



# Real Estate

## Continuing Professional Development

---

# Physical property inspection

**Estimated time needed: 1.5 hours**

**V3.0**

December 2020



## Contents

Real Estate CPD - Physical property inspection covers the following information:

Contents .....	3
Learning Outcomes.....	4
Terms used in this guide.....	5
Physical property inspection .....	6
Inspection of land.....	6
Boundaries.....	6
Building line restriction .....	10
Driveways and access.....	11
Protected trees .....	12
Coastal zoning.....	12
Subsidence .....	13
Drainage.....	14
Flooding .....	14
Minimum floor levels .....	15
Inspection of buildings and other structures .....	16
Number of bedrooms .....	16
Construction type.....	18
Modern home with potential leaky home risks.....	18
Leaky building risks.....	19
Stigmatised materials.....	19
Warning signals to watch out for when inspecting a building.....	22
Exterior wall cladding .....	22
Flat roof with narrow eaves.....	22
Windows .....	22
Concealed guttering and downpipes .....	22
Complex building design .....	23
Interior signs of dampness.....	23
Guidance from the Disciplinary Tribunal regarding weathertightness issues .....	23
Insulation and clean heating grants .....	24
Decks, balconies and verandas .....	25
Other improvements .....	27
Retaining walls .....	27
Fences.....	27
Swimming pools and spa pools.....	28
Accessory buildings .....	29
Claims made in relation to damage of the property.....	31
Weathertightness pay-outs.....	31
EQC claims.....	32

DISCLAIMER: The information contained in this document has been prepared for the purpose of continuing professional development under the Real Estate Agents (Continuing Professional Development Rules) Notice 2018. It is not intended as a comprehensive statement of the law and does not constitute legal advice, and cannot be relied on as such. While all reasonable measures have been taken to ensure the quality and accuracy of the information, REA makes no warranty, express or implied, nor assumes any legal liability or responsibility for the accuracy, completeness or use of any such information.

## Learning Outcomes

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

- explain requirements for physical inspection of a property.
- explain key aspects to consider when inspecting land, buildings and other structures
- explain indications of possible issues when inspecting land, buildings and other structures
- explain requirements for decks, balconies, verandas and other property improvements
- explain requirements regarding claims made in relation to damage of a property.

## 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 agency 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')

## Physical property inspection

When appraising or inspecting a property, it is important to be on the alert for any visible signs of actual or potential problems in the land or the structure of a building, or for any other indicators that may point to actual or potential problems.

There are some problem indicators that may not be visible. For this reason, licensees may need to have access to property related documentation prior to, and during, a property inspection. For example, the record of title (previously a certificate of title), district city or unitary plan, LIM report.

If property related documents are not available at the time of inspection, any property inspection report or appraisal report provided should be made subject to reviewing those documents, which may indicate material matters, e.g. encumbrances, compliance related issues or unauthorised structures.

In this topic we will look at some of the key issues that licensees must take into consideration when carrying out a physical property inspection.

## Inspection of land

### Boundaries

The issue of whether a licensee has a positive obligation to explