessment that weighs up all information provided.</p> <p>The application process provides an applicant or licensee the opportunity to respond to any points raised by the assessment.</p>	<p>No change to the guidelines is required.</p> <p>The guidelines as drafted currently explain that the principles of natural justice apply when assessing licence applications.</p>
<p>2. More inclusive approach (gender-neutral language and reference to physical condition possibly being a factor indicating not 'fit and proper')</p>	<p>REA is committed to carrying out our regulatory function in an inclusive and open manner. Recognising the importance of ensuring applicants and licensees do not feel excluded from our processes, REA has amended the guidelines to reflect gender-neutral language, based on feedback.</p> <p>Additionally, the guidelines have been amended to consider whether an applicant is unable to perform the functions and regulatory requirements of a real estate licensee, based on an assessment of any conditions disclosed.</p>	<p>Real estate licensing assessments are non-discriminatory.</p> <p>The guidelines have been amended to reflect feedback to have gender-neutral and non-discriminatory language</p>

FEEDBACK	RESPONSES	ACTION / CHANGE
<p>3. Guidelines too lenient- seek greater enforcement and punitive approach in the evaluation of 'fit and proper'.</p> <p>Submitters here felt that the Registrar should look at past behaviour as indications of fitness of character.</p> <p>Other submitters proposed that convictions, regardless of time lapsed and rehabilitation, should disqualify an applicant from being licensed.</p>	<p>Effective regulation and sound decision-making for regulatory regimes are based on robust, established legal principles. Generally, the legal principles are based on proportionality, due process, and recognising opportunities for rehabilitation.</p> <p>It is important to emphasise that an assessment as to whether a person is a 'fit and proper' person to hold a licence is not intended to be a further punitive measure.</p> <p>REA recognises that people may consider any prior conviction renders an applicant unfit. However, assessments are balanced decisions considering the applicant as a whole person and not limited to certain aspects of their past.</p> <p>In particular, REA does not seek to further punish people for conduct that has already been the subject of a separate process, unless the person continues to present a risk. The nature and extent of any remaining risk will be considered in the assessment</p> <p>Licensing assessments are a balancing exercise. They take a forward-looking approach.</p> <p>Applicants have an opportunity to demonstrate they do not pose a current risk of acting contrary to the expectations of real estate professionals, and/or that they have been rehabilitated.</p>	<p>No change to the guidelines is required.</p> <p>The Registrar's approach under the guidelines is not to punish applicants unduly for their past mistakes unless ongoing risks that cannot be mitigated exist.</p>
<p>4. Confusion between 'fit and proper' assessment and complaint and disciplinary framework.</p> <p>Submitters highlighted their concerns with licensees' behaviour in carrying out real estate agency work.</p>	<p>Assessing whether a person is 'fit and proper' to hold a licence is different to REA's complaint and disciplinary regime.</p> <p>While the complaints and disciplinary framework can <i>inform</i> assessments of fitness, the 'fit and proper' guidelines are not intended to address any poor conduct that licensed real estate professionals may carry out. This is particularly the case when allegations remain unproven.</p>	<p>No change to the proposed guidelines is required</p>

FEEDBACK	RESPONSES	ACTION / CHANGE
<p>Responses referred to specific complaint issues rather than factors for assessing an applicant's fitness to hold a licence.</p> <p>It appeared that responses focused on specific conduct of licensed professionals rather than feedback on the evaluation process before a person is licensed.</p>	<p>The 'fit and proper' evaluation, and the complaint and disciplinary framework, are different processes.</p> <p>The 'fit and proper' guidelines are about a person's ability to be licensed within the profession. Concerns about conduct once someone is licensed is dealt with through the complaints and disciplinary process. The fact of a complaint, that has not been determined may not be sufficient to deny a license on renewal. If a license is to be cancelled or suspended that will be determined in the complaint process.</p> <p>REA is always looking to improve our processes, especially to ensure our regulatory function fulfils our legislative purposes.</p> <p>We welcome feedback and take it into consideration for the complaint and disciplinary arms of our regulatory framework.</p>	
<p>5. Opportunity to look at and/or emphasise other areas such as real estate qualifications to be widened to include areas such as climate change and natural hazards.</p> <p>The submitter here proposed that licensees could be required to broaden their knowledge so they were well-informed of issues that could arise in carrying out their real estate work. For instance, geographical/environmental issues and Te Tiriti o Waitangi.</p>	<p>A strong CPD programme is essential to supporting high standards of conduct and professionalism across the industry.</p> <p>REA regularly reviews and updates the suite of continuing professional development topics to ensure licensees' professional development is fit for purpose.</p> <p>Qualification and training requirements of the regulatory regime are outside the scope of this consultation but have been noted.</p>	<p>No change is required to the guidelines.</p>

FEEDBACK	RESPONSES	ACTION / CHANGE
<p>6. Give greater weight to certain factors such as plagiarism, cheating and bankruptcy.</p> <p>Some submitters considered certain factors as presenting more risk than others.</p>	<p>REA recognises that cheating, plagiarism, bankruptcy, or other similar factors can cast a shadow over an applicant’s fitness to hold a real estate licence. Examples of these factors are reflected in the guidelines.</p> <p>However, it is not intended to approach the guidelines as an exhaustive list of factors.</p> <p>All evaluations are carried out by the Registrar with an open mind, applying a case-by-case assessment taking into account all information provided and available to the Registrar at the time of making a decision.</p> <p>REA does not consider it appropriate to expressly emphasise some factors over others, nor to prescribe an exhaustive list, as the ‘fit and proper’ assessment is a principles-based evaluation.</p> <p>It is not intended to prescribe the weightings or that two or three factors would disqualify an applicant.</p> <p>REA considers this would be inconsistent with approaching applications on an open and principled basis consistent with the natural justice legal principles.</p> <p>The Registrar will look at all factors obtained and provided in an application process when determining a decision.</p> <p>This means that individual factors may not be enough to decline an applicant.</p> <p>The context of any issue identified will be considered through the application process.</p>	<p>No change to the guidelines is required.</p> <p>The guidelines are not prescriptive or exhaustive. Care is taken to avoid disproportionate weightings when considering and balancing assessments.</p>