



Real Estate

Continuing Professional Development

Disclosure: obligations to your client and customer

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Learning objectives

At the end of this topic, you will be able to:

- explain the meaning of disclosure
- describe key legislation and rules related to disclosure
- explain requirements for consent to disclosure from client-vendor/lessor
- explain disclosure obligations in conflict of interest situations
- explain requirements for disclosure of material facts to customers
- explain disclosure requirements related to methamphetamine contamination
- describe key 'red flags' indicating a possible problem that may require disclosure.

Terms used in this guide

In this guide, we will use various terms related to real estate agency work and complaints processes. This table will explain key terms.

Term/abbreviation	Notes
CAC	This abbreviation stands for the Complaints Assessment Committee.
Client	A client is a person on whose behalf an agent carries out real estate agency work under a signed agreement. In this guide, we will consider that the agency has a client relationship with the seller and, therefore, that seller is their 'client', and any buyers or potential buyers are 'customers'.
Code of Conduct	We will refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 as the 'Code of Conduct'.
Consumer	In the context of this guide, the word 'consumer' refers to buyers and sellers and potential buyers and sellers in the real estate sale and purchase process.
Customer	A customer is a person who is a party or a potential party to a transaction and excludes a client or potential client (as defined in rule 4.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012). The meaning of 'customer' depends on with whom the agency has a client relationship.
Disciplinary Tribunal	We will refer to the Real Estate Agents Disciplinary Tribunal as the Disciplinary Tribunal.
Purchaser	The person buying the property (sometimes referred to as the 'buyer')
REA	This abbreviation stands for the Real Estate Authority.

Vendor	The person selling the property (sometimes referred to as the 'seller')
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Understanding disclosure

Understanding obligations about disclosure is a challenge for many licensees.

This includes understanding obligations to clearly explain legal and fiduciary requirements to clients and customers. It also includes licensee obligations to demonstrate competency and knowledge of any property, space or business they are representing in the market.

Disclosure is the action of making new or secret information/new material facts known <https://en.oxforddictionaries.com/definition/disclosure>

A fresh perspective on disclosure

Disclosure has been a key topic of previous years' CPD, yet failure to comply with disclosure obligations is still the biggest cause of complaints made to the Real Estate Authority (REA).

Many disclosure complaints concern the description of properties, marketing and advertising, and the oral and written exchange of information with clients and customers.

Issues of disclosure arise for two reasons:

- non-disclosure, or
- the disclosure of false or misleading information (misrepresentation).

There are two *Latin* terms that relate to the topic of disclosure. They are:

- *Suppressio veri* – the suppression or concealment of truth
- *Suggestio falsi* – the suggestion of what is false

These two terms can be, and are often combined into one statement:

The suppression of truth is equivalent to the suggestion of what is false.

Non-disclosure

The action of 'non-disclosure' can be due to:

- Licensees not fully understanding information in documents relating to the property, space, or business they are marketing
- Licensees understanding information but not fully understanding what they are obliged to properly disclose
- Licensees lack understanding as to what constitutes 'material' information
- Licensees remaining silent about an issue that might be material to prospective purchasers or lessees
- Licensees not substantiating a positive representation before making it

We can break down the 'action' of non-disclosure into the following four categories:

1. The action itself
2. A person's attitudes towards the action
3. The person's motives for doing the action
4. The results of the action

1. Action:

By looking at the breaches that the REA investigates each year, it becomes clear that non-disclosure happens in three main situations:

- Licensees that endeavour to comply
- Licensees that do not endeavour to comply
- Licensees that are unaware of their non-compliance

We will explore this further when we analyse examples of Complaints Assessment Committee (CAC) decisions.

2. Attitude

Licensees who comply with their disclosure obligations have an attitude of 'wanting to get things right'.

Licensees that comply with their disclosure obligations:

- Demonstrate high levels of competency and knowledge of each listing they are entrusted with
- Ensure thorough checks are conducted of each property

- Check any potential areas of concern
- Meet disclosure requirements for both:
 - the vendor or lessor (fiduciary relationship and full disclosure from the agent to their client) and,
 - the purchaser or lessee (disclosure of all things material)

3. Motives

Motives, such as a need or desire can cause a person to act in a certain way.

There are many motives that can affect disclosure. For example, the conflicts between needing to earn commission and disclosing issues with a property.

4. Results

The results of non-disclosure are obvious, being ultimately the reduction of public confidence in the real estate industry. Allegations of breaches of disclosure lead to disciplinary complaints, and then investigations. Investigations are not ideal, as they may bring:

- Stress or distraction – an emotional strain of a complaint
- Loss of productivity – focus is redirected to accessing files, diary notes, emails etc, to respond to a complaint
- Negative publicity – which can drag on for months/years (for the licensee concerned, the agency involved and associated colleagues)
- Possible civil litigation for property-related compensation

Disciplinary Tribunal finding in relation to disclosure

The Real Estate Disciplinary Tribunal in *Dolheguy v Real Estate Agents Authority & Anor* [2015] NZREADT 27¹, made an important clarification about disclosure in the context of a right of way encumbrance on the record of title. The Disciplinary Tribunal stated @ [85]:

'A real estate agent is engaged by a vendor to market the property and that must be done in an ethical and fair manner in accordance with the law.

However, such an agent is not expected to give legal or technical advice to prospective purchasers; nor is that agent required to analyse the property from a purchaser's viewpoint except to honestly, sensibly, and fairly answer questions.'

Knowing what you are offering, understanding the relevant and material information, properly communicating that information about that property, space or business, and knowing when you need to refer clients and customers for independent legal or technical advice can help to protect you against a complaint.

¹ <http://www.nzlii.org/nz/cases/NZREADT/2015/27.html>

Misrepresentation

Licensees should be very careful to avoid misleading or false representations.

When licensees conduct a viewing of a property, it is essential that they are familiar with all aspects of the property and can communicate material information to prospective customers.

This is especially true when a licensee is conducting an open home on behalf of a colleague (who is the listing licensee), as demonstrated in the following case study.

Read the following case study and answer the question that follows.

Case study 1

A purchaser complained when a licensed salesperson misrepresented a residential property, stating that the salesperson had said there were no consent problems with a wall which had been re-positioned at the property.

The salesperson had relied on information she had obtained from the council desk stating that there were no consent problems.

After the complainant purchased the property, she found that consent for the work had not been obtained by the vendor.

It transpired that the vendor had already discussed the problem with another licensed salesperson from the agency who had listed the property.

The vendor had not signed off the consent section of the agency agreement.

No reference to the lack of consent was included in the Sale and Purchase Agreement, exposing the vendor to a breach of warranty claim.

At the time the agreement was prepared the agency's supervising agent was on leave.

Complaint number: C08183 [2017] NZREAA 166 (10 August 2017)

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

1. What rules, if any, did the licensee and/or agency breach?

Note the comments made by the Complaints Assessment Committee for Case Study 1:

[para 3.8] '[Licensed salesperson] says that she did advise the Complainant that there were questions about what was and wasn't permitted. She has not said she followed up such advice in writing and provides no evidence of having done so. The Committee finds any advice she gave to the Complainant was not followed up in writing.'

In its experience, it is **staggering** to this Committee how rare it is for a Licensee to follow up and confirm important advice in writing. Prudent practice dictates that any important advice given to a party to a transaction must be followed up/confirmed in writing. If Licensee X had confirmed in writing advice she says she gave the Complainant, it may have assisted her case.'

Review of disclosure obligations to clients and customers

Note

There are a number of definitions of fiduciary relationship, but in essence it is a relationship where one party places special trust, confidence and reliance in and is influenced by another who has a fiduciary duty to act for the benefit of the party.

Clients

A fiduciary relationship exists between the **agent** and the **client** (the one paying the commission).

Refer to the Real Estate Agents Act 2008 and the Rules as follows:

Section 48 Agent's licence

- (1) An agent's licence authorises the licensee to carry out real estate agency work on his or her own account whether in partnership or otherwise

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

A **licensee** (being an agent, a branch manager or a salesperson) all have fiduciary obligations to the licensee's client. Refer to the definition of the licensee in section 4 of the Real Estate Agents Act 2008:

Section 4(1) interpretation

real estate agency work or agency work –

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

(b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a)

Agency agreement relationship

The fiduciary relationship requires the licensee to fully comply with their legal obligations to their client.

A further principle involved is '*uberrimae fidei*', a Latin term meaning to act in the utmost good faith.

These two principles are integral to the agency agreement.

Fiduciary relationship – *uberrimae fidei* – to act in the utmost good faith

The essence of this agency relationship is the duty owed by the agent to the client (fiduciary) and the obligation on the client to disclose all things material to the agent.

The client's obligation needs to be clearly defined within the agency agreement. The licensee must ensure there is 'full disclosure of all things material to their client'.

This obligation between agent and client includes the licensee's obligation of non-disclosure of a client's confidential personal information without the client's written consent. Disclosure of this information could be a breach of confidentiality.

However, the licensee is required to disclose any property-related information, which may be material to a customer, or purchaser and not just what the licensee *believes* is material.

Prior written consent must be obtained from the client to disclose material information.

