
Real Estate

Continuing Professional Development

Agency agreements: Compliance requirements

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Estimated time needed: 1 hour 30 minutes

Version 2.0 Adapted for use on rea.govt.nz

05 August 2019

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Learning objectives

- Review the six principles of contract and how they apply to agency agreements
- Review of agency agreements
- Understanding the inclusion of material particulars into agency agreements
- Review of:
 - Entitlements to commission or expenses
 - Agency agreements must disclose rebates, discounts, and commissions
- Understanding Anti-money laundering requirements
 - Customer due diligence (CDD)
- Review how the Rules apply to agency agreements, including:
 - Appraisals
 - Commission payable
 - Advising about double commissions
 - Approved guide – residential property
 - Methods of sale and licensee benefits
- Review of standard clauses for residential agency agreements, including:
 - When an agency is entitled to a commission under the standard clauses
 - Impact of changes in the standard clauses and Rules 9.10 and 9.11
- Review important points relating to sole agency agreements
- Review cancellation criteria for an agency agreement

The six principles of contract and how they apply to agency agreements

Principle	Brief explanation of the meaning	Relevance in an agency relationship
Intent	The parties to the contract must have intended to enter into a legally binding relationship	The principal (client or lessor) must intend that the <i>agent</i> acts for them, and the <i>agent</i> must intend to carry out those activities
Offer and acceptance	One party makes an offer and the other party accepts it	To carry out agency work or to pay commission for the work carried out
Consideration	Both parties give up something of value - i.e. something of value changes hands	Work or payment
Capacity	The parties to the contract must have legal capacity They are in a position where they can legally enter into a contract (e.g. are old enough, of sound mind)	Client or lessor authorised authority signs Licensee (authorised authority of agent) signs
Legal purpose	The contract must be for a legal purpose because the law will not enforce an illegal act	Legal real estate transactions; licensee is licensed to carry out real estate work
Genuine consent	The parties entered into the contract under their own free will giving genuine informed consent - they were not tricked or forced into it	Conditions are reasonable and fully understood; there is no undue pressure or duress

Agency agreements

Types of agency

There are two types of agency: sole agency and general agency.

A **sole agency** gives one real estate agency the exclusive right to market and arrange the sale or lease (or purchase) of the property, space or business.

A **general agency** is not exclusive, and the client may also employ other real estate agencies, or market and arrange the sale or lease (or purchase) of the property, space or business privately. The client would need to sign an agency agreement with each different real estate agency.

Standard agency agreements

Licensees use standard agency agreements approved by their office. In turn, the agency agreements will often have been drafted:

- With assistance from legal advisors
- Based on Real Estate Institute NZ templates (REINZ)
- Following guidelines from the Real Estate Authority (REA)
- To comply with the statutory requirements under the Real Estate Agents Act 2008 (the Act)
- To comply with the client care obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules)

All material particulars must be included in an agency agreement before signing

Rule 9.9 of the Rules requires that all material particulars (relevant details and information) must be included in or attached (e.g. required forms, marketing plan, property description) to an agency agreement **before** the licensee submits the document to the client(s) for signing.

9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for a signature unless all material particulars have been inserted into or attached to the document.

This rule aims to ensure the integrity of the agency agreement and helps protect the interests of clients who may be inexperienced in dealing with contractual documents.

Who signs an agency agreement?

An agency agreement is between the real estate agent (the agency) and the client(s).

An agency agreement must be signed by **all** those parties or an 'authorised person' on each party's behalf.

Generally, the salesperson licensee will sign on behalf of the agent as the agent's 'authorised person'.

Generally, the client will sign the agency agreement themselves, unless they have nominated an 'authorised person', e.g. a person who has power of attorney. Where a client has nominated an 'authorised person' to sign an agency agreement on their behalf, a licensee will confirm this by taking a copy of a signed power of attorney or other similar document. Any such documentation should be attached to the associated agency agreement.

Where a property, space or business has more than one owner, **all** owners must sign the agency agreement; or the licensee must obtain clear evidence of authority (in writing) that one owner has authority to sign on behalf of the other owners, e.g. power of attorney.

Note: A power of attorney requires a Certificate of non-revocation; an enduring power of attorney requires a Certificate of non-revocation and non-suspension of the enduring power of attorney; a trustee requires a trust deed; a company director requires written authority to sign from Company Directors or company rules or a shareholder agreement; an executor of an estate requires a grant of probate.

Signatory capacity labels

The Auckland District Law Society (ADLS) Sale and purchase agreement Ninth Edition 2012 (8) is published with the inclusion of signatory capacity labels on the last page. These labels help identify authorised signatories and required verification documentation.

A number of agencies are now including signatory capacity labels in their agency agreement. The capacity labels are:

Director / Trustee / Authorised Signatory / Attorney

All licensees are required to ensure accurate deletion of those labels that **do not** apply.

Signature of Purchaser(s):	Signature of Vendor(s):
<p>Director / Trustee / Authorised Signatory / Attorney* <i>Delete the options that do not apply</i> <i>If no option is deleted, the signatory is signing in their personal capacity</i></p>	<p>Director / Trustee / Authorised Signatory / Attorney* <i>Delete the options that do not apply</i> <i>If no option is deleted, the signatory is signing in their personal capacity</i></p>

Identification and verification of clients

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML/CFT Act) sets out specific requirements on real estate agents (as a 'reporting entity' under the AML/CFT Act) to identify and verify the identity of clients entering into an agency agreement. Agencies must carry out the appropriate level of customer due diligence¹ as set out in the AML/CFT Act and in accordance with their agency's AML/CFT programme.

Relevant information includes:

- (a) the person's full name; and
- (b) the person's date of birth; and
- (c) if the person is not the customer, the person's relationship to the customer; and
- (d) the person's address or registered office; and
- (e) the person's company identifier or registration number

Agencies must ensure appropriate personal identification (e.g. driver's license, passport, proof of address – such as a utility bill) is provided by those parties signing the agency agreement (clients or lessors) and carry out verification of the identification as required by the AML/CFT Act. Refer to page 14 for further information on AML/CFT requirements.



Note

Remember: the AML/CFT Act refers to 'customers'. For real estate agency work purposes, your clients who you enter into agency agreements with are 'customers'.

¹ Standard customer due diligence (refer ss 14 to 17 of the AML/CFT Act)
Simplified customer due diligence (refer ss 18 to 21 of the AML/CFT Act)
Enhanced customer due diligence (refer ss 22 to 26 of the AML/CFT Act)

No entitlement to commission or expenses without an agency agreement

Under Section 126 an agent is not entitled to any commission or expenses unless a written and signed agency agreement is in place.

Section 126(2) states that a copy of the signed agreement must be given to the client or lessor within 48 hours of signing unless there are reasons outside the agent's control that prevent this.

126 No entitlement to commission or expenses without an agency agreement

(1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—

(a) the work is performed under a written agency agreement signed by or on behalf of—

- (i) the client; and
- (ii) the agent; and

(b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and

(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.

(2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.

(3) A court may not make an order described in subsection (2) unless satisfied that—

- (a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
- (b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
- (c) failure to make the order would be unjust.

(4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2019.

Agency agreement must disclose rebates, discounts, and commissions

Non-disclosure of rebates, discounts, and commissions arising from expenses by an agent to their client or lessor, may result in the agent not being able to receive payment for those expenses. Non-compliance is also a general offence under the Act (refer section 128).

Rebates and discounts may include, for example:

- Discounts received on marketing expenses, such as advertising, incurred on behalf of the client or lessor.

128 Agency agreement must disclose rebates, discounts, and commissions

(1) An agent is not entitled to any expenses from a client for or in connection with any real estate agency work carried out by the agent for the client in connection with a transaction unless the agency agreement under which the agent performs that work contains a statement that—

- (a) identifies the source of all rebates, discounts, or commissions that the agent will or is eligible to receive in respect of those expenses; and
- (b) specifies the estimated amount of those rebates, discounts, or commissions (to the extent that the amount can reasonably be estimated).

(2) This section does not limit the liability of any person under the Secret Commissions Act 1910.

Form 1 – Agent’s statement relating to rebates, discounts, and commissions

Form 1 - *Agent's statement relating to rebates, discounts, and commissions* (from the Real Estate Agents (Duties of Licensees) Regulations 2009 and reproduced below) MUST be completed and included in every agency agreement.

Form 1

Agent's statement relating to rebates, discounts, and commissions

Section 128, Real Estate Agents Act 2008

Note: This form must be included in every agency agreement.

1 I, the agent, confirm that, in relation to any expenses for or in connection with any real estate agency work carried out by me for the client(s) in connection with the transaction covered by this agency agreement,—

**(a)* I will not receive, and am not entitled to receive, any rebates, discounts, or commissions.

**(b)* I will receive, or am entitled to receive, the rebates, discounts, and commissions specified below.

*Select the paragraph that applies.

2 *Omit this paragraph if you selected paragraph 1(a) above. If you selected paragraph 1(b) above, provide the specified details for each rebate, discount, or commission.*

Expenses to be incurred	Provider of rebate, discount, or commission	Amount of rebate, discount, or commission
<i>[specify goods or services to which rebate, discount, or commission relates]</i>	<i>[specify name of person or organisation]</i>	<i>[\$[specify actual or estimated amount* (including GST)]</i>

*Estimates must be clearly marked as such.

Date:

Signature:

(agent)



Note

Note: *Expenses* means any sum or reimbursement for expenses or charges incurred in connection with services provided by an agent in the capacity of an agent.

Source:

<http://www.legislation.govt.nz/regulation/public/2009/0281/latest/DLM2372545.html>

A copy of Form 1 can also be found on the REA website link below:

<https://www.rea.govt.nz/assets/Uploads/Resources/Forms/Licensing-forms/Form-1-Agents-statement-relating-to-rebates-etc.pdf>

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 (the AML/CFT Act) – customer due diligence

Amendments to the AML/CFT Act 2009 broadened the scope of application to include real estate agents as designated 'reporting entities', effective 1 January 2019.

A key aspect of the AML/CFT Act is the requirement for all reporting entities to undertake **customer due diligence (CDD)** (refer Appendix 2) in compliance with their risk assessment and associated AML/CFT programme.

For real estate agents:

The **customer** (as referred to in the AML/CFT Act 2009)

IS

The **client** (as referred to in the Real Estate Agents Act 2008)

Section 11 (1) & (2) of the AML/CFT Act sets out the obligations and requirements for reporting entities to conduct customer due diligence on:

- A customer e.g. vendor or lessor
- Any beneficial owner* of a customer e.g. 'or nominee'; beneficiaries; company director
- Any person acting on behalf of a customer e.g. 'power of attorney'

11 Customer due diligence

(1) A reporting entity must conduct customer due diligence on—

- (a) a customer:
- (b) any beneficial owner of a customer:
- (c) any person acting on behalf of a customer.

(2) For the purposes of subsection (1)(b), a customer who is an individual and who the reporting entity believes on reasonable grounds is not acting on behalf of another person is to be treated as if he or she were also the beneficial owner unless the reporting entity has reasonable grounds to suspect that that customer is not the beneficial owner.

(3) The type of customer due diligence that must be conducted by a reporting entity is, -

- (a) in the circumstances described in section 14, at least standard customer due diligence
- (b) in the circumstances described in section 18, at least simplified customer due diligence
- (c) in the circumstances described in section 22, enhanced customer due diligence

(4) A reporting entity that is required to conduct customer due diligence in circumstances described in sections 14, 18, and 22 is not required to obtain or verify any documents, data, or information that it has previously obtained and verified for the purposes of carrying out customer due diligence in accordance with this Act, unless there are

reasonable grounds for the reporting entity to doubt the adequacy or veracity of the documents, data, or information previously obtained.

(5) Nothing in subsection (4) affects the obligation to conduct ongoing customer due diligence in accordance with section 31...

Customer due diligence must be completed prior to entering into an agency agreement for all new clients.

Customer due diligence (CDD) must be carried out in accordance with each reporting entity risk assessment and associated AML/CFT programme.

Section 11 (3) of the AML/CFT Act sets out the level of customer due diligence required to be conducted, based on prescribed circumstances (refer Appendix 2 – ss 11 to 25). These are:

- Standard customer due diligence (refer section 14)
- Simplified customer due diligence (refer section 18)
- Enhanced customer due diligence (refer section 22)

Standard customer due diligence - summary

Standard CDD will apply in most situations for real estate agency work.

Requirements:

Identity – full name, date of birth, and, if not the customer – their relationship to the customer, their address or registered office, company identifier or registration number.

Verification – the reporting entity must take reasonable steps to satisfy itself that the information obtained is correct; check the identification information is correct, including 'beneficial owner' if applicable (e.g. passport to verify name and date of birth; utility bill to verify address; check company registrar's office to verify company details and director(s) names). Verification must be carried out before the business relationship is established or the occasional transaction or activity is conducted.

Additional information – nature and purpose of business relationship of the customer; decide if 'enhanced customer due diligence' is required.

Simplified customer due diligence - summary

Simplified CDD is applicable where the client is considered low risk according to AML/CFT and are specified in section 18(2), e.g. publicly listed companies, government departments.

Requirements:

Identity – full name, date of birth, their relationship to the customer, anything further required under the regulations.

Verification – check the identity information is correct (e.g. passport to verify name and date of birth; utility bill to verify address; check company registrar's office to verify company details and director(s) names); verification must be carried out before the business relationship is established or the occasional transaction or activity is conducted.

Additional information – nature and purpose of business relationship of the customer.

Enhanced customer due diligence - summary

Enhanced CDD is to be carried out where there are factors which expose the reporting entity to greater AML/CFT risk e.g. trusts, companies.

Enhanced customer due diligence (refer section 22 – Appendix 2) applies if:

the reporting entity establishes a business relationship with a customer, and if a customer seeks to conduct an occasional transaction or activity through the reporting entity and that customer is:

- a trust or another vehicle for holding personal assets
- a non-resident from a country that has insufficient anti-money laundering and countering financing of terrorism systems or measures in place
- a company with nominee shareholders or shares in bearer form

Requirements:

Identity – full name, date of birth, if not the customer – their relationship to the customer, their address or registered office, company identifier or registration number, and information relating to the source of funds; or wealth of the customer

- if a trust, the name and date of birth of each beneficiary of the trust
- if a discretionary trust or charitable trust or a trust with more than 10 beneficiaries, a description of
 - each class or type of beneficiary
 - if a charitable trust, the objects of the trust

Verification – the reporting entity must take reasonable steps to satisfy itself that the information obtained is correct; check the identification information is correct, including 'beneficial owner' if applicable (e.g. passport to verify name and date of birth; utility bill to verify address; check company registrar's office to verify company details and director(s) names); verification must be carried out before the business relationship is established or the occasional transaction or activity is conducted.

Additional information – nature and purpose of business relationship between the customer and the reporting entity.

Timing of due diligence

Regulation 24A (of the AML/CFT (Definition) Regulations 2011) covers the timing of due diligence and states:

For the purpose of sections 14(3), 18(3A), and 22(6) of the Act, a real estate agent must conduct customer due diligence before the real estate agent enters into an agency agreement (within the meaning of section 4(1) of the Real Estate Agents Act 2008) with a customer.

It is clear from section 24A that due diligence **must** be completed before an agency agreement is entered into. This includes the requirement to carry out verification. Any delay should be rare and be clearly substantiated (fact-based), justifiable and accurately recorded.



Note

CDD conducted after the client has signed the agency agreement, but prior to the real estate agent signing the agency agreement is likely to comply with Regulation 24A. Licensees are also reminded of compliance requirements with Rule 9.10.

