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# Real Estate

## Continuing Professional Development (CPD)

### Agency agreements: Professional competence and ethics

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**Estimated time needed: 1 hour**

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## Learning objectives

- Review: Licensee responsibilities in regard to agency agreements
- Understanding responsibilities of a professionally competent licensee when entering into an agency agreement, including knowledge of:
  - who enters into an agency agreement
  - authorised persons
  - multiple signatories
  - capacity to sign
  - capacity labels
  - anti-money laundering – customer due diligence
  - appraisals
  - methods of sale
  - commission and marketing and advertising
  - material particulars included in the agency agreement
- Understanding the ethical responsibilities of a licensee
- Review: advising about double commissions, including an understanding of:
  - standard clauses
  - entitlement to commission
  - standard clauses and rules 9.10 and 9.11
  - changes to the Fair Trading Act 1986 – unfair contract terms
- Understanding rights around the cancellation of agency agreements
- Understanding disclosure obligations of the vendor or lessor, including:
  - disclosure of defects
- Review of responsibilities when dealing with transactions involving unit title properties

## Review: licensee responsibilities in relation to agency agreements

In previous Continuing Professional Development programmes, we have looked in detail at licensee responsibilities in relation to agency agreements.

To review some of these responsibilities, complete the following quiz to check your knowledge of professional competencies required of licensees.



### Note

**Note:** The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) reflect the minimum requirements that licensees must meet to demonstrate professional competence (refer Appendix 1).

## Responsibilities of a professionally competent licensee when entering into an agency agreement

This section covers licensee responsibilities that must be met by the licensee when entering into an agency agreement with a client.

### Who enters into an agency agreement?

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

An agent is not entitled to any commission or expenses unless a signed written agency agreement is in place.

An agency agreement must be signed by 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(s) will sign the agency agreement themselves, unless they have nominated an 'authorised person', such as a lawyer or person who has power of attorney.

### Authorised persons

Generally, the client will sign the agency agreement themselves, unless they have nominated an 'authorised person', for example - 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 another similar document. Any such documentation should be attached to the associated agency agreement.

Always check that the power of attorney, if used, has been invoked (come into force), and obtain a non-revocation confirmation from the party's solicitor, to be filed with a copy of the power of attorney form.



#### 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.

## Multiple signatories

Where a property 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 the authority to sign on behalf of the other owners, for example - power of attorney.

Where multiple signatories are entering into an agency agreement, copies of the signed document **must** be provided to **all** parties.

## Capacity to sign

All signatories must have the capacity to sign, i.e., they are in a position where they can legally enter into a contract (they are old enough and of sound mind).

A professionally competent licensee who is behaving ethically must not enter into a contract with someone who does not have the capacity to sign, for example, if the person is emotionally or mentally compromised. Another example is where an executor of a deceased estate attempts to sign an agency agreement when probate has not yet been granted.

## 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><b>Director / Trustee / Authorised Signatory / Attorney*</b>  <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><b>Director / Trustee / Authorised Signatory / Attorney*</b>  <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>

Furthermore, in the case of signature by:

- a Power of Attorney, licensees are required to attach the **Certificate of non-revocation** (ADLS form code: 4098WFP)
- an Enduring Power of Attorney, licensees are required to attach the **Certificate of non-revocation and non-suspension of the enduring power of attorney** (ADLS form code: 4997WFP)

- an Attorney, insert the wording:

“Signed by [full name of the donor] by his or her Attorney [attorney’s signature]”

**Note:** The ‘donor’ is the person who authorises the attorney to sign on their behalf.

## Proof of Identity: identification and verification

### Anti-money laundering – customer due diligence

Real estate agencies are ‘reporting entities’ under the Anti-money Laundering and Countering Financing of Terrorism Act 2009.

Agencies must carry out customer due diligence<sup>1</sup> (CDD) on new clients prior to entering into an agency agreement (refer section 11, AML/CFT Act – Appendix 3).

The level of CDD (Standard, Simplified, or Enhanced) must comply with the AML/CFT Act, the agency 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 Agent 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 i.e. vendor or lessor
- Any beneficial owner of a customer (‘or nominee’; beneficiaries; company director)
- Any person acting on behalf of a customer, for example *power of attorney*

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<sup>1</sup> 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)

## Appraisals

An appraisal of land or business must be provided in writing to a client by a licensee (refer rule 10.2).

### **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.

Licensees must ensure that the written appraisal is carried out for ALL sectors of real estate and provided to the client prior to an agency agreement being signed.

The appraisal must not only reflect current market conditions (10.2 (b)) but also be supported by comparable information on sales of similar land in similar locations or businesses (10.2 (c)), in order to provide the client with quality data that helps them to make an informed decision about the estimated value of the land, property or business they are looking to sell. The comparable sales data is compared to the subject property and appropriate adjustments are made as to value to demonstrate sales that are either superior, inferior, or similar to the subject property.

This means a licensee must exercise skill, care, competence and diligence when compiling the appraisal (refer rule 5.1).

Where no directly comparable or semi comparable sales data exists the licensee must explain this, in writing, to a client (refer rule 10.3).

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

Rule 10.3 does not mean that the licensee is not required to complete an appraisal where 'no directly comparable or semi comparable sales data exists'. A licensee must still compile an appraisal based on whatever sales data is available to them (for example - sales data may be more than 6 months old), and then provide written explanation to the client as to how the sales data available applies to the subject property, space or business.

Once again, the comparable sales data is compared to the subject property and appropriate adjustments are made as to value to demonstrate sales that are either superior, inferior, or similar to the subject property.

A licensee must ensure the information contained in the written appraisal is relevant and accurate; and complies with the overarching requirement of rule 6.4.

### **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.



Remember, the licensee must help the client to be equipped with quality information, so a robust discussion can be made in order to finalise an agreed advertised price; which in turn should reflect the pricing expectations agreed with the client (refer rule 10.4).

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

## **Methods of sale, or offering of property, space or business and licensee benefits**

Licensees must make clients aware of the various possible methods of sale or offering of property, space or business and how the chosen method could impact on the individual benefits that the licensee may receive.

Because clients rely on the advice of licensees, it is important that clients are able to evaluate the information they are given and understand how the licensee will benefit from the decisions they make about the method they choose. For example, a higher share of the commission received from a property listed for sale by auction (refer rule 10.5).

**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.

In accordance with a licensee's fiduciary duty to their client (refer rule 6.1), it is important to advise on methods of sale that will best suit your client's interests, not your own.

## **Commission and marketing or advertising**

Rule 10.6 sets out specific requirements in relation to the commission payable and marketing and advertising, which include:

- The commission must be specified as an estimated cost (actual \$ amount) based on the written appraisal required under rule 10.2
- How the land or business will be marketed and advertised, and any additional expenses associated with this

**Note: Rule 10.6(a) specifically links with the requirements of rule 10.2 (written appraisal)** (refer rule 10.6 below).

**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.

### **Material particulars included in the agency agreement**

All material particulars (relevant details and information, when the agency agreement ends (refer rule 10.6(b)) must be included in or attached (for example - required forms, marketing plan, property description) to an agency agreement **before** the licensee submits the document to the client(s) or lessor(s) for signing (refer rule 9.9).

**9.9** A licensee must not submit an agency agreement or 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.

Read the following scenario and consider if the licensee has breached the Rules (refer Appendix 1).

### **Scenario 1**

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A complaint was made to the Real Estate Authority in regard to a property that was owned by a company. The Complainant and her ex-partner were the directors and equal shareholders (50/50) of the company. The Complainant and her ex-partner had separated and were at the end of the process of negotiating the resolution of relationship property matters between them.

The Complainant alleged that the Licensee had listed and marketed the property without obtaining her authority as a director and half owner.

NOTE: during the inquiry, the Complaints Assessment Committee became aware that the Licensee had not completed a Comparative Marketing Appraisal (CMA) for the property.

Background:

The Licensee entered into a listing [agency] agreement with the Complainants ex-partner, to whom he had previously sold the property, two years prior. No CMA was completed.

On the same day the Licensee introduced a potential buyer from Japan; and subsequently sent property details to another potential buyer from America.

At this point, the Complainant discovered that the property was being marketed without her permission and contacted the Licensee and the Agency concerned.

The Licensee responded to the Complainant informing her that he was advised to continue with marketing and sale of the property by the ex-partner.

### **Complaint number: C20896**

You can read more about this decision through the 'Search complaints decisions' link at [rea.govt.nz](http://rea.govt.nz)



### Note

While it is not completely clear from the decision, the Complainant was the co-director of the company which owned the property and the Licensee was therefore required to obtain the Complainant's authorisation prior to listing the property. Licensees should take extra care when listing property in the context of a relationship break-up to ensure that the party instructing them is properly authorised to do so.

Note the following comments made by the Committee:

- [Para 3.5] 'The Listing authority shows the name of the ex-partner as the sole vendor and the Company name. When listing a property for sale a search of the title should always be done. This would have provided the Licensee with evidence of the current owner, which was the Company. A simple free search of the Companies Register [on-line: refer url link below] would have provided the Licensee with the details of the shareholders and directors of the Company. The Committee considers that this is a basic step which should be taken on every occasion a property held by a Company is listed.'
- [Para 3.8] 'The Committee was concerned that the Licensee continued to pursue the US offer even after he was contacted by the Complainant and the position made clear.'