Apart from confidential personal information, a client cannot require non-disclosure of any material information by the licensee. A licensee must not continue to act for a client who directs that defects in the land be withheld (refer to rule 10.8).

Refer to case: Real Estate Agents Authority (CAC 20005) v Austin [2013] NZREADT 108
<http://www.nzlii.org/nz/cases/NZREADT/2013/108.html>

Customers

The **customer** sits outside the fiduciary relationship between the agent and the client.

The licensee must ensure full disclosure of 'all things material to the customer', except confidential personal information of the client (unless consented by the client in writing). Information provided by licensees to relevant parties must be current, authoritative, relevant and able to be substantiated (proven). Oral disclosure should be confirmed in writing; for example, by email.

Refer to the flow chart on the following page.

Note: reference to section 36L of the Fair Trading Act 1986 relates to a CAC complaint (**Baker - Complaint No C17051 [2017] NZREAA 201**) where a licensee and an Agency had engaged in unsatisfactory conduct for breaching *uninvited direct sale agreement* provisions.

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

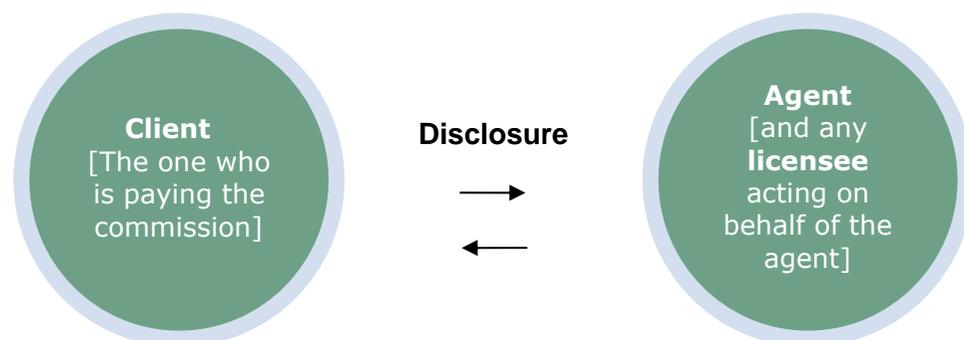
Note the Committee's comments:

- [para 3.1] Section 36K of the FTA defines the meaning of an 'uninvited direct sale agreement'.
For current purposes it is, '*... an agreement for the supply, in trade, of goods or services to a consumer... that is made as a result of negotiations... between a supplier and consumer... where the negotiations take place between the consumer and the supplier in each other's presence, in the consumer's home... where the consumer did not invite the supplier to come to that place for the purposes of entering into negotiations relating to the supply of those goods or services.*'
[It is noted that the definition also embraces approaches to consumers in their workplaces and by telephone.]
- [para 3.3] Section 36L of the FTA sets out a number of disclosure requirements that suppliers must meet when entering into uninvited direct sales agreements...

A review of disclosure obligations to client and customer

A fiduciary relationship exists between the **agent** and the **client**. A **licensee acting 'for and on behalf of the agent'** has the same fiduciary obligations. This relationship is based on the trust, confidence and reliance held by the client with the agent.

The relationship also relies on the obligation of the client to disclose what is known about the property to the agent. The client's obligation needs to be clearly defined within the agency agreement.

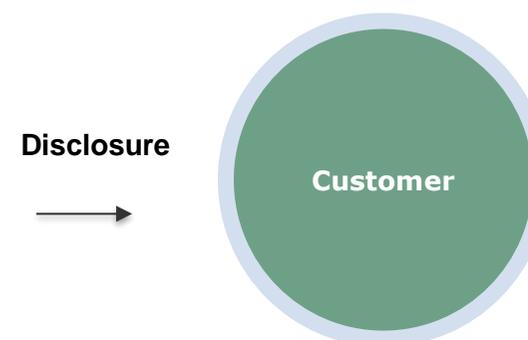


Important rules and legislation (in addition to fiduciary duty):

- Sections 134 – 137 of the Real Estate Agents Act 2008
- Rules 5.1, 6.1 (9.1), 6.2, 6.3, 6.4, 10.7, 10.8
- Rules 9.16, 9.17, 9.18
- Fair Trading Act 1986 (sections 9, 12A, 14, 26A and 36L)

The customer sits outside the fiduciary relationship between the agent and the client.

Full disclosure of 'all things material to the customer' is required, **except the client's confidential personal information** (unless permitted in writing) as covered by Rule 9.17.



Important rules and legislation:

- Sections 136 and 137 of the Real Estate Agents Act 2008
- Section 35 of the Contract & Commercial Law Act 2017 (replaced section 6 Contractual Remedies Act 1979)
- Fair Trading Act 1986 (sections 9, 12A, 14)
- Rules 5.1, 6.2, 6.3, 6.4, 10.7

Important legislation and the rules relating to disclosure

You should be familiar with the key Rules and legislation that relate to disclosure, as they have been covered in CPD programmes in previous years. Check your understanding of these concepts by completing the following questions. Refer to Appendices 1-4 as necessary.



Questions

2. Read the rules in the table below. Do the obligations they describe relate to client, customer or both?

Rule	Client	Customer
5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.	<input type="checkbox"/>	<input type="checkbox"/>
6.1 A licensee must comply with fiduciary obligations to the licensee's client.	<input type="checkbox"/>	<input type="checkbox"/>
6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.	<input type="checkbox"/>	<input type="checkbox"/>
6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.	<input type="checkbox"/>	<input type="checkbox"/>
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.	<input type="checkbox"/>	<input type="checkbox"/>
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.	<input type="checkbox"/>	<input type="checkbox"/>
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.	<input type="checkbox"/>	<input type="checkbox"/>
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.	<input type="checkbox"/>	<input type="checkbox"/>

3. The following legislative provisions relate to disclosure obligations of licensees to clients and customers.

In cases where the client is a vendor or lessor and the customer is a purchaser or lessee, do the obligations they describe relate to client, customer or both?

Refer to Appendices 2 - 3 to help you answer the questions, as necessary.

Section	Client	Customer
Section 134 of the Real Estate Agents Act 2008 which deals with situations in which contracts for acquisition by licensee or related person may be cancelled.	<input type="checkbox"/>	<input type="checkbox"/>
Section 135 of the Real Estate Agents Act 2008 which deals with situations in which clients must be provided with a valuation.	<input type="checkbox"/>	<input type="checkbox"/>
Section 136 of the Real Estate Agents Act 2008 which deals with situations in which disclosure of other benefits that licensee stands to gain from transaction must be made.	<input type="checkbox"/>	<input type="checkbox"/>
Section 137 of the Real Estate Agents Act 2008 which defines the meaning of licensee and person related to licensee in sections 134 to 136.	<input type="checkbox"/>	<input type="checkbox"/>
Section 9 of the Fair Trading Act which prohibits misleading and deceptive conduct.	<input type="checkbox"/>	<input type="checkbox"/>
Section 12A of the Fair Trading Act which prohibits the use of unsubstantiated representations.	<input type="checkbox"/>	<input type="checkbox"/>
Section 14 of the Fair Trading Act which prohibits false representations and other misleading conduct in relation to land.	<input type="checkbox"/>	<input type="checkbox"/>
Section 36L of the Fair Trading Act refers to uninvited direct sales. The licensee is required to give the client <u>oral notice</u> before the agency agreement is entered into of the client's right to cancel the agreement within 5 working days after the date on which the consumer receives a signed copy of the agreement; and how the consumer may cancel the agency agreement. The licensee must include specific information on the front page of the written agency agreement, including a summary of the client's right to cancel the agency agreement within 5 working days.	<input type="checkbox"/>	<input type="checkbox"/>

Consent of client-vendor or lessor to disclose

Disclosure of personal and/or property-related information

A client's confidential personal information, for example their financial situation, must not be disclosed without the client's written consent to do so (Rules 9.17 and 9.18). Licensees must confirm in writing that a client has given consent to disclose their personal information and that the consent given was 'informed consent'.

Under rule 6.1 and common law, and as has been illustrated in complaint decisions, licensees must speak with the client-vendor or lessor before making any disclosure decisions about the property.

If a licensee believes that issues with the property may be important to a prospective purchaser or lessee, the licensee must discuss the matter with the client and obtain the client's written consent to disclose the issues. Once again, it is important for licensees to confirm through documentation that the client has given written consent to disclose property, space, or business-related information and that the consent given was 'informed consent'.

Licensees should make sure they can demonstrate that they have discussed the implications of disclosure with their client. The best way to do this is by keeping written records of when and what was disclosed. If a client does not fully understand the implications of what they are consenting to, then they will not have given 'informed consent'.

A licensee's fiduciary obligation to their client (Rule 6.1) is paramount, and the licensee must act in accordance with the lawful instructions of their client (Rule 9.1). However, if the client does not agree to disclose what a reasonably competent licensee believes is material information concerning defects (Rule 10.7), then the licensee must cease to act for the client (Rule 10.8). It is important to note that when a licensee ceases to act for a client in these circumstances, under their continuing fiduciary obligation, they may not disclose the reason for withdrawing from the agency agreement.

Licensees can't follow a client's (or a client's lawyer's) instruction if it is unlawful. This includes when a client (or a client's lawyer) gives an instruction that is contrary to a licensee's obligations under the Rules or the Real Estate Agents Act 2008. The licensee and the agency must comply with rule 10.8 and must not continue to act for a client giving an unlawful instruction regarding disclosure of defects in terms of Rule 10.7. If such a situation occurs, and the licensee cannot change the client's (or the client's lawyer's) mind, the agency agreement should be cancelled, and all affected parties advised in writing.

A licensee's fiduciary obligation to their client continues until settlement and in some cases can continue beyond that. A licensee's duty of confidentiality to their client continues indefinitely. Similarly, a licensee's disclosure obligation to a customer continues until settlement.

It is best practice for licensees to confirm that a client has given consent to disclose property-related information in writing.

Disclosure of clients' confidential personal information

Read the following case study and answer the question that follows.

Case study 2

During the period when prospective purchasers were considering the purchase of a property, the licensee marketing the property disclosed to them offers from other prospective buyers. This included a copy of a sale and purchase agreement from an interested potential buyer, details of another offer sent to them via email, and verbal disclosure of other offers during the business relationship.

Complaint number: C06991

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

4. What rules, if any, did the licensee breach?

Note the following comments made by the Committee in relation to this case:

- [para 3.8] 'The situation is different as regards the disclosure of offers received from other parties.
Rule 9.16 of the Rules provides that "a licensee must not use information that is confidential to a client for the benefit of any other person or of the licensee."
There have clearly been here breaches by this agent of obligations of confidentiality on, we infer, more than one occasion. This is effectively admitted by the Licensee.
In circumstances where there are or have been other offers on a property, all that a licensee can properly say to prospective buyers is just that, namely: "there have been other offers."'
- [para 3.9] 'The details of any other offers submitted to a vendor client may not be disclosed. To do so is a clear breach of applicable professional standards. We therefore find the Licensee to be, in this regard, guilty of unsatisfactory conduct...'

Disclosure obligations in relation to sections 134, 135 & 137

The Real Estate Agents Act 2008 (the Act) sets out specific requirements regarding disclosure obligations when a licensee or related person wishes to take an interest in land or a business. These obligations are set out in sections 134, 135 and 137 (refer to Appendix 1).

Note

Complying with sections 134, 135 and 137 without addressing the associated 'conflict of interest' that arises from fulfilling your fiduciary duty, must be managed in accordance with the standards of professional competence as set out in the Rules. Specifically, a 'licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work' (rule 5.1) and 'a licensee must comply with fiduciary obligations to the licensees' client' (rule 6.1).

Refer to the section on **Conflicts of Interest and Informed Consent** below for more information.

The next few pages summarise sections 134, 135 and 137.

You can access the complete Real Estate Agents Act 2008 at <http://legislation.govt.nz/act/public/2008/0066/64.0/DLM1151921.html>

Section 134

Implications of non-compliance with sections 134 and 135 include the clients' right to cancel any sale and purchase agreement that has been transacted, as set out in section 134 (1), (2) & (3), and loss of commission.

Key points from **section 134** include:

1. Licensee or related person must obtain clients consent (section 134(1)) to acquire or gain a beneficial interest in the land or business to which the transaction relates.
2. Licensees, without the [written] consent of the client, may not continue to carry out real estate agency work in respect of a transaction if they know, or should know, it will result in a person related to the licensee acquiring the land or business (134(2))
3. Clients consent is only effective if it is in the prescribed form [Form 2] and provided with an independent registered valuation *in accordance with section 135* (134(3))
4. Failure to comply with subsections (1) or (2) above entitles the client to cancel the contract
5. No commission is payable if consent is not obtained, regardless of whether the client cancels the contract or not (134(5)), and a client may recover any commission paid (134(6))
6. Subsection (7) clarifies obligations apply to an agent, branch manager and salesperson
7. A licensee **cannot** contract out of the requirements of section 134 or 135 (134(8))

Section 135

The provision of a valuation in accordance with s135 is required for effective client consent.

Section 135 specifically details a licensee's obligations when providing a valuation to their client if they, or a related person, wish to take an interest in land or business.

A summary of **section 135** is as follows:

1. The valuation is at the licensee's own expense (135(1))
2. The valuation must be made by an independent registered valuer or, when marketing a business, an independent qualified statutory accountant (135(2))
3. The valuation must be given to the client *either* before seeking consent, or within 14 days after consent is given and with the clients' agreement, (135(3))
4. If no valuation is provided, any consent given by the client is ineffective 135(4))
5. The contract is voidable by the client if the valuation when provided, is greater than the provisional valuation previously agreed to (135(5))

Refer to case: Tremain Real Estate (2012) Ltd & Cox v REAA & Ly [2018]

Note: Provisional valuation is discussed later.

Section 137

Section 137 provides a detailed interpretation of licensee and related person.

Section 137 (1) – Licensee includes an agent that is a company, and every officer and shareholder of that company

137 Meaning of licensee and person related to licensee in sections 134 to 136

137(1) In sections 134 to 136, licensee includes, in the case of an agent that is a company, every officer and shareholder of the company.

Section 137 (2) – interpretation of person related to licensee

(2) For the purposes of sections 134 to 136, a person is related to a licensee if the person is—

- (a) a partner of the licensee under a partnership agreement:
- (b) an employee of the licensee:
- (c) a branch manager or salesperson engaged by the licensee:
- (d) the licensee’s spouse or civil union partner:
- (e) the licensee’s de facto partner:
- (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraphs (d) or (e):
- (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):
- (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):
- (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest (except where either interest is in quoted financial products within the meaning given for those terms in section 6(1) of the Financial Markets Conduct Act 2013).

Conflict of interest and informed consent

Licensees wishing to take an interest in a client’s property or seeking consent on behalf of a related person taking an interest, are required to ‘step back or away’ from any negotiations, or any real estate agency work, on that property.

This requirement also applies to licensees from another agency who enter into a conjunctive agreement to take an interest in a client’s property or seeking consent on behalf of a related person taking an interest.

The agency is to conduct negotiations with the client when a conflict of interest is identified. The supervising agent, on behalf of the agency, should conduct all negotiations, or appoint an ‘arms-length’ licensee (preferably an agent) to conduct all negotiations with the client.

The supervising agent must ensure the client has given 'informed consent' to the land or the business being sold to the licensee or a related person.

Read the following case study.

Case study 3

In November 2013 a CAC (Complaint number: C03049) investigated an agency (Company Licensee) which was believed to be in breach of its fiduciary obligations to its Client(s); specifically, when a salesperson licensee wishes to purchase a property that is owned by a current client of the Company Licensee.

The CAC investigation was initiated after two previous complaints against salesperson licensees engaged by the Company Licensee. Both cases involved the purchase of a Client's property by a salesperson engaged by the Company Licensee.

The Committee's main concern was regarding the Company Licensee in-house policy which stated that 'licensees who wish to acquire a client's property were instructed to approach the client directly and thereafter to commence and control all negotiations'.

The Company Licensee believed that the Courts (in New Zealand) have held that fiduciary obligations are met if the Client has given 'informed consent' to a potential conflict of interest in situations of this kind.

However, the Committee disagreed with this opinion's narrow application of the principal concerns expressed by complainants in the two previous cases; furthermore, the CAC stated that:

[para 4.3] 'a fiduciary obligation required the highest level of care and good faith'; and that 'an agent should do all it can for its Client, rather than all it can get away with.'

The Complainants in the two previous cases drew [para 4.5] 'a distinction between the willingness to sell to a person who acts as a representative of their agent and the unbalanced and unfair advantage of negotiating directly with that person'.

The concerns raised by the Complainants focus particularly on the information gained by a licensee/purchaser (of the agency) that is not ordinarily available to other purchasers (e.g. members of the general public).

Furthermore, there is a conflict of interest that arises through the in-house policy that then instructs licensees wishing to purchase property that is owned by a current client of the Company Licensee to undertake negotiations directly with the client, as opposed to negotiations through an impartial third party from within the Company Licensee.

Furthermore, the Committee stated:

[para 4.7] 'The Committee finds that a Purchaser/Employee cannot advise and protect the best interests of the Client when their own agenda is to buy the property on the most favourable terms they can negotiate for themselves. The Company Licensee's policies do not recognise this conflict of interest.'

The Committee decision was a determination that the Company Licensee engaged in unsatisfactory conduct.

Complaint number: C03049

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

The CAC decision was appealed by the Company Licensee.

In July 2014 the appeal was held before the Real Estate Agents Disciplinary Tribunal (the Tribunal) (Case: Barfoot & Thompson Ltd v REAA [2014] READT48).

The Tribunal stated that:

[para 21] 'The Real Estate Agents Act 2008 (the Act) allows licensees to bid for and buy properties listed by them (or their employers) and sections 134 – 137 the Act set out the requirements that must be complied with. The Act must be read in conjunction with the Rules which set out the standards of conduct and client care that licensees must observe. That includes rules 6.1 (A licensee must comply with fiduciary obligations to the licensee's client) and 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).'

The Tribunal went on to say [para 22] 'there will be an inherent tension between a licensee's own interests and his or her duties to the vendor client if the licensee is a prospective purchaser', referring to the CAC statement in paragraph 4.7 (noted above).