Existing client

An existing client is defined as 'a person who was in a business relationship with a reporting entity immediately before the Act began to apply'. A reporting entity is not required to complete a CDD on an existing client unless there has been a 'material change in the nature or purpose of the business relationship with that client'. This includes any event, activity or situation that may have a negative impact on the level of AML/CFT risk the reporting entity may be exposed to.



Note

Section 11(4) states that once you have undertaken CDD in accordance with the AML/CFT Act, you are NOT required to carry out another CDD (obtain or verify documents, data, or information previously obtained) unless there are reasonable grounds to doubt the adequacy or veracity.

This means a licensee will not be required to undertake another CDD on a 'repeat' customer unless you have reasons to believe there has been a material change to the customer and potential exposure to greater AML/CFT risk.



Note

Further details of AML/CFT requirements are included in the following Continuing Professional Development topic: Anti-money laundering: your compliance requirements.

Agency agreements and the Rules

The Rules set out requirements of a licensee when entering into an agency agreement with a prospective client/client. We have referred to rule 9.9 (above) that states:

9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted or attached to the document.

Appraisals

Licensees must provide a written appraisal for ALL property (residential, rural, lifestyle, horticultural or specialised unit, business, commercial or industrial) regardless of whether the property is to be advertised with or without a price.

The appraisal must be provided to the client prior to signing an agency agreement.

The appraisal provides the prospective client with information to help them understand what they might be able to sell or lease the property, space, or business for.

The appraisal must comply with rule 10.2 which states:

10.2 An appraisal of land or a business must—

- (a) be provided in writing to a client by a licensee; and
- (b) realistically reflect current market conditions; and
- (c) be supported by comparable information on sales of similar land in similar locations or businesses.

The appraisal must be rigorous and factual. It needs to do more than simply show comparable sales; it must show why the properties have been selected and how that information translates into the appraised price (e.g. include a 'linking statement' which explains the correlation between the comparable sales and the subject property). The appraisal must include factual sales data and relevant market information, and licensees must seek to avoid the risk of over-representing or under-representing the potential value of land or a business.

Lack of directly comparable data

Rule 10.3 provides for situations where a licensee is unable to obtain 'directly comparable or semi-comparable sales data' in order to satisfactorily complete an appraisal of the subject property.

10.3 Where no directly comparable or semi-comparable sales data exists, a licensee must explain this, in writing, to a client.

Where no directly comparable or semi-comparable sales data exists, a licensee must still provide a written appraisal. The licensee must explain to the client in writing that no directly comparable or semi-comparable sales data exists, and detail how the sales data available is either 'superior' or 'inferior' to the subject property and include any relevant information that would help the prospective client understand the data more fully, e.g. changes in market conditions since the sales data.

Commission payable

The appraisal forms the basis for providing the prospective client with written notification of commission payable by the client upon the successful completion of the transaction. This is required prior to a client signing an agency agreement and is based on the appraised value of the subject property as set out in the written appraisal as set out in rule 10.6.

10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing—

- (a) the conditions under which commission must be paid and how the commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2;
- (b) when the agency agreement ends;
- (c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur;
- (d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c);
- (e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

This rule ensures that the licensee explains to the client how the commission has been calculated and includes an **actual \$ amount** (inclusive of GST) of commission payable, based on the appraised price of the land or business.

Marketing and advertising

Rule 10.6 also requires the licensee to provide the client with information about how the property will be marketed and advertised, and including any additional expenses for marketing or advertising. The licensee must also explain to the client that they are not obliged to agree to the additional expenses for marketing or advertising.

Legal advice

A licensee must recommend that a prospective client/client seek legal advice prior to signing an agency agreement, as stated in rule 9.7.

- 9.7** Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—
- (a) recommend that the person seek legal advice; and
 - (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
 - (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

Advising about double commissions

Before an agency agreement is signed, the licensee must advise and explain to the client or lessor the circumstances in which the client or lessor could be liable to pay full commission to more than one agent in the event a transaction is concluded, as set out in rule 9.10.

- 9.10** A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

When an agency agreement is cancelled the licensee must give the client or lessor a list of customers who, if the client sells to, may entitle that agency to a commission.

This obligation is specified in Rule 9.11 as follows:

- 9.11** On cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

Methods of sale and licensee benefits

As covered in previous Continuing Professional Development topics, licensees must ensure clients or vendors are made aware of the various possible methods of sale available to them, and how the chosen method could impact on the individual benefits that the licensee may receive.

Because clients or lessors rely on the advice of licensees, it is important that clients or lessors are able to evaluate the information they are given and understand how the licensee will benefit from the decisions they make about the property transaction, e.g. a higher share of the commission received in an auction sale.

This is clarified in Rule 10.5 as follows:

10.5 Before a prospective client signs an agency agreement, the licensee must explain to the prospective client how choices that the prospective client may make about how to sell or otherwise dispose of his or her land or business could impact on the individual benefits that the licensee may receive.

Approved guide – residential property

Section 127 of the Real Estate Agents Act 2008 requires a licensee to provide a client with an approved guide **before** signing an agency agreement for residential property and to obtain signed acknowledgement from the client that they have been given the approved guide.

127 Approved guide to be provided before agency agreement for residential property signed

(1) An agent must not enter into an agency agreement with a person for the sale of residential property unless the agent or a licensee on the agent's behalf—

- (a) has provided the person with a copy of the approved guide before the agreement is signed by or on behalf of the person; and
- (b) has received a signed acknowledgement from the person that the person has been given the approved guide.

(2) In this section—

approved guide means a guide that—

- (a) is about the sale of residential property;
- (b) has been approved by the Authority for the purposes of this section

residential property does not include any property that—

- (a) has been developed with other properties in a continuous area; and
- (b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.

(3) A contravention of this section does not affect the validity of the agency agreement.

Read the following scenario and consider if the licensee has breached the Rules (refer Appendix 1), or section 127 of the Act (refer to page 24 above).

Scenario 1

A Complaints Assessment Committee laid a charge of misconduct before the Real Estate Agents Disciplinary Tribunal.

It was noted that the Licensee had previously been charged with misconduct or unsatisfactory conduct on eight occasions since 2011 (including the three cases currently before the READT).

Present Case: The Licensee was charged over three complaints in 2015 (C07072, C06292 [under appeal], and C07275) in respect of CAC cases in relation to residential property and subsequent charges of unsatisfactory conduct for breaches made between August 2014 – April 2015.

The Licensee denied all particulars of the charge.

It was noted that all three charges were highly similar to each other, involving:

- Failure to provide written appraisals
- Failure to provide the REAA Guides (refer section 127 of the Act - Approved guide to be provided before agency agreement for residential property signed)
- Failure to provide written marketing plans
- Failure to ensure essential particulars were included in listing [agency] agreements

Evidence from the Licensee – at the time of the hearing, the licensee held an agent's licence but during the period of offending, he held a salesperson's licence. He stated that during a period of his offending over five years he had "*no effective supervision and support*" whilst being "*frantically busy*". He asserted this was the root cause of his breaches. He was selling a large number of properties and was earning "*over a million dollars a year*".

Complaint: [2016] NZREADT 72 – Penalty Decision

<http://www.nzlii.org/nz/cases/NZREADT/2016/72.html>

Note the comments included in the decision:

- [Para 20] ‘...referred to [the Licensee’s] previous disciplinary history...in respect of conduct that is similar to his conduct in the present case...directly relevant to the Tribunal’s penalty decision in this case, and are a highly aggravating factor... [the licensee] failed to learn from his previous disciplinary sanctions, and had persevered with the same cavalier approach towards his clients and customers...’
- [para 21] ‘...the [Committee] submitted that when [the Licensee’s] present conduct is viewed in the context of his previous disciplinary history, nothing less than the cancellation of [the Licensee’s] licence would adequately protect the public...his continued breaches show he lacks insight into his conduct and is unable or unwilling to comply with the duties and obligations required of licensees...’
- [Para 27] ‘... do not accept that any lack of supervision, management oversight, or systems within an agency ameliorates [the Licensee’s] conduct to any great extent...’
- [Para 31] ‘...the number of charges [the Licensee] has faced since mid-August 2011 over the course of his engagement by two agencies, and the fact that he has been ordered to complete courses of training on three occasions, on three different aspects of real estate agency work, causes the Tribunal to have grave concerns as to [the Licensee’s] competence to carry out real estate agency work to the standard required within the industry...’