### Companies Register link:

<https://companies-register.companiesoffice.govt.nz/>

## Ethical responsibilities of the licensee

While gaining listings is essential to real estate agency business, it is vital that real estate agencies and licensees operate ethically in all aspects of their work.

The following rules highlight the importance of ethical behaviour and have relevance when working with a prospective client who is about to sign an agency agreement.

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

For example, licensees must avoid creating an unreasonable sense of urgency that impacts on the prospective client's ability to think clearly about the agreement or prevents them from having enough time to seek appropriate legal or technical advice and so on.

**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.

For example, do not sign documents with a prospective client who is under the influence of alcohol, medication or other substances. Advise that someone who is clearly having problems understanding (such as an elderly person who seems confused, or someone who is not familiar with the language being used) seeks the additional advice they may need.

**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.

This is a consumer protection measure that places an obligation on the real estate agency to ensure that only the legitimate interests of the agent are protected by the terms of the contract.

## Advising about double commissions

Before an agency agreement is signed, licensees must advise and explain to the client the circumstances in which the client could be liable to pay full commission to more than one agent in the event a transaction is concluded.

**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 one agent in the event that a transaction is concluded.

When an agency agreement is cancelled the licensee must give the client 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.

**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.

## Standard clauses for residential and rural agency agreements



### Note

*Residential property* means any property used, or intended to be used, exclusively or principally for residential purposes.

The Real Estate Agents Authority together with the Real Estate Institute of New Zealand (REINZ) have developed standard clauses for residential and rural agency agreements. These clauses create greater certainty around the cancellation of agency agreements and when an agent is entitled to the commission.

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

REA is promoting 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.

## **When is an agency entitled to commission under standard clauses?**

Under the standard clauses, the agency's right to claim commission only arises in the following situations:

**In the case of a sole agency** – the vendor or client enters into a sale and purchase agreement during the sole agency period and that agreement is unconditional or becomes unconditional later.

**In the case of a general agency** – the vendor or client enters into 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.

### **In the case of either a sole or general agency – residential**

In residential transactions, if the vendor sells the property privately within 6 months of the agency 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 6 months to a person introduced by the agent does not incur an obligation to pay commission.

### **In the case of either a sole or general agency – rural**

In rural transactions, if the vendor sells the property privately within 12 months of the agency 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 after 12 months to a person introduced by the agent does not incur an obligation to pay commission.

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

Some agents are using the standard clauses, and some are not. Agents have no control over any previous agency agreement already signed. It is best practice to obtain a copy of the previous agency agreement before proceeding with cancellation.

Licensees 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 if a transaction is concluded.

In the same way, under Rule 9.11, every licensee who is served with a cancellation notice must 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. This applies to ALL real estate sectors, including residential.

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.

### **Changes to the Fair Trading Act 1986 covering unfair contract terms**

The Fair Trading Act 1986 covers unfair contract terms in standard form consumer contracts. These changes confirm in law that clauses contrary to the interests of the consumer cannot be used. Agency agreements can be considered standard form consumer contracts.

The amendments covering unfair contract terms include the following:

- The Commerce Commission can apply to the court for a declaration that a term in a standard form consumer contract is unfair (refer section 46H).
- Under section 26A, if the court decides that a term in a standard form consumer contract is an unfair contract term, the Fair Trading Act prohibits a business from including the term in a standard form contract or from applying, enforcing or relying on the term.
- Under section 40, if a party then continues to use or enforce the unfair term it can be fined up to \$600,000 per breach if a company or \$200,000 per breach if an individual, enjoined from continuing to use or enforce the term and ordered to pay damages or refund money.

A contract term may be considered unfair if: the term would cause a significant imbalance in the parties' rights and obligations arising under the contract, the term is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and the term would cause detriment (financial or otherwise) to a party if the term were applied, relied on, or enforced (section 46L of the Fair Trading Act).

Examples of contract terms that may be regarded as unfair when used in a standard form consumer contract are provided in section 46M of the Fair Trading 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 agency agreements

### Cancellation of sole agency agreement by 5 pm the next working 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 signed agreement.

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

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

#### **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)

Under section 36M(1)(a) of the Fair Trading Act 1986, a client approached under the classification of *uninvited direct sales* has the right to cancel an agency agreement within 5 working days after the date on which the client receives a signed copy of the agreement.



#### **Note**

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 – Disclosure requirements relating to uninvited direct sale agreements).



## **Cancellation of sole agency agreement for residential property after 90 days**

If the sole agency agreement is for a residential property and is 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 (refer section 131 of the Real Estate Agents Act below).

### **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.

## Roll-over clause provisions

Until recently, many agency agreements 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 (for example, 90 days).

This meant that clients had to cancel the general agency agreement after the 90-day period had lapsed if they no longer wanted to work with that agency.

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

Without the roll-over clause - if the client wishes to exit from the relationship with the agency once the 90-days of sole agency expires, the client can do so consistent with Section 131 of the Real Estate Agents Act; that is, to give written notice, effective immediately.

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, a breach of rule 9.12, 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.

## Ensuring the vendor or lessor is aware of licensee disclosure obligations

### Disclosure of defects

Licensees must ensure that their client (vendor or lessor) is aware of the licensee's disclosure obligations to customers (purchasers or lessees) under rule 10.7 (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 defects<sup>1</sup>, 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.

This means a licensee must obtain written consent from the client to disclose any defect that has been identified (and confirmed as such) to a customer.

The licensee must also ensure they disclose the defect to a customer and advise them to seek expert advice if they so choose.

A prudent licensee will ensure that in all situations where a defect needs to be disclosed, the disclosure is confirmed in writing to the customer, for example by email.

Clients who direct that information about defects be withheld must be made to understand that the licensee is required to comply with rule 10.7 and 10.8 and will no longer be able to

act for the clients.

**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.

Licensees must not advertise any land or business on terms that are different from those authorised by the client (rule 10.9).

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

## Responsibilities when dealing with transactions involving unit title properties

Transactions involving unit title properties have some specific disclosure requirements that licensees must ensure are met.

A professionally competent and ethical licensee should discuss the following disclosure requirements with a client-vendor at the time of entering into an agency agreement to make sure:

- The vendor understands that their disclosure obligations are a statutory requirement under the Unit Titles Act 2010
- The vendor is aware of any costs involved
- A plan is in place for how required information will be provided in time

Information about unit title properties must be disclosed to prospective purchasers at up to three occasions in the transaction:

- Before the purchaser enters into a sale and purchase agreement. This is called a pre-contract disclosure statement (PCDS) (refer section 146 of Unit Titles Act 2010)
- Within 5 working days of being requested by the purchaser to provide more information. This is called an additional disclosure statement (ADS)
- At least 5 working days before settlement. This is called a pre-settlement disclosure statement (PSDS)



### Note

A fourth type of disclosure statement also exists - a turn-over disclosure. This does not relate to the buying and selling of a unit title property, but a turn-over disclosure statement must be provided by the original owner or developer to the body corporate. The parties should seek detailed legal advice from their lawyers in relation to this.

All disclosure information must be in writing and dated and signed by the vendor or an authorised person.

## **ADLS / REINZ Agreement for Sale and Purchase Ninth Edition 2012(8) - clauses**

The ADLS / REINZ Agreement for Sale and Purchase Ninth Edition 2012(8) incorporates compulsory provisions of the Unit Titles Act 2010 in the following clauses:

### **Deposit**

- Clause 2.4(3)
  - pre-settlement disclosure statement (section 147)
  - an additional disclosure statement (section 148) if requested by the purchaser

### **Possession and settlement**

- Clause 3.17

### **Titles, boundaries and requisitions**

- Clause 6.3

### **Unit title and cross lease provisions**

- Clause 9.1, 9.2, 9.3, 9.4, 9.5

### **Unauthorised structures – cross leases and unit titles**

- Clause 9.6
  - structures erected without body corporate consent

It is important that in initial discussions licensees make vendors aware that it is not possible to contract out of these clauses. Deleting or amending these clauses will have no effect.

## 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.<sup>1</sup> 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 the 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 conduct<sup>2</sup> may make a report to the Authority.
- 7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct<sup>3</sup> 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.

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<sup>2</sup> Unsatisfactory conduct is defined in the Act: see section 72

<sup>3</sup> Misconduct is defined in the Act: see section 73

- 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

- 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.<sup>4</sup>

### 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.

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<sup>4</sup> 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)



9.6 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.

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 semi comparable 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.

### The 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 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.

#### Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in the 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 defects<sup>5</sup>, 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.

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 —

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<sup>5</sup> 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.<sup>5</sup>

(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 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: Real Estate Agents Act 2008 - Section 126

### 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 2017.

## Appendix 3: Section 11, Anti-money Laundering and Countering Financing of Terrorism Act 2009

### 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...