Furthermore, the Tribunal also stated:

[para 33] 'In effect, the Committee found that a vendor client...is reasonably entitled to expect when engaging a licensee that such vendor will have a licensee to negotiate on their behalf, and, in doing so, provide robust, objective, and practical assistance and advice on the quality of any offer made, including whether it should be accepted and any risks of declining the offer'

The Tribunal decision was clear:

[para 50]: 'We agree with the reasoning and determinations of the Committee and confirm its penalty orders. Accordingly, this appeal is dismissed.'

Case: Barfoot & Thompson Ltd v REAA [2014] NZREADT 48

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

The Tribunal decision was appealed and referred to the High Court

In October 2014 the appeal against the Tribunal ruling was heard in the High Court, and a full review of all the facts covered by both the CAC and the Tribunal was undertaken, including reference to case law. (Case: Barfoot & Thompson Ltd v REAA [2014] NZHC3309).

Pertinent comments from the High Court judge include:

[para 37] 'The fiduciary duty of loyalty has several aspects, principally the obligations not to act in a position of conflict and not to profit from the relationship. The nature of the agency relationship also imposes a duty not to misuse confidential information that comes into the agent's hands. A vendor who engages a licensed real estate agent is therefore entitled to have the agent not act in a position of conflict, not profit from the relationship and not misuse confidential information.'

[para 39] '...consent for the purposes of s 134 must mean informed consent.'

[para 40] 'What is required to obtain informed consent depends on the circumstances of the particular case. The client is consenting to the agent acting in a position of conflict and must give consent in the knowledge of that conflict. Self-evidently, bare advice that a conflict exists is not adequate. The client must be provided with sufficient information to understand the nature and implications of a conflict.'

The appeal was dismissed.

Barfoot & Thompson Ltd v REAA [2014] High Court NZHC 3309

<http://www.nzlii.org/nz/cases/NZHC/2014/3309.pdf>

The High Court decision was appealed and referred to the Court of Appeal.

In March 2016 the Court of Appeal heard the appeal. (Case: Barfoot & Thompson Ltd v REAA [2016] NZCA105).

The introduction to the hearing stated:

[1] This appeal raises issues about the obligations of a licensed real estate agent when the licensee or a related person wishes to buy the property the licensee's agency has been engaged to sell.

[2] For many years, legislation governing the activities of real estate agents has forbidden licensees or related persons from acquiring a property in such circumstances unless certain requirements have been met. Under the Real Estate Agents Act 1963 the vendor's consent was required. The Real Estate Agents Act 1976 added a requirement that an independent valuation of the property be provided to the client. These requirements are now contained in ss 134 to 137 of the Real Estate Agents Act 2008'.

The issues for consideration on appeal were that the findings of the High Court were wrong in law. The counsel acting for the Company Licensee contended that if compliance of sections 134 to 137 were met, there was no further obligation on the licensee. However, in respect of this submission, the Court held @ [42]:

[42]...(there is) the clear distinction between the functions of ss 134 to 137 and the disciplinary provisions of Part 4 of the Act. The former set out the statutory requirements which must be met before there can be an enforceable agreement enabling the licensee or a related person to acquire a client's property or an interest in it. In contrast, the disciplinary functions of the Committee and the Tribunal under the Act are concerned with regulating the professional conduct of licensees.

The Court of Appeal stated the appeal should be dismissed

[para 49] '...we have no hesitation in agreeing with the High Court that the policy amounted to unsatisfactory conduct as found by the Committee and upheld by the Tribunal.'

[2016] Court of Appeal NZCA 105 <http://www.nzlii.org/nz/cases/NZCA/2016/105.html>

Note

Despite consistent findings of the CAC, the Tribunal and the High Court in this regard, the Company Licensee neglected to amend its in-house policy awaiting the Court of Appeal decision.

A Complaints Assessment Committee received a further complaint regarding conduct based on the same policy that took place in early January 2016.

In March 2018 the Company Licensee was found guilty of unsatisfactory conduct for '*having an internal policy that contradicted its duty to act in the best interests of its vendor client*'; breach of Rules 6.1, 6.2 and 9.1.

The commission of \$13,574.60 was ordered to be refunded to the complainant.

Complaint number: C22342

You can read more about this decision through the 'Search complaints decisions' link at rea.govt.nz

Provisional valuation

The Tribunal has held that the appraised value should be used as the provisional value; this was originally confirmed in [2015] NZREADT 83² Advantage Realty Ltd v REAA:

[para 58] 'We consider that every effort must be made by the vendor and purchaser to wait for an urgent independent valuation of the property, or that, otherwise the figure to be inserted in the said Statement B of Form 2 is the existing appraised value from the agent.'

Following the [2015] NZREADT 83 ruling, the REAA applied to the Tribunal for a recall of the [2015] NZREADT 83 decision, stating that the Tribunal had *'inadvertently referred to using the appraised value, rather than the agreed price, for the provisional value in Statement B of Form 2'* (refer to [2016] NZREADT 6³).

The Tribunal confirmed the decision made in [2015] NZREADT 83, and stated:

[para 7] 'We take the view that the valuation process required by ss 134 and 135 is for the protection of the vendor in the situation of the licensee having the perceived conflict of interest outlined in s 134.

Prior to that situation arising, the vendor received an appraisal and was aware of the contents of that when negotiating what became the agreed sale price. Accordingly, it seems logical to us that the appraisal figure be the touchstone for comparison with the independent valuation when it eventually comes to hand. Only if that independent valuation exceeds the appraised value, as distinct from the agreed price, should the vendor be able to cancel the contract in terms of s135(5).'

In a recent CAC decision (**Complaint No: C16789**), the Committee made the following comments concerning the provisional value and the requirement for it to be the appraised value:

In regard to Licensee 3:

[para 4.14] 'The Committee found..... that Licensee 3's actions have resulted in unsatisfactory conduct as he incorrectly completed the provisional valuation on the form. He used the offer price, then the agreed sale price, as the provisional value.'

² <http://www.nzlii.org/nz/cases/NZREADT/2015/83.html>

³ <https://www.justice.govt.nz/assets/Documents/Decisions/2016-NZREADT-6-Advantage-Realty-Ltd-v-Gambino.pdf>

In regard to the Agency:

- [para 4.18] 'The Committee found that the Agency failed to provide adequate supervision resulting in unsatisfactory conduct...The reason being as follows:
- [para 4.19] 'As noted in paragraph 4.16, we find Licensee 3 was following then current Agency policy on the process for setting the provisional value in Form 2.'
- [para 4.20] 'The Agency accepts that it was made aware of the Advantage decision ([2015] NZREADT 83; [2016] NZREADT 6) and the Authority's direction on 11 July 2016. It was raised at that time However, this knowledge was not passed onto the ... branch. It was not picked up...by the team...'
- [para 4.22] 'This failure by the Agency to advise ALL its licensees of the Advantage decision in July 2016 and the subsequent delayed policy change directly resulted in Licensee 3 following what was, at the time, Agency protocol.
- [para 4.26] 'The Agency failed, as an agent operating a business, to ensure that Licensee 3 had a sound knowledge of the rule issued by the Authority on provisional value. Form 2 is not a simple form. Given that the Form 2 in this matter involved two directors of the Agency as the purchasers, the Agency should have exercised greater care and diligence in supervising Licensee 3 in this area and ensuring he understood how to completely correct it.

This CAC decision (C16789) was appealed to the Tribunal.

The Tribunal confirmed the unsatisfactory conduct decision made against the Agency but allowed the appeal on behalf of the licensed salesperson. In their decision, the Tribunal firmly reinforced the Advantage decisions on the appraised price.

Case: [2018] NZREADT 54

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

Notes

When a property is for sale by auction and option B on Form 2 is selected, the most recent appraised price should be used as the provisional value.

Form 2 should be completed prior to the auction and the points noted above should be explained to the vendor or lessor by the supervising agent or arms-length delegated licensee.



Questions

Read the following statements and decide whether they are 'True' or 'False'.

5. Under Section 134 of the Real Estate Agents Act, written consent is required from the client if the licensee or a related person wishes to acquire the land or business to which the transaction relates. However, the format is not prescribed.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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6. Unless the client has given authorisation in Form 2, a licensee must not complete the transaction if a related person is likely to acquire the land or business.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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7. If a transaction progresses under the terms of section 134 the licensee must provide the client with an independent valuation paid for by the licensee.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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8. Under section 134, the client may not cancel any contract relating to the property and does have to pay commission if requirements are not complied with.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Benefitting financially from a transaction other than from commission

Section 136

Under section 136 a licensee who carries out a real estate agency transaction must disclose in writing to every prospective party if they, or any person related to them (as defined in section 137 – refer above), may benefit financially from the transaction.

In summary, **section 136** provides:

1. Disclosure must be made of whether or not the licensee, or any person related to the licensee, *may* benefit financially from the transaction
2. Disclosure must be in writing
3. Disclosure is required to be provided to **every prospective party** to the transaction

Section 136 is set out in full, as follows:

136 Disclosure of other benefits that licensee stands to gain from transaction

Section 136 (1)

136(1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.