Read the following scenario and consider if the licensee has breached the Rules (refer Appendix 1) or the Act (refer to Appendix 3 – sections 134 and 135).

Scenario 2

A Complaints Assessment Committee (CAC) heard a case brought by a complainant in relation to the listing and sale of their property which comprised 0.8245 hectares of land and a house built in 2006, part of which was designed and used for bed and breakfast accommodation. In the rateable valuation document dated February 2013, the capital value (land and improvements) of the property was \$1.1 million.

Prior to marketing the property, the vendors obtained a market valuation from a registered valuer; the market value was assessed at \$1.13 million.

The Complainants met with the Licensee (who held a branch manager's licence) at their property to discuss listing it for sale.

The Complainants subsequently signed a sole agency agreement with the Licensee. The agency agreement stated the duration of the sole agency, that commission would be \$35,000 (estimated on the basis of the rateable value of \$1.1 million), and marketing costs were estimated at \$3,828.15 for a six-week marketing period.

The Licensee brought an offer of \$1.050 million to the Complainants, which they rejected. The offer was increased to \$1.075 million, which they also rejected.

The same day the latest offer was rejected, the Licensee phoned the Complainants and asked if he could bring his partner to view the property, which they agreed to.

The Licensee subsequently made a written offer to the Complainants for \$1.1 million, sent via email. The sale and purchase agreement had a line drawn through the box which stated that the sale was no longer by the X Realty Group Limited, and the words 'Private Sale' had been inserted.

The Complainants signed the offer and returned it to the Licensee. The agreement was settled, and no commission was charged to the complainants.

Four months following the sale, the Licensee 'on-sold' the property for \$1.4 million after carrying out some renovation work on it.

The Complainants allege the following:

- Breach of section 134 (refer to Appendix 3) – the licensee:
 - failed to obtain the Complainants informed consent to continue to act for them when he had a conflict of interest
 - did not obtain consent in writing on the prescribed form, as required by section 134 (Form 2 of the Schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009)
 - failed to explain the existence and nature of his conflict of interest

- failed to explain to the Complainants that he would be in possession of information that the Complainants would expect to be confidential
- Breach of section 135 (refer Appendix 3) – the licensee:
 - failed to provide with a written independent valuation
 - failed to provide a written (or any) appraisal of the property
 - failed to advise how properties referred to in documents provided to them had been selected and how that information could be reflected in the price for the property (comparable data included 12 properties, of which only two were in the same geographical area of the subject property)
 - failed to act in the best interests of his client

Complaint: [2017] NZREADT 6 - Decision

<http://www.nzlii.org/nz/cases/NZREADT/2017/6.html>

Standard clauses: residential and rural agency agreements

Note: *residential property* means any property used or intended to be used, exclusively or principally for residential purposes (section 5, Real Estate Agent Act 2009).

Most real estate agencies have traditionally used an 'introduction clause' in their agency agreements to claim commission. The introduction clause would typically be something similar to the following:

'If the property or part of it is sold by or through the instrumentality of the Agent or to anyone introduced through the agency of the Agent, the Client agrees to pay a commission as set out in this agreement.'

A clause like the one above often survives termination or expiry of an agency agreement as it gives the agency a right to claim commission if the property is sold to the person introduced by that agency (or where the agency has been instrumental in the sale) and is effective for an undefined period.

Problems with such an introduction clause arose because it created uncertainty for the client and the client's newly engaged real estate agency as to who would be entitled to receive a commission if a buyer who showed interest in the property in the past came back to the newly engaged agency.

In order to address this issue, the Real Estate Authority (REA) together with the Real Estate Institute of New Zealand (REINZ) developed standard clauses for residential agency agreements and rural agency agreements. The clauses create greater certainty around the cancellation of agency agreements and when an agent is entitled to a commission.

Use of the standard clauses in residential and rural agency agreements is voluntary; however, the REA recommends that all real estate agents in the residential and rural sector use them. The REA also encourages other sectors of the real estate industry to include these clauses in their agreements.

The REA promotes the use of the standard clauses by publishing the names of agencies that have agreed to include them in their agency agreements on its website, which can be accessed via the 'Resources' tab on the REA website, as follows:

<https://www.rea.govt.nz/resources/>

Standard clauses – residential

Sole Agency

The Client appoints the Agent as sole agent. The agency commences on (Commencement Date) and continues until midnight on; or, if no end date is provided, 90 days from the Commencement Date.

This sole agency may be terminated by the Client, by written notice to the Agent by 5 pm on the first working day after the day on which a copy of this agreement is given to the Client.

Note: Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.

OR

General Agency

The Client appoints the Agent as general agent. The agency commences on and continues until midnight on unless cancelled prior by either party giving seven (7) days' written notice to the other party; or, if no end date is provided until cancelled by either party by giving seven (7) days' written notice to the other party.

Commission and expenses

Payment of Commission:

The Client must pay the Agent the commission, on the terms set out in this agreement, if:

- in the case of a sole agency, the Client enters into an agreement to sell or exchange the Property (or part of it) at any time during the term of the agency and the agreement is or becomes unconditional (whether during or after the term of the agency); or
- in the case of a general agency, the Client enters into an agreement to sell or exchange the Property (or part of it) at any time during the term of the agency, through the instrumentality of the Agent or to a purchaser introduced by the Agent and the agreement is or becomes unconditional (whether during or after the term of the agency); or
- in the case of either a sole or general agency, the Client enters into a private agreement to sell or exchange the Property (or part of it) within a period of 6 months following the date of expiry, cancellation or termination of the agency, through the instrumentality of the Agent or to a purchaser introduced by the Agent, and the agreement is or becomes unconditional (whether during or after the 6 months period). In this subclause 'private agreement' means any agreement to sell or exchange the Property (or part of it) in the absence of any effective agency agreement between the Client and a real estate agent holding a licence under the Real Estate Agents Act 2008.

Standard clauses – rural

Agency type (Choose either Sole Agency or General Agency – delete one)

Sole Agency:

The Client appoints the Agent as sole agent from until midnight on

NB: A sole agency may be terminated by the Client, by written notice to the Agent by 5 pm on the first working day after the day on which a copy of this agreement is given to the Client.

OR

General Agency:

The Client appoints the Agent as general agent. The agency commences on and continues until midnight on unless cancelled prior by either party giving seven (7) days' written notice to the other party; or, if no end date is provided until cancelled by either party by giving seven (7) days' written notice to the other party.

Payment of Commission

The Client must pay the Agent the commission, on the terms set out in this agreement, if:

- In the case of a sole agency, the Client enters into an agreement to sell or exchange the Property (or part of it) at any time during the term of the agency and the agreement is or becomes unconditional (whether during or after the term of the agency); or
- In the case of a general agency, the Client enters into an agreement to sell or exchange the Property (or part of it) at any time during the term of the agency, through the instrumentality of the Agent or to a purchaser introduced by the Agent and the agreement is or becomes unconditional (whether during or after the term of the agency); or
- In the case of either sole or general agency, the Client enters into a private agreement to sell or exchange the Property (or part of it) within a period of 12 months following the date of expiry, cancellation or termination of the agency, through the instrumentality of the Agent or to a purchaser introduced by the Agent, and the agreement is or becomes unconditional (whether during or after the 12 months period). In this subclause 'private agreement' means any agreement to sell or exchange the Property (or part of it) in the absence of any effective agency agreement between the Client and a real estate agent holding a licence under the Real Estate Agents Act 2008.

When is an agency entitled to commission under the standard clauses?

Under the standard clauses, the agency's right to claim commission only arises if:

- **For Sole Agency** – the vendor signs a sale and purchase agreement during the sole agency period and that agreement is unconditional or becomes unconditional later.
- **For General Agency** – the vendor signs a sale and purchase agreement during the general agency period with a purchaser introduced by that general agent (or where the agent has been instrumental in the sale) and that agreement is unconditional or becomes unconditional later. Seven (7) days' notice is required to cancel a general agency agreement.

Agencies using the standard clauses have a right to claim commission related to any sale and purchase agreement entered into during the term of their agency. Entitlement to commission relating to those agreements only applies when those agreements become unconditional during or after the term of the agency.

If the vendor sells the property privately, either within 6 months of the residential agency coming to an end, or within 12 months of the rural agency agreement coming to an end (either sole or general agency), to a person introduced by the agency or where the agency was instrumental in the sale, the vendor is liable to pay the agent commission. A private sale beyond these timelines to a person introduced by the agent does not incur an obligation to pay commission.

A six-month limitation on claims for commission on private sales was considered to be a reasonable period that strikes a fair balance between:

- protecting the agent from vendor clients who intentionally avoid paying commission by waiting out a certain period before selling privately to the person introduced by the agent (or where the agent has been instrumental in the sale); AND
- the client's right to sell freely to anyone without involving an agent.

Impact of changes in the standard clauses and Rules 9.10 and 9.11

Some agents will use the standard clauses, and some will not. Agents will have no control over any previous agency agreement already agreed and signed.

All licensees (including rural and residential) need to continue to comply with Rule 9.10 which states that a licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than one agent in the event that a transaction is concluded.

In the same way, as long as Rule 9.11 remains in the Rules, every licensee (including rural and residential) who is served with a cancellation notice must continue to comply with this rule and advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

Cancellation of agency agreements

Cancellation of sole agency agreement by 5 pm the next day

Section 130 of the Real Estate Agents Act allows clients who have signed a sole agency agreement to change their mind and cancel the agreement by 5 pm on the first working day after they have been given a copy of the agreement.

Cancellation must be in writing (by letter, fax or email to the agent and licensee).

However, if any work is carried out before the agreement is cancelled that results in the sale of the property, then the terms of the agency agreement will be legally binding. This means the client must still pay the agent commission.

130 Client may cancel a sole agency agreement by 5 pm next working day

- (1) A client who is party to a sole agency agreement with an agent may, by 5 pm on the first working day after the day on which a copy of the agreement is given to the client under section 126(1)(c), cancel the agreement by written notice to the agent.
- (2) A notice under subsection (1) may be served by fax or email.
- (3) Subsection (1) has effect despite any provision to the contrary in any agreement.
- (4) Even though a sole agency agreement has been cancelled, an agent may rely on that agreement if, before that cancellation,—
 - (a) the agent carries out any agency work in accordance with the agreement, and
 - (b) that agency work enables the conclusion of a contract that effects a transaction to which the agreement relates.

Unsolicited approach (uninvited direct sale)

If a licensee obtained a signed agency agreement with a client as a result of an unsolicited approach (uninvited direct sale) by the licensee, the client may cancel the agreement within five working days of receiving a copy of the agreement (refer section 36M(1)(a) Fair Trading Act 1986).

36M(1)(a) Cancellation of uninvited direct sale agreement by the consumer

- (1) A consumer may cancel an uninvited direct sale agreement by giving notice of the cancellation to the supplier—
 - (a) within 5 working days after the date on which the consumer receives a copy of the agreement; or...

The clause in the agency agreement allowing cancellation until 5 pm the next working day must be varied prior to signing to reflect the clients right to cancel within five working days (refer section 36L Fair Trading Act).

36L Disclosure requirements relating to uninvited direct sale agreements

(1) A supplier must ensure that—

(a) every uninvited direct sale agreement entered into by that supplier—

- (i) is in writing; and
- (ii) is expressed in plain language; and
- (iii) is legible; and
- (iv) is presented clearly; and
- (v) complies with the requirements of subsection (2); and

(b) a copy of the agreement is given to the consumer—

- (i) at the time the agreement is entered into; or
- (ii) in the case of an agreement entered into over the telephone, within 5 working days after the date on which the agreement was entered into...

<http://www.legislation.govt.nz/act/public/1986/0121/latest/DLM6156640.html>

It is important to note that notice of cancellation by the client of an uninvited direct sale is not required to be in writing (refer section 36M(2) Fair Trading Act 1986).

36M(2) Cancellation of uninvited direct sale agreement by the consumer

(2) Notice of cancellation may be expressed in any way (including oral or written) that shows the intention of the consumer to cancel or withdraw from the agreement.

Cancellation of sole agency agreement for residential property after 90 days

If the sole agency agreement is for a residential property and for a term longer than 90 days, the client or the agent can cancel the agreement after 90 days or at any time after that.

131 Parties may cancel sole agency agreements in respect of residential property 90 days after the agreement is signed

- (1) Any party to a sole agency agreement that relates to residential property and is for a term longer than 90 days may, at any time after the expiry of the period of 90 days after the agreement is signed, cancel the agreement by written notice to the other party or parties.
- (2) If the parties to a sole agency agreement to which subsection (1) relates agree in writing to renew the sole agency agreement, the signing of the renewal agreement is, for the purposes of that subsection, taken to be the signing of a new sole agency agreement.
- (3) For the purposes of subsection (1), a sole agency agreement is signed when it is signed by or on behalf of the client or if there is more than 1 client, when the agreement is signed by the last client.
- (4) A notice under subsection (1) may be served by fax or email.
- (5) This section has effect despite any provision to the contrary in any agreement.
- (6) In this section, *residential property* does not include any property that—
 - (a) has been developed with other properties in a continuous area; and
 - (b) is proposed to be sold or otherwise disposed of by a vendor who also proposes to sell or otherwise dispose of, or who has sold or otherwise disposed of, some or all of those other properties.



Key information

Up until recent times, most agency agreements have contained a clause (often known as a 'roll-over' clause) which turns the sole agency automatically into a general agency after a certain period has elapsed (e.g. 90 days).

This has meant that clients have also needed to cancel the general agency agreement after the 90-day period has lapsed if they no longer want to work with that agency.

Changes to the roll-over provision in the standard clauses

There is no 'roll-over' clause in the standard clauses.

Note: In a **residential** agency agreement, a roll-over clause provision could be an example of an unfair contract term in an agency agreement under section 46M of the Fair Trading Act 1986 and a breach of section 131 of the Real Estate Agents Act.

Furthermore, this would be considered inappropriate use of the 'roll-over clause' and applies whether the standard clauses are used or not.

If the client wishes to exit from the relationship with the agency once the 90 days of sole agency expires, then the client should be able to do so consistent with Section 131 of the Real Estate Agents Act.

These amendments underpin rule 9.12 which says that an agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.

Cancellation of a general agency agreement

General agency agreements will usually specify what notice period is required for cancellation, giving agencies adequate time to conclude any introductions they are currently working through.

There is no specific legal cancellation notice period; however, industry practice is usually between 7 to 14 days.

Any requirement for the notice period beyond 14 days may be in breach of the rules.

Appendices

Appendix 1 – Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

Contents

Pursuant to section 14 of the Real Estate Agents Act 2008, the Real Estate Agents Authority, with the approval of the Minister of Justice given in accordance with section 17 of that Act, and after consultation in accordance with section 16 of that Act, makes the following rules.

Rules

These Rules make up the Real Estate Agents Authority code of professional conduct and client care. The Rules were made by the Authority and notified in the New Zealand Gazette.¹ The rules set minimum standards of conduct and client care that licensees are required to meet when carrying out real estate agency work and dealing with clients.

Important note

The Real Estate Authority (REA) is the operating name of the Real Estate Agents Authority (REAA). Please note that this publication uses the legal name 'Real Estate Agents Authority (REAA)' due to a requirement to maintain consistency with legislation.

1 Title

These rules are the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

2 Commencement

These rules come into force on 8 April 2013.

3 Scope and objectives

3.1 These practice rules setting out a code of professional conduct and client care have been prepared by the Real Estate Agents Authority (**the Authority**). They constitute the Professional Conduct and Client Care Rules required by section 14 of the Real Estate Agents Act 2008.

3.2 These practice rules set out the standard of conduct and client care that agents, branch managers, and salespersons (collectively referred to **as licensees**) are required to meet when carrying out real estate agency work and dealing with clients.

3.3 These practice rules are not an exhaustive statement of the conduct expected of licensees. They set minimum standards that licensees must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and dealt with despite the charge not being based on a breach of any specific rule.

3.4 These practice rules must be read in conjunction with the Act and regulations, and do not repeat duties and obligations that are included in the Act or regulations.

4 Interpretation

4.1 In these rules,—

Act means the Real Estate Agents Act 2008.

customer means a person who is a party or potential party to a transaction and excludes a prospective client and a client.

prospective client means a person who is considering or intending to enter into an agency agreement with an agent to carry out real estate agency work.

regulations means regulations made pursuant to the Act.

4.2 Unless the context otherwise requires, terms used in these rules have the same meaning as in the Act.

5 Standards of professional competence

5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

6 Standards of professional conduct

6.1 A licensee must comply with fiduciary obligations to the licensee's client.

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

7 Duty to report misconduct or unsatisfactory conduct

7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct² may make a report to the Authority.

7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct³ must make a report to the Authority.

7.3 A licensee must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.

7.4 If a licensee learns that a person is committing an offence by undertaking real estate agency work without a licence, the licensee must immediately report the matter to the Authority.

8 Duties and obligations of agents

Promoting awareness of rules

8.1 An agent who is operating as a business must display these rules prominently in the public area of each office or branch, and provide access to them on every website maintained by the agent for the purposes of the business.

8.2 A licensee must make these rules available to any person on request.

Supervision and management of salespersons

² Unsatisfactory conduct is defined in the Act: see section 72

³ Misconduct is defined in the Act: see section 73

8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.⁴

Ensuring knowledge of regulatory framework and promoting continuing education

8.4 An agent who is operating as a business must ensure that all licensees employed or engaged by the agent have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

8.5 An agent who is operating as a business must ensure that licensees employed or engaged by the agent are aware of and have the opportunity to undertake any continuing education required by the Authority.

9 Client and customer care

General

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

9.3 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.

9.4 A licensee must not mislead customers as to the price expectations of the client.

9.5 A licensee must take due care to—

(a) ensure the security of land and every business in respect of which the licensee is carrying out real estate agency work; and

(b) avoid risks of damage that may arise from customers, or clients that are not the owner of the land or business, accessing the land or business.

9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

Agency agreements and contractual documents

9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—

(a) recommend that the person seek legal advice; and

(b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and

(c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

9.8 A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.

⁴ The Act defines what is meant by a salesperson being properly supervised and managed by an agent or a branch manager for the purposes of section 50 of the Act: see section 50(2)

9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.

9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

9.11 On notice of cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.

9.12 An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.

9.13 When authorised by a client to incur expenses, a licensee must seek to obtain the best value for the client.

Conflicts of interest

9.14 A licensee must not act in a capacity that would attract more than 1 commission in the same transaction.

9.15 A licensee must not engage in business or professional activity other than real estate agency work where the business or activity would, or could reasonably be expected to, compromise the discharge of the licensee's obligations.

Confidentiality

9.16 A licensee must not use information that is confidential to a client for the benefit of any other person or of the licensee.

9.17 A licensee must not disclose confidential personal information relating to a client unless—

(a) the client consents in writing; or

(b) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client; or

(c) the licensee is required by law to disclose the information; or

(d) the disclosure is consistent with the information privacy principles in section 6 of the Privacy Act 1993.

9.18 Where a licensee discloses information under rule 9.17(b), (c) or (d), it may be only to the appropriate person or entity and only to the extent necessary for the permitted purpose.

10 Client and customer care for sellers' agents

10.1 This rule applies to an agent (and any licensee employed or engaged by the agent) who is entering, or has entered, into an agency agreement with a client for the grant, sale, or other disposal of land or a business.

Appraisals and pricing

10.2 An appraisal of land or a business must—

(a) be provided in writing to a client by a licensee; and

- (b) realistically reflect current market conditions; and
- (c) be supported by comparable information on sales of similar land in similar locations or businesses.

10.3 Where no directly comparable or semicomparable sales data exists, a licensee must explain this, in writing, to a client.

10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

Relationship between prospective client's choices about how to sell and licensee's benefits

10.5 Before a prospective client signs an agency agreement, the licensee must explain to the prospective client how choices that the prospective client may make about how to sell or otherwise dispose of his or her land or business could impact on the individual benefits that the licensee may receive.

Agency agreements

10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing—

(a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2:

(b) when the agency agreement ends;

(c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur:

(d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c):

(e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects⁵, a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

⁵ For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.⁵

10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

Advertising and marketing

10.9 A licensee must not advertise any land or business on terms that are different from those authorised by the client.

Contractual documentation and record keeping

10.10 A licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land or business, provided that such offers are in writing.

10.11 If a licensee is employed or engaged by an agent, the licensee must provide the agent with a copy of every written offer that the licensee submits.

10.12 An agent must retain, for a period of 12 months, a copy of every written offer submitted. This rule applies regardless of whether the offer was submitted by the agent or by a licensee employed or engaged by the agent and regardless of whether the offer resulted in a transaction.

11 Client and customer care for buyers' agents

11.1 This rule applies where an agency agreement authorising an agent to undertake real estate agency work for a client in respect of the purchase or other acquisition of land or a business on the client's behalf (a buyer's agency agreement) is being entered into, or has been entered into.

11.2 Before a prospective client signs a buyer's agency agreement, a licensee must explain to the prospective client and set out in writing —

(a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the average of the estimated price range of the land or business that the client is seeking to purchase:

(b) when the agency agreement ends:

(c) any additional services that the licensee will provide, or arrange for the provision of, on the client's behalf and the expenses relating to those services payable by the client:

(d) that the client is not obliged to agree to the additional expenses referred to in rule 11.2(c):

(e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

11.3 A licensee must not undertake real estate agency work with customers, or other licensees, on terms that are different from those that are authorised by the client on whose behalf the licensee is carrying out real estate agency work.

11.4 A licensee must submit all offers that the licensee is instructed by the client to make concerning the purchase or acquisition of any land or business, provided that such offers are in writing.

11.5 If a licensee is employed or engaged by an agent, the licensee must provide the agent with a copy of every written offer that the licensee submits.

11.6 An agent must retain, for a period of 12 months, a copy of every written offer submitted. This rule applies regardless of whether the offer was submitted by the agent or

by a licensee employed or engaged by the agent and regardless of whether the offer resulted in a transaction.

12 Information about complaints

12.1 An agent must develop and maintain written in-house procedures for dealing with complaints and dispute resolution. A copy of these procedures must be available to clients and consumers.

12.2 A licensee must ensure that prospective clients and customers are aware of these procedures before they enter into any contractual agreements.

12.3 A licensee must also ensure that prospective clients, clients, and customers are aware that they may access the Authority's complaints process without first using the in-house procedures; and that any use of the in-house procedures does not preclude their making a complaint to the Authority.

12.4 A licensee employed or engaged by an agent must advise the agent within 10 working days of becoming aware of—

(a) any complaint made to the Authority against them, the decision of the Complaints Assessment Committee made in respect of that complaint, and any order made by the Committee in respect of that complaint; and

(b) if the matter proceeds to the Tribunal, the decision of the Tribunal in respect of the matter, and any order made by the Tribunal in respect of the matter.