Section 136 (2)

136(2) Subsection (1) does not apply to any matter disclosed under section 128 or 134.

Section 136 does not cover the requiring of consent constraint on the right of a licensee or any partner, sub-agent, nominee or a related person to purchase property or land from a client of the agency or sub-agency. This is covered in section 134 of the Real Estate Agents Act 2008.

Section 136 (3)

136(3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.

For example, any licensee listing their own property for sale, or the property of a related party, is required to make full disclosure, in writing, to all parties to the transaction before or at the time that the licensee provides the prospective party with any contractual documents.

Note: Section 136 declaration statements are available from both the Real Estate Authority and the Real Estate Institute.

Note: Section 128 provides for disclosure of expenses such as rebates, discounts, and commissions in relation to expenses incurred on behalf of a client, for example, marketing or advertising expenses.

128 Agency agreement must disclose rebates, discounts, and commissions

Section 128 (1)

128 (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).

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

Read the following case study and answer the question that follows.

Case study 4

A licensed salesperson negotiated the sale of a commercial property, on behalf of the vendor, to a purchaser with whom she had recently established a romantic relationship.

The relationship was disclosed verbally to the vendor, and subsequently, a further term of sale disclosing the relationship in writing as a declaration made under Section 136 of the Act was inserted into the sale and purchase agreement e.g. the salesperson may benefit financially from the transaction.

A complaint was made to the Real Estate Authority (REA) stating that the salesperson had failed to obtain the vendor's signature (consent) on the required form (Form 2) and also failed to provide the vendor with required independent registered valuation.

Complaint number: C17798

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

9. What sections of the Act or rules, if any, did the licensee breach?

Note the comments made by the Complaints Assessment Committee for the case above:

[para 3.2] 'The breadth and significant impact of the above provisions (e.g. section 134 to 137) show that Parliament intended them to be taken seriously. They exist for a reason, namely to protect vendors, and the Committee does not consider ignorance of the steps required by a licensee can be condoned.'

Read the following case study and answer the question that follows.

Case study 5

Licensee A listed a residential property for sale and a selling licensee was also involved with the sale of the property. A further licensee B (supervising licensee) within the agency was responsible for supervising both licensee A and the selling licensee.

The selling licensee introduced a buyer to the property who was a 'related person' by definition of section 137.

The supervising licensee B knowingly allowed the selling licensee to conduct negotiations directly with the client(s) of the property on behalf of the 'related person' (thereby acting in a position of conflict) rather than require the listing licensee A carry out negotiations on their behalf.

The Agency had a policy for dealing with a situation where one of its licensees or a related person wished to buy a property listed for sale with the agency. This policy was required to be followed by its licensees.

The policy stated:

'When a salesperson licensee wishes to purchase a property that is owned by a current client of the Company Licensee, those licensees are instructed that they should contact the client directly to ascertain the current situation with the property.

The licensees are then authorised to commence and control all negotiations between themselves and the client provided that the provisions of section 134 to 137 of the Act have been complied with.'

Complaint number: C22342

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

10. What rules, if any, did the licensee(s) A and B, or the agency breach?

The Committee decided that, unlike the agency, no further action would be taken in relation to both licensees involved in this complaint as they were adhering to the agency in-house policy.

The Committee stated that the licensees, however, should have been more alert to their obligations and cannot exclusively rely on internal agency policies, particularly if that requires breaking the law.

It should be noted that the selling licensee had previously been found to be engaged in unsatisfactory conduct. (Complaint C16220).

In its decision, the Committee found a breach of Rules 6.1 and 9.1 by the Agency and made the following statement:

[para 3.8] 'The Agency's continuation of and their failure to amend the agency Policy to minimise any conflict of interest between their vendor clients and their licensee salespeople was incompatible with their obligations to "act in good faith and deal fairly" with the complainants and therefore a breach of Rule 6.2.'

Disclosure of material facts to the customer

Establishing clarity of material facts, and the associated obligations for disclosure of those material facts as pertinent to each real estate transaction is an integral part of the Standards of professional conduct as set out in the Rules.

Numerous CAC decisions cite a disclosure breach by licensees of the following rules:

Rule 5.1

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

Rule 6.2

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

Rule 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

Rule 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, 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.

Read the following case study and answer the question that follows.

Case study 6

A licensed salesperson advertised a site as having 'all services at the boundary'.

The licensee assured the purchaser that the site had water pipes, based on the fact that a cottage used to be on site and was hooked up to existing services; and that a conduit under the road contained telecommunication services.

The purchaser complained to the Real Estate Authority on the basis that the representation was misleading and extra expenditure was required to complete the installation. It was later found that the cottage was transportable and had been connected to the water on a neighbouring site, however water pipes did in fact run past the front of the property.

It was found that although a conduit had been laid under the road, it was empty, and did not contain a phone line. With the exception of telecommunication services, the complainant purchaser was not able to establish that all services were not provided to the boundary.

Complaint number: C13761

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

11. What rules, if any, did the licensee(s) A and B, or the agency breach?

Read the following case study and answer the question that follows.

Case study 7

A complaint was made to the Real Estate Authority about a licensed salesperson not disclosing a *clean fill* proposal on land that adjoined the property that the complainant had entered into an agreement to purchase.

The proposal, which was widely known about in the community and involved up to 93 trucks a day accessing the adjoining property.

The complainant sought release from the agreement on the grounds of non-disclosure by the salesperson, who claimed that she had no knowledge of the proposal.

Complaint number: C17934

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.

Note: the complaint involved two licensees, but the Committee made a decision of no further action against Licensee 2 for the handling of the complaint.



Questions

12. What sections of the rules, if any, did the licensee breach?

Read the following case study and answer the question that follows.

Case study 8

A complainant, who had purchased a property, complained to the Real Estate Authority that two licensed salespersons had not disclosed to her that there were 'leakage problems from the terrace into the garage'.

It transpired that the garage had been 'cluttered' with tenant possessions. The salespersons submitted that they had been unable to inspect the garage at the time of inspection and were therefore unaware of any leakage problems with the property.

Complaint number: C15652

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

13. What sections of the rules, if any, did the licensee breach?

Information licensees need to disclose

Disclosure of sensitive issues

Whether or not to disclose an issue that does not relate to the physical state of the property, but is *sensitive* (for example where a murder, suicide or violent crime has taken place at the property), isn't easy or straightforward. There is no simple 'yes' or 'no' answer.

Disclosure of a sensitive issue depends on the facts of the case, and whether the vendor gives consent for disclosure. The types of considerations that might be relevant, however, include the following:

- The **location** of the event. For example, sometimes it will be reasonable to view a tragedy in the grounds of a property differently from one in a living area of a house
- The **circumstances** of the event and whether it has a degree of notoriety, even if just in the local neighbourhood
- **How long ago** the event happened
- The **circumstances following** the event. For example, whether a residential property has been lived in since and, if so, for how long
- The **likely reaction** of potential purchasers to the information and the possible impact on the price

It is important that disclosure of any sensitive issue is discussed with the vendor or lessor and that their views are considered when making any decisions.

As covered earlier, disclosure cannot be made without the written consent of a client-vendor or lessor. If a licensee thinks that disclosure should be made but the client does not agree, then the only appropriate action for the licensee to take is to cease to act for the client and not disclose the information.

If it is decided that an issue must be disclosed, and the vendor agrees in writing, the disclosure must be handled sensitively.

There is no need to advertise the sensitive information or tell everyone who views the property (unlike in situations described by the High Court in appendix 2, where the information is so significant to the property that anyone who visits a property needs to know about it). The licensee obligation is to tell prospective (or potential) purchasers who have indicated an interest in submitting an offer on the property.

Reference: Summarised information from the REA website – 'Disclosure of Sensitive issues', August 2018

Guidance from a decision

The REA website provides an example of dealing with sensitive issues and is set out below:

Read the following case study.

Case study 9

This case involves a property that was sold where a tenant had committed suicide in the garage 12 months before the listing.

The property was listed with two agencies. Agency One disclosed the suicide to prospective buyers. Agency Two, which sold the property, did not. The matter was considered by senior staff at Agency Two who concluded that, because it was a personal matter of the occupants and did not relate to the condition of the property, it did not need to be disclosed.

The property was purchased by the complainants who decided to sell it five months later and entered into a sale and purchase agreement. The complainants' neighbour asked them if they were on-selling so quickly because of the suicide.

This was the first time the complainants had heard about the death at the property. The complainants disclosed the event to their purchasers who then didn't want to move in, so they on-sold the property before settlement.

The Complaints Assessment Committee (CAC) found unsatisfactory conduct against Agency Two, which was upheld by the READT and subsequently appealed to the High Court.

The High Court [2014] NZHC 2817 upheld the appeal and overturned the finding of unsatisfactory conduct.

<http://www.nzlii.org/nz/cases/NZHC/2014/2817.html>

The High Court rejected the suggestion that agents should err on the side of caution and disclose. Whether it needs to be disclosed will depend on the facts of the case:

[para 50] '[the Tribunal] has effectively grafted onto the rule [6.4] an additional requirement, namely that where the issue of what "fairness" demands is in doubt, a licensee must disclose the information. The reading in of such a rule is not appropriate or justifiable. An evaluation of what "should by...fairness" be provided to a client must be undertaken in the particular circumstances of each individual case. There is no presumption either way.'