12.5 If a licensee was employed or engaged by a different agent at the time of the conduct relevant to the complaint referred to in rule 12.4, the licensee must also provide the information referred to in rule 12.4(a) and (b) to that agent within 10 working days of becoming aware of the complaint.

13 Revocation

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (SR 2009/304) are revoked.

Issued under the authority of the Acts and Regulations Publication Act 1989. Date of notification in Gazette: 13 December 2012. These rules are administered by the Real Estate Agents Authority, PO Box 25 371, Featherston Street, Wellington.

Appendix 2 – AML/CFT Act: Subpart 1 – Customer due diligence (ss 10 to 25)

10 Definitions

In this subpart, unless the context otherwise requires,—

enhanced customer due diligence means customer due diligence in accordance with the requirements set out in sections 23 to 30 and any other requirements prescribed by regulations

simplified customer due diligence means customer due diligence in accordance with the requirements set out in sections 19 to 21 and any other requirements prescribed by regulations

standard customer due diligence means customer due diligence in accordance with the requirements set out in sections 15 to 17 and any other requirements prescribed by regulations.

11 Customer due diligence

(1) A reporting entity must conduct customer due diligence on—

- (a) a customer;
- (b) any beneficial owner of a customer;
- (c) any person acting on behalf of a customer.

(2) For the purposes of subsection (1)(b), a customer who is an individual and who the reporting entity believes on reasonable grounds is not acting on behalf of another person is to be treated as if he or she were also the beneficial owner unless the reporting entity has reasonable grounds to suspect that that customer is not the beneficial owner.

(3) The type of customer due diligence that must be conducted by a reporting entity is,—

- (a) in the circumstances described in section 14, at least standard customer due diligence;
- (b) in the circumstances described in section 18, at least simplified customer due diligence;
- (c) in the circumstances described in section 22, enhanced customer due diligence.

(4) A reporting entity that is required to conduct customer due diligence in the circumstances

described in sections 14, 18, and 22 is not required to obtain or verify any documents, data, or information that it has previously obtained and verified for the purposes of carrying out customer due diligence in accordance with this Act, unless there are reasonable grounds for the reporting entity to doubt the adequacy or veracity of the documents, data, or information previously obtained.

(5) Nothing in subsection (4) affects the obligation to conduct ongoing customer due diligence in accordance with section 31.

(6) Subsections (1) and (3) and sections 14 to 31 do not apply in relation to the provision of services by a reporting entity to a customer that, in relation to that reporting entity, are not, under section 6(4), activities to which this Act applies.

12 Reliance on risk assessment when establishing level of risk

When establishing the level of risk involved for the purposes of this subpart, a reporting entity must rely on its AML/CFT programme and its risk assessment undertaken in accordance with section 58.

13 Basis for verifying identity

Verification of identity must be done on—

- (a) the basis of documents, data, or information issued by a reliable and independent source; or
- (b) any other basis applying to a specified situation, customer, product, service, business relationship, or transaction prescribed by regulations.

Standard customer due diligence

14 Circumstances when standard customer due diligence applies

(1) A reporting entity must conduct standard customer due diligence in the following circumstances:

- (a) if the reporting entity establishes a business relationship with a new customer:
- (b) if a customer seeks to conduct an occasional transaction or activity through the reporting entity:
- (c) if, in relation to an existing customer, and according to the level of risk involved,—
 - (i) there has been a material change in the nature or purpose of the business relationship; and
 - (ii) the reporting entity considers that it has insufficient information about the customer:
- (d) any other circumstances specified in subsection (2) or in regulations.

(2) For the purposes of subsection (1)(d), as soon as practicable after a reporting entity becomes aware that an existing account is anonymous, the reporting entity must conduct standard customer due diligence in respect of that account.

(3) Despite subsections (1) and (2), a real estate agent must conduct standard customer due diligence at the times, and with any other modifications, specified in regulations.

15 Standard customer due diligence: identity requirements

A reporting entity must obtain the following identity information in relation to the persons referred to in section 11(1):

- (a) the person's full name; and
- (b) the person's date of birth; and
- (c) if the person is not the customer, the person's relationship to the customer; and
- (d) the person's address or registered office; and
- (e) the person's company identifier or registration number; and
- (f) any information prescribed by regulations.

16 Standard customer due diligence: verification of identity requirements

(1) A reporting entity must—

- (a) take reasonable steps to satisfy itself that the information obtained under section 15 is correct; and
- (b) according to the level of risk involved, take reasonable steps to verify any beneficial owner's identity so that the reporting entity is satisfied that it knows who the beneficial owner is; and
- (c) if a person is acting on behalf of the customer, according to the level of risk involved, take reasonable steps to verify the person's identity and authority to act on behalf of the customer so that the reporting entity is satisfied it knows who the person is and that the person has authority to act on behalf of the customer; and

- (d) verify any other information prescribed by regulations.
- (2) Except as provided in subsection (3), a reporting entity must carry out verification of identity before establishing a business relationship or conducting an occasional transaction or activity.
- (3) Verification of identity may be completed after the business relationship has been established if—
 - (a) it is essential not to interrupt normal business practice; and
 - (b) money laundering and financing of terrorism risks are effectively managed through procedures of transaction limitations and account monitoring or (if the reporting entity is not a financial institution) through other appropriate risk management procedures; and
 - (c) verification of identity is completed as soon as is practicable once the business relationship has been established.

17 Standard customer due diligence: other requirements

A reporting entity must also obtain—

- (a) information on the nature and purpose of the proposed business relationship between the customer and the reporting entity; and
- (b) sufficient information to determine whether the customer should be subject to enhanced customer due diligence.

Simplified customer due diligence

18 Circumstances when simplified customer due diligence applies

- (1) A reporting entity may conduct simplified customer due diligence if—
 - (a) it establishes a business relationship with one of the customers specified in subsection (2); or
 - (b) one of the customers specified in subsection (2) conducts an occasional transaction or activity through the reporting entity; or
 - (c) a customer conducts a transaction or obtains a product or service specified in regulations through the reporting entity.
- (2) The following are customers for the purposes of subsection (1):
 - (a) a listed issuer (within the meaning of section 6(1) of the Financial Markets Conduct Act 2013) that is the issuer of quoted voting products (within the meaning of that Act);
 - (b) a government department named in Schedule 1 of the State Sector Act 1988;
 - (c) a local authority, as defined in section 5(2) of the Local Government Act 2002;
 - (d) the New Zealand Police;
 - (e) a State enterprise (within the meaning of section 2 of the State-Owned Enterprises Act 1986) and a new State enterprise (as listed in Schedule 2 of that Act);
 - (f) a body that—
 - (i) corresponds to a State enterprise or a new State enterprise (as defined in paragraph (e)); and
 - (ii) is located in a country that has sufficient AML/CFT systems;
 - (g) *[Repealed]*
 - (h) a person licensed to be a supervisor or statutory supervisor under the Financial Markets Supervisors Act 2011, when the person acts for itself;
 - (i) a trustee corporation, within the meaning of section 2(1) of the Administration Act 1969, when the trustee corporation acts for itself;

- (j) a Crown entity, as defined in section 7(1) of the Crown Entities Act 2004;
 - (k) an organisation named in Schedule 4 of the Public Finance Act 1989;
 - (l) a company named in Schedule 4A of the Public Finance Act 1989;
 - (m) a government body that—
 - (i) corresponds to a government department named in Schedule 1 of the State Sector Act 1988; and
 - (ii) is located in an overseas jurisdiction that has sufficient AML/CFT systems;
 - (n) a registered bank within the meaning of section 2(1) of the Reserve Bank of New Zealand Act 1989;
 - (o) a licensed insurer within the meaning of section 6(1) of the Insurance (Prudential Supervision) Act 2010;
 - (p) a company, or a subsidiary (within the meaning of section 5(1) of the Companies Act 1993) of that company,—
 - (i) whose equity securities are listed in New Zealand or on an overseas stock exchange that has sufficient disclosure requirements; and
 - (ii) that is located in a country that has sufficient AML/CFT systems in place;
 - (q) any other entity or class of entities specified in regulations.
- (3) A reporting entity may also conduct simplified customer due diligence on a person who purports to act on behalf of a customer when—
- (a) the reporting entity already has a business relationship with the customer at the time the person acts on behalf of the customer; and
 - (b) the reporting entity has conducted one of the specified types of customer due diligence on the customer in accordance with this Act and regulations (if any).
- (3A) Despite subsections (1) to (3), a real estate agent must conduct simplified customer due diligence at the times, and with any other modifications, specified in regulations.
- (4) For the avoidance of doubt, nothing in this subpart requires identification or verification of identity of a beneficial owner of a customer in respect of whom a reporting entity may conduct simplified customer due diligence.