[para 80] 'I accept this is a matter on which reasonable people can have different views. While some may be affected by it, others may be so to a lesser extent, or indeed, not at all.'

The Judge acknowledged that the issue was a finely balanced one on which people can have Different views:

- [para 81] 'This is a very finely balanced decision. In favour of the appellant are the facts that the suicide took place in the garage over 12 months before the sale, and the property had been occupied during that 12 month period. Furthermore, there was no industry standard or guidance available to assist in the decision as to whether the suicide required disclosure.
- [para 82] 'As against that, one estate agency had decided that disclosure was required, although that is not determinative. More telling is the fact that the agency was unable to effect a sale. However, there could have been other reasons for that. The reaction of the second respondents and their purchasers provides evidence only after the event.
- [para 83] 'Because the decision is so finely balanced and because there was no industry standard or guidance available, I conclude that it is inappropriate to find the appellant in breach of the rule.'

Key Point

Based on the appeal decision made by the High Court in 2015, if faced with a sensitive issue you should:

- Consider carefully whether it is something that needs to be disclosed
- Consider the nature of the issue. It is not just unnatural deaths that may need to be disclosed, but also other matters such as particularly vicious crimes
- Take a cautious approach.

'As is/where is' provisions do not negate disclosure obligations

'As is/where is' means that a vendor is selling, and a purchaser is buying property or land in whatever condition it represents at the time of signing a contract. The purchaser is accepting all present faults.

Examples of where 'as is/where is' provisions may typically be used include property or land that:

- Is sold in a mortgagee sale
- Needs extensive or significant repair
- Has illegal occupants
- Has issues with title and/or non-complying structures
- Has issues associated with its zoning or locality
- Has issues of uncertainty associated with the title and/or compliance, e.g. remediation following earthquake damage

Under an 'as is/where is' arrangement, any costs related to fixing any of these problems (unless negotiated differently) are the responsibility of the purchaser.

The 'as is/where is' provision does not negate a licensee's disclosure obligations under rules 10.7 and 6.4.

If a licensee is aware or should be aware, of anything that may be material to a prospective purchaser, that information needs to be fully disclosed, no later than the point of inducement.

Potential purchasers interested in property or land for sale 'as is/where is' should be actively encouraged to carry out their own due diligence.

An ethical licensee should particularly stress the importance of a potential purchaser carrying out their own due diligence in these situations.

In a sale and purchase agreement, the standard vendor warranties would be crossed out.

When to disclose

There are four specific times in a possible or actual transaction when it is essential to accurately describe and disclose the legal and physical characteristics of real estate.

These are as follows:

- At the time of advertising and marketing
- At the time of inducement for a prospective purchaser or lessee
- At the time of contract execution
- At the time between contract execution and settlement

Methamphetamine: disclosure requirements

In May of 2018 the Prime Minister's Chief Science Advisor, Sir Peter Gluckman, released information which found no evidence of health risks from third-hand exposure to methamphetamine (meth) smoking residues on household surfaces.

This finding has led to much debate within the real estate sector as to obligations of disclosure when listing and marketing a property that is believed to be contaminated with meth, either through personal use or through production or manufacture.

The Real Estate Authority has placed on its website guidance in June 2018, based on the findings of the **Gluckman Report**.

It is important to understand the following licensee disclosure obligations:

- Methamphetamine contamination of 15 micrograms per 100cm² or above is considered a property defect that must be disclosed to potential buyers (rule 10.7 of the Professional Conduct and Client Care Rules 2012).

- You do not have to disclose test results below 15 micrograms per 100cm² unless specifically asked by a prospective buyer or where a prospective buyer has clearly shown an interest in methamphetamine contamination (rule 6.4 of the Professional Conduct and Client Care Rules 2012).
- Disclosure is not required where:
 - methamphetamine has only been used at the property, and the property has been successfully remediated back to below 15 micrograms per 100cm² or
 - methamphetamine has been produced or manufactured at the property, and the property has been successfully remediated back to below 1.5 micrograms per 100cm².

You should discuss the issue with your vendor before making any disclosures.

- A property that tests below 15 micrograms per 100cm² is considered safe to live in, with no adverse health effects.
- The report said there was little reason to test a property for methamphetamine contamination unless there was a strong suspicion that it had been used for methamphetamine production or there had been very heavy use.
- The report found no evidence of adverse health effects from third-hand exposure to methamphetamine smoke residue on household surfaces below 15 micrograms per 100cm².
- Methamphetamine that is inhaled or absorbed through the skin leaves the body within about a day. Residual levels on household surfaces also diminish over time, so a person is not exposed to a constant dose every day.
- The level of 15 micrograms per 100cm² still includes a large safety buffer.
- If your clients have questions about methamphetamine contamination, direct them to the information on settled.govt.nz (external link).
- The report also found that there was little need to test for methamphetamine contamination unless there was strong suspicion or information from Police or forensic experts that a property had been the site of production or heavy use of methamphetamine.
- If a vendor or prospective buyer wants a property to be tested, it is important to make them aware that the methamphetamine testing industry is not currently regulated in New Zealand. The report notes that composite field testing, where multiple samples taken throughout a property are combined into a single sample, can lead to false impressions of high levels of contamination. This type of testing is not recommended.
- Remediation back to 1.5 micrograms per 100cm² is only required where the property was used for methamphetamine manufacture involving solvents and other toxic chemicals, as the methamphetamine reading is used as the marker for these other

toxic chemicals. These chemicals are not usually used in methamphetamine production now.

- Remediation to below 15 micrograms per 100cm² is required for a property where only methamphetamine use took place.
- The new guidance and the findings in the report do not alter decisions already made by Complaints Assessment Committees or the Real Estate Agents Disciplinary Tribunal (READT).

Source: <https://www.rea.govt.nz/real-estate-professionals/disclosures/methamphetamine-disclosure/>

What does this mean for licensees?

Licensees should continue to be vigilant when assessing a property, space or business prior to entering into an agency agreement with the vendor(s) or lessor(s). This includes knowing how to recognise possible meth contamination in a property, space or business.

This section is an extract from REINZ Information Sheet: Meth – Guidance for Sales Agents and is reproduced with the permission of REINZ.

Here are some indicators of possible methamphetamine use or manufacture.

Many of these indicators may have innocent explanations when viewed in isolation, but a red flag should go up if more than one factor can be identified.

- Neighbours complaining of strange chemical smells or sounds
- Fumes/vapour escaping from windows or ventilators
- Windows being covered/sealed day and night
- The presence of drug paraphernalia such as glass pipes
- Occupants acting nervous, jittery, agitated and having dry lips, facial sores and/or dilated pupils
- Major changes in the behaviour of the occupant without other reasons
- The presence of common precursors such as pseudoephedrine, iodine or hypophosphorous acid, especially in large quantities. Numerous chemical containers (labelled solvent, hazardous, acid, flammable) stored
- Presence of Contact NT (a cold and flu medicine which contains pseudoephedrine) capsules or packages. The capsules usually contain pink and yellow granules
- The presence of chemical equipment, such as beakers, distillers, scales or 'par bombs'; large quantities of plastic or glass containers fitted with glass or rubber tubing
- Portable gas tanks or other cylinders not normally seen or used in the area
- Chemical stains around household kitchen sinks, laundry tubs, toilets and/or stormwater drains
- Yellow/brown staining of interior floor, wall, ceiling and/or appliance surface

- The NZ Police website also provides information on detecting possible meth labs

Steps to follow if a property is suspected to be contaminated with meth

If it is suspected a property or space is contaminated, the salesperson licensee should immediately discuss the matter with their supervising agent or branch manager as soon as they become aware that a property or space is, or may be, contaminated with methamphetamine.

The client will need to be informed that under the Rules, methamphetamine contamination levels are considered a property 'defect' that must be disclosed to prospective buyers.

Rule 10.7 states that where it appears likely that land may be subject to hidden or underlying defects, a licensee must either obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to a defect, or permission to disclose any significant potential risk to prospective purchasers.

Rule 10.8 states that if the client does not consent to disclosure, the licensee must cease acting for them.

Rule 6.4 provides that 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.

In respect of members of the public accessing potentially contaminated properties, licensees are obliged to exercise skill, care, competence and diligence at all times when carrying out real estate agency work (rule 5.1).

The licensee should also advise potential customers to get the property or space tested should they believe there is a chance methamphetamine is present.

Important note

It must be remembered that the manufacture of methamphetamine or the letting of premises to be used by someone to make or use drugs is a criminal offence. P-Lab activity should be reported to the police or contact made with the local council environmental health officer.

<http://www.police.govt.nz/advice/drugs-and-alcohol/illicit-drugs-offences-and-penalties>

Prudent Advice

It can be confusing as to what the licensee obligations are in the following circumstances:

- When there is a rumour that a property or space is contaminated
- When information presented suggests a likelihood that a property, space or business is contaminated
- When initial screening has confirmed the presence of methamphetamine, but detailed testing has yet to confirm whether contamination is at the remedial level or higher
- When methamphetamine contamination is confirmed by detailed testing as present at a property, space or business at the remedial level or higher
- When methamphetamine contamination is confirmed by detailed testing as present at a property, space or business but at a level lower than the remedial level
- When a property, space or business has been decontaminated

It is important that all licensees are aware of their duty to disclose 'all things material' to the prospective customer/customer. What may be material to one customer, may not be to another.

All licensees must ensure they comply with their legal obligations: identifying what material information needs to be disclosed 'in fairness' to affected parties complying with the Real Estate Agents Act 2008, and associated regulations, the Rules, legislation and other legal requirements relevant to real estate agency work (e.g. rule 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).

Agency in-house policies

For this reason, an agency may decide to establish in-house policies that set disclosure requirements on meth contamination at any level (e.g. any meth contamination, or meth contamination above 1.5 micrograms per 100cm²) other than those currently provided in the REA guidance following the findings in the Gluckman report.

Agencies are entitled to set their own in-house policies, as long as they comply with those set by the Real Estate Agents Act 2008, and associated regulations, the Rules, the REA, legislation and other legal requirements relevant to real estate agency work.

In all situations, the licensee must comply with agency-specific policies, and ensure the vendor provides [written] informed consent to the licensee for any disclosure in this regard. It would be prudent to obtain the vendor's informed consent prior to entering into an agency agreement, and to substantiate that consent within the agency agreement itself, stating the implications of what the consent includes.

In situations where the vendor does not provide consent, the licensee should discuss the situation with their supervising agent or branch manager and if agreed, comply with rule 10.8 and 'not continue to act for a client who directs that informationbe withheld.'

Consider the following case study and decide if the licensee has breached the Rules listed at the beginning of this section.

Case study 10

A complainant, who had purchased a property, stated to the Real Estate Authority that a licensed salesperson had not disclosed to them that a property they viewed twice and subsequently purchased had tested positive for methamphetamine contamination.

The property had been marketed previously and a written offer to purchase the property was received, conditional on the property being tested for methamphetamine contamination.

After the offer was made, the licensee produced an initial drug test report from the vendor which had been carried out prior to the written offer being made. The report revealed methamphetamine contamination.

At that time the prospective purchaser withdrew their offer.

The following month another prospective purchaser viewed the property and subsequently entered into a sale and purchase agreement conditional on finance, a satisfactory LIM, satisfactory builders report and that the vendors' belongings would be removed from the property, and the property cleaned to a satisfactory manner prior to settlement.

The agreement was settled, and the purchasers moved into the property.

Some months later, an anonymous note was posted in the complainant's letterbox stating that a drug test had been carried out on the property and that it had tested positive for methamphetamine.

The purchasers moved out of the property and had it tested for methamphetamine. The report cited a moderate level of contamination. The property was then decontaminated, tested again and deemed safe for occupation.

The licensee admitted he had read the report and that he had not provided it to the prospective purchasers. Despite a dispute as to whether the licensee had verbally disclosed that a test had been done, the licensee did not, at any time, provide written notification of the existence of the drug test report to the purchasers.

Case: [2017] NZREADT 59 <http://www.nzlii.org/nz/cases/NZREADT/2017/59.html>

You can read about this complaint and decision in the REA decisions database at rea.govt.nz.



Questions

14. What rules, if any, did the licensee breach?

Recognising 'red flags'

A *red flag* is a sign that there is, or could be, a problem that should be noticed, dealt with or investigated further. It is important that licensees are able to identify any red flags associated with a property, space or business they are dealing with.

A *red flag* in the context of a real estate transaction could be:

- Anything from the general property, space or business history that could be cause for concern.
- Properties that fit the weather tightness issue profile.
- Properties with indications that there might be issues with the boundary; for example, if the property extends into bushland.
- A residential property that has been tenanted; for example, due to the possible risk of positive methamphetamine test results.
- Properties where alterations have been made without local authority compliance documentation provided.
- Any sensitive issues that affect the property, space or business; for example, a suicide at the property.
- Properties affected by any restrictions on titles or council compliance.
- Properties that seem out of character with others in the neighbourhood – this may or may not indicate an existing use right and or that the property operates under a resource consent.

- Properties that are to be marketed as 'home and income'. Licensees must ensure that all necessary consents and compliance documentation are in place. For example resource consent, building consent, code compliance certificate.
- Properties that are vacant lots, as these may or may not have specific building platforms.
- Properties adjacent to rivers or lakes. There may have been accretion (addition to land by the action of water) and/or erosion, changing the land area of the property. There may be esplanade strips or access strips in existence, or if the purchaser is proposing a subdivision, provision for esplanade reserves may be required.
- Properties on the foreshore and in coastal zones may be subject to additional resource and building consent constraints e.g. building structures may be required to be removable. Additional reserve requirements are likely to apply if a subdivision is contemplated. Also, coastal resource consents are required for any development below mean high water springs. Properties on the foreshore may also be affected by protected Māori customary rights.
- Properties near airports – there may be additional controls over the height and lighting of buildings and noise control requirements.
- Properties adjacent to main roads and important intersections – there may be additional controls over access, signs and road-widening designations.
- Properties where specific purchasers may be required to gain consent under the Overseas Investment Act 2005.
- Properties in areas where there are proposed developments that may have an impact on the area, such as designated highways, road-widening or cell phone towers.
- Commercial investment properties subject to lease but where some or all the space is vacant; situations where the tenant may not be paying (full) rent; where a shop has a sign indicating it is closing down or being vacated whilst a lease is in place.
- Commercial properties where asbestos has been identified as a hazard e.g. buildings built prior to 2000 are required to have an Asbestos Identification and Management Plan.
- Businesses with security of tenure issues such as a demolition clause in the lease; businesses with declining sales and known reasons for this; awareness of a new business competitor due to open in the area; Government legislation changes that may be forthcoming with potential negative impacts on the operation of the business; employee issues such as a key staff member planning on leaving.

Appendix 1 – Real Estate Agents Act 2008, ss 134 to 137

Contracts for acquisition by the licensee – section 134

Licensees must meet disclosure obligations where a conflict of interest may occur (sections 134–137 of the Real Estate Agents Act 2008).

134 Contracts for acquisition by the 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.

(6) The client **may recover any commission** paid in respect of any contract of the kind described in subsection (4) as a debt.

(7) For the purposes of this section, **a person who is the client of an agent** in respect of a transaction **is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.**

(8) This section and section 135 have effect **despite any provision to the contrary in any agreement.**

134(1) means...

The client must give prior consent for the licensee to enter into a contract to buy/lease the property

134(2) means...

The client must give prior consent for ‘a related person’ to enter into a contract to buy/lease the property.

134(3) means...

Consent is only valid if given on the prescribed form and if the licensee provides a valuation.

134(4) means...

If 134 (1) or 134 (2) are breached, the client can cancel the contract.

134(5) and (6) mean...

The client does not need to pay commission on any sale made where their consent has not been validly given whether or not the contract is cancelled, and/or can get the commission payment refunded in full.

134(7) means...

‘The client’ is also considered the client of all of the agent’s (i.e. company’s) licensees involved in the sale. This may also include other licensees who are in an agency relationship with the client, e.g. conjunctual / ‘shared’ sales.

134(8) means...

You cannot contract out of your legal requirements to comply.

Client to be provided with a valuation – section 135

135 Client to be provided with a 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 chartered accountant.**

(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.**

135(1) means...

If the client gives permission for the licensee or 'related person' to buy or lease the property, the licensee must pay for a valuation.

135(2) means...

The valuation must be by an independent registered valuer or chartered accountant (for a business). An agent's appraisal is not sufficient.

The rules about when the valuation must be given to the client under **135(3)** must be followed, i.e. before seeking consent, or within 14 days (with client agreement).

135(4) means...

If a valuation is not given to a client, their consent is invalid.

135(5) means...

The client may cancel the contract if the final valuation received is higher than the provisional valuation.

The provisional valuation will be the appraised value.

Meaning of licensee and person related to the licensee in sections 134 to 136

137 Meaning of licensee and person related to the licensee in sections 134 to 136

- (1) In sections 134 to 136, *licensee* includes, in the case of an agent that is a company, every officer and shareholder of the company.
- (2) For the purposes of sections 134 to 136, a person is related to a licensee if the person is—
- (a) a partner of the licensee under a partnership agreement:
 - (b) an employee of the licensee:
 - (c) a branch manager or salesperson engaged by the licensee:
 - (d) the licensee's spouse or civil union partner:
 - (e) the licensee's de facto partner:
 - (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraphs (d) or (e):
 - (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):
 - (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):
 - (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest (except where either interest is in quoted financial products within the meaning given for those terms in section 6(1) of the Financial Markets Conduct Act 2013).

Form 2 – Client consent for the licensee to acquire an interest in the property

Form 2 - Client consent for the licensee to acquire interest in the property (from the Real Estate Agents (Duties of Licensees) Regulations 2009) MUST be completed if a licensee or related person wishes to enter into a contract as described in section 134.