19 Simplified customer due diligence: identity requirements

A reporting entity must obtain the following identity information in relation to a person acting on behalf of the customer:

- (a) the person's full name; and
- (b) the person's date of birth; and
- (c) the person's relationship to the customer; and
- (d) any information prescribed by regulations.

20 Simplified customer due diligence: verification of identity requirements

- (1) A reporting entity must, according to the level of risk involved, verify the identity of a person acting on behalf of a customer and that person's authority to act for the customer so that it is satisfied it knows who the person is and that the person has authority to act on behalf of the customer.
- (2) Verification of identity must be carried out before the business relationship is established or the occasional transaction or activity is conducted or the person acts on behalf of the customer.
- (3) For the purposes of verifying a person's authority to act in the circumstances described in section 18, a reporting entity may rely on an authority provided in an application form or other document provided to the reporting entity that shows a person's authority to act or transact on an account.

21 Simplified customer due diligence: other requirements

In the circumstances described in section 18(1)(a), a reporting entity must also obtain information on the nature and purpose of the proposed business relationship between the customer and the reporting entity.

Enhanced customer due diligence

22 Circumstances when enhanced customer due diligence applies

(1) A reporting entity must conduct enhanced customer due diligence in accordance with sections 23 and 24 in the following circumstances:

(a) if the reporting entity establishes a business relationship with a customer that is—

- (i) a trust or another vehicle for holding personal assets:
- (ii) a non-resident customer from a country that has insufficient antimoney laundering and countering financing of terrorism systems or measures in place:
- (iii) a company with nominee shareholders or shares in bearer form:

(b) if a customer seeks to conduct an occasional transaction or activity through the reporting entity and that customer is—

- (i) a trust or another vehicle for holding personal assets:
- (ii) a non-resident customer from a country that has insufficient antimoney laundering and countering financing of terrorism systems or measures in place:

(iii) a company with nominee shareholders or shares in bearer form:

(c) if a customer seeks to conduct, through the reporting entity, a complex, unusually large transaction or unusual pattern of transactions that have no apparent or visible economic or lawful purpose:

(d) when a reporting entity considers that the level of risk involved is such that enhanced due diligence should apply to a particular situation:

(e) any other circumstances specified in section 22A or regulations.

(2) A reporting entity must conduct enhanced customer due diligence in accordance with section 26 if—

(a) it establishes a business relationship with a customer who it has determined is a politically exposed person; or

(b) a customer who it has determined is a politically exposed person seeks to conduct an occasional transaction or activity through the reporting entity.

(3) A reporting entity must conduct enhanced customer due diligence in accordance with sections 27 and 28 if it is an ordering institution, an intermediary institution, or a beneficiary institution in relation to a wire transfer.

(4) A reporting entity must conduct enhanced customer due diligence in accordance with section 29 if it has, or proposes to have, a correspondent banking relationship.

(5) A reporting entity must conduct enhanced due diligence in accordance with section 30 if—

(a) it establishes a business relationship with a customer that involves new or developing technologies, or new or developing products, that might favour anonymity; or

(b) a customer seeks to conduct an occasional transaction or activity through the reporting entity that involves new or developing technologies, or new or developing products, that might favour anonymity.

(6) Despite subsections (1) to (5), a real estate agent must conduct enhanced customer due diligence at the times, in the circumstances, and with any other modifications specified in regulations.

22A Enhanced customer due diligence required for certain activities requiring suspicious activities report

(1) This section applies to an activity—

- (a) that the reporting entity concerned (other than a high-value dealer) is required to report to the Commissioner under section 40; and
- (b) that is not otherwise exempt from the customer due diligence requirements or from all the requirements of the Act; and
- (c) that is conducted, or sought to be conducted,—
 - (i) by an existing customer; or
 - (ii) by a customer engaging in an occasional transaction or activity.

(2) For the purposes of section 22(1)(e), as soon as practicable after a reporting entity becomes aware that the reporting entity must report the suspicious activity under section 40, a circumstance occurs in which the reporting entity must conduct enhanced customer due diligence in respect of that activity.

23 Enhanced customer due diligence: identity requirements

(1) A reporting entity must, in relation to a person referred to in section 11(1), obtain the information required under section 15 and the following additional information:

- (a) information relating to the source of the funds or the wealth of the customer; and
- (b) the additional information referred to in subsection (2) and any additional information prescribed by regulations.

(2) For the purposes of subsection (1)(b), a reporting entity must obtain,—

- (a) in the case of a trust other than a trust to which paragraph (b) applies, the name and the date of birth of each beneficiary of the trust;
- (b) in the case of a customer that is a discretionary trust or a charitable trust or a trust that has more than 10 beneficiaries, a description of—
 - (i) each class or type of beneficiary;
 - (ii) if the trust is a charitable trust, the objects of the trust.

24 Enhanced customer due diligence: verification of identity requirements

(1) A reporting entity must—

- (a) conduct the verification of identity requirements for standard customer due diligence set out in section 16; and
- (b) according to the level of risk involved, take reasonable steps to verify the information obtained under section 23(1)(a); and
- (c) verify any other information prescribed by regulations.

(2) Except as provided in subsection (3), a reporting entity must carry out verification of identity before establishing a business relationship or conducting an occasional transaction or activity.

(3) Verification of identity may be completed after the business relationship has been established if—

- (a) it is essential not to interrupt normal business practice; and
- (b) money laundering and financing of terrorism risks are effectively managed through procedures of transaction limitations and account monitoring or (if the

reporting entity is not a financial institution) through other appropriate risk management procedures; and
(c) verification of identity is completed as soon as is practicable once the business relationship has been established.

25 Enhanced customer due diligence: other requirements

In the circumstances described in section 22(1)(a), 22(2)(a), and 22(5)(a), a reporting entity must also obtain information on the nature and purpose of the proposed business relationship between the customer and the reporting entity.

Appendix 3 – Acquisition by licensee or related person (ss 134 & 135)

134 Contracts for acquisition by licensee or related person may be cancelled

- (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (3) The client's consent is effective only if—
 - (a) given in the prescribed form; and
 - (b) the client is provided with a valuation in accordance with section 135.
- (4) The client may cancel any contract—
 - (a) made in contravention of subsection (1); or
 - (b) brought about by agency work carried out in contravention of subsection (2).
- (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.

135 Client to be provided with valuation

- (1) For the purposes of section 134(3), the licensee must give the client a valuation made at the licensee's expense.
- (2) The valuation must have been made by—
 - (a) an independent registered valuer; or
 - (b) in the case of a business, by an independent qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013).
- (3) The licensee must give the client the valuation either—
 - (a) before seeking the consent of the client; or
 - (b) with the agreement of the client, within 14 days after obtaining that consent.
- (4) Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.
- (5) Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—
 - (a) the client gives his or her consent in accordance with subsection (3)(b); and
 - (b) the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.