This requirement is set out in Clause 5 of the Real Estate Agents (Duties of Licensees) Regulations 2009 which specifies the following:

5 Client consent under section 134 of Act must be in form 2 of Schedule

- (1) A client's consent given for the purposes of **Section 134** of the Act must be in **form 2** as prescribed in the Schedule.
- (2) The notes under the heading '**Important information for clients**' on the front page of [form 2](#), and the heading itself, must—
- (a) appear in a prominent position on the form; and
 - (b) be in a font and font size that is easily readable.

Form 2 is also available from the REA website.

Form 2 – document

Form 2

Client consent for the licensee to acquire an interest in property

Section 134, Real Estate Agents Act 2008

(Front page)

Important information for clients

1 This form has legally binding consequences. You may wish to seek legal advice before signing it.

2 This form is required by the Real Estate Agents Act 2008. The licensee must ask for your consent, using this form, if any of the following people want to acquire an interest in your land* or business:

- (a) an agent[†], branch manager, or salesperson (**licensee**) who is working for you; or
- (b) a person related to that licensee (**related person**[‡]).

*Note that land is defined in section 4 of the Real Estate Agents Act 2008 to include a number of different types of property and interests in property—including, for example, your house.

[†]Note that an agent includes, if the agent is a company, every officer and shareholder of that company.

[‡]For the definition of related person, see below.

3 The licensee must give you this form **before** you agree to grant, sell, or otherwise dispose of your land or business, or an interest in your land or business, to the licensee or related person. If the licensee gives you this form after that, do not sign it.

4 The licensee must give you a valuation* of the land or business at his or her own expense. The licensee must give you the valuation either—

- (a) before seeking your consent; or
- (b) with your agreement, within 14 days after obtaining your consent.

If the valuation provided under paragraph (b) turns out to be higher than the provisional valuation specified in this consent form, you are entitled to cancel the contract for the grant, sale, or other disposal of the land or business.

*Note that a valuation of land (which includes, for example, your house) must be made by an independent registered valuer, and a valuation of a business must be made by an independent chartered accountant.

5 If you have **not** given your consent by signing this form, or you did not receive a valuation, you are entitled to—

- (a) cancel the contract for the grant, sale, or other disposal of the land or business; and
- (b) recover any commission you may have paid to the agent.

(Front page continued)

Meaning of related person

A **related person** is defined in section 137 of the Real Estate Agents Act 2008 to mean any 1 of the following:

- (a) a partner of the licensee under a partnership agreement:
- (b) an employee of the licensee:
- (c) a branch manager or salesperson engaged by the licensee:
- (d) the licensee's spouse or civil union partner:
- (e) the licensee's de facto partner:
- (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraph (d) or (e):
- (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):
- (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):
- (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest (except where either interest is in quoted financial products within the meaning given for those terms in section 6(1) of the Financial Markets Conduct Act 2013).

(Back page)

1 I/We*, (*full name(s), address(es)*), the client(s), signed the agency agreement with (*full name, address*), the agent, in respect of a transaction relating to the following land†/business*: (*address and/or legal description of land or business to which agency agreement relates*).

*Select one.

†Note that land is defined in section 4 of the Real Estate Agents Act 2008 to include a number of different types of property and interests in property—including, for example, your house.

2 I/We* consent to (*full name(s)*), the licensee(s)/related person(s)*, acquiring, directly or indirectly, the following interest(s) in the land/business* described above: (*nature of interest(s) to be acquired*).

*Select one.

3 For this paragraph select the statement that applies.

Statement A (consent based on valuation)

I/We* confirm that, before signing this form, I was/we were* provided, at the licensee's expense, with—

†(a) a valuation of the land described above, made by an independent registered valuer:

†(b) a valuation of the business described above, made by an independent chartered accountant.

*Select one.

†Select the subparagraph that applies.

Statement B (consent based on provisional valuation)

I confirm that—

(a) the licensee has informed me/us* that the land/business* described above is provisionally valued at \$(*provisional value*); and

*Select one.

(b) I/we* have given my/our* agreement to the licensee providing to me/us*, within 14 days after the date of this consent,—

†(i) a valuation of the land described above, made at the licensee's expense by an independent registered valuer:

†(ii) a valuation of the business described above, made at the licensee's expense by an independent chartered accountant.

*Select one.

†Select the subparagraph that applies.

Date:

Signature(s):

(client(s))

Disclosure of other benefits that licensee stands to gain – section 136

136 Disclosure of other benefits that licensee stands to gain from transaction

(1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.

(2) Subsection (1) does not apply to any matter disclosed under section 128 or 134.

(3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.

(4) For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.

(5) A contract entered into in contravention of this section may not be cancelled merely because of that contravention.

Appendix 2 – Prasad v REAA (CAC 416) [2020] NZHC 335

Recent developments in disclosure

The High Court recently confirmed in *Prasad v REAA (CAC 416) [2020] NZHC 335* that disclosure of material issues should be made to all potential purchasers, and it is not for the licensee to decide who is a potential purchaser. In that case, the licensee had become aware of a road widening project that would impact the property she was marketing. She did not disclose this fact in writing but had disclosed it to some people who had visited the open home. The licensee claimed that she had told anyone who had expressed to her an interest in buying the property, but this did not establish that she had told all potential purchasers.

At paragraph [31] of its decision, the High Court quoted paragraph [73] of the earlier Tribunal decision with approval:

[para 73] “We accept Mr Waalkens’ submission that it was not for her to select who should be informed. As he submitted, the significance of the effect of the road-widening project on the property made it vital that anyone who came to an open home, and anyone who might develop an interest in the property, was fully informed about it.”

Read about this complaint and decision at
<http://www.nzlii.org/nz/cases/NZHC/2020/335.html>

Appendix 3 - The Fair Trading Act 1986

Section 9 and Section 12A

Misleading and deceptive conduct

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Compare: Trade Practices Act 1974 s 52 (Aust)

Unsubstantiated representations

12A Unsubstantiated representations

(1) A person must not, in trade, make an unsubstantiated representation.

(2) A representation is *unsubstantiated* if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.

(3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.

(4) In this section and sections 12B to 12D, *representation* means a representation that is made—

(a) in respect of goods, services, or an interest in land; and

(b) in connection with—

(i) the supply or possible supply of the goods or services; or

(ii) the sale or grant or possible sale or grant of the interest in land; or

(iii) the promotion by any means of the supply or use of the goods or services or the sale or grant of the interest in land.

Section 12A: inserted, on 17 June 2014, by section 10 of the Fair Trading Amendment Act 2013 (2013 No 143).

Section 14

14 False representations and other misleading conduct in relation to land

(1) No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—

(a) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land.

(2) No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.

(3) In this section *interest*, in relation to land, means a legal or equitable estate or interest in the land; and includes—

(a) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in a company that owns the land or building; or

(b) a right, power, or privilege, over, or in connection with, the land.

Compare: Trade Practices Act 1974 s 53A (Aust)

Section 14(1)(a): amended, on 8 July 2003, by section 3 of the Fair Trading Amendment Act 2003 (2003 No 31).

Section 36L

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.
- (2) The requirements referred to in subsection (1)(a)(v) are that—
- (a) the following information is set out on the front page of the agreement:
 - (i) a clear description of the goods or services to be supplied under the agreement; and
 - (ii) a summary of the consumer's right to cancel the agreement under section 36M(1); and
 - (iii) the supplier's name, street address, telephone number, and email address; and
 - (iv) the consumer's name and street address; and
 - (b) either—
 - (i) the total price payable, and any other consideration to be given, under the agreement is disclosed in the agreement; or
 - (ii) if the total price or consideration is not ascertainable at the time at which the agreement is entered into, the method by which the total price or consideration will be calculated is disclosed in the agreement; and
 - (c) the agreement is dated.
- (3) The supplier must give the consumer oral notice, before the agreement is entered into, of—
- (a) the consumer's right to cancel the agreement within 5 working days after the date on which the consumer receives a copy of the agreement; and
 - (b) how the consumer may cancel the agreement.

(4) However, if an uninvited direct sale agreement is, or includes, a consumer credit contract (as defined in section 11 of the Credit Contracts and Consumer Finance Act 2003), in relation to that consumer credit contract only,—

(a) Part 2 of that Act applies in place of this subpart; and

(b) the supplier must give the consumer oral notice, before the agreement is entered into, of—

(i) the consumer's rights to cancel the agreement under that Act; and

(ii) how the consumer may cancel the agreement under that Act.

(5) For the purposes of subsection (4), a consumer credit contract is included in an uninvited direct sale agreement if that contract was entered into for the purpose of financing the purchase of the goods or services that are the subject of the uninvited direct sale agreement.

(6) To avoid doubt, where an uninvited direct sale agreement includes a consumer credit contract, this subpart continues to apply to every part of the agreement that is not a consumer credit contract.

Section 36L: inserted, on 17 June 2014, by section 23 of the Fair Trading Amendment Act 2013 (2013 No 143).

Appendix 4 - Contract & Commercial Law Act 2017

Section 35

35 Damages for misrepresentation

(1) If a party to a contract (A) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (B) —

(a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and

(b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of that misrepresentation.

Subsection (1) applies to contracts for the sale of goods —

(a) Despite sections 197 and 201(2); but

(b) Subject to section 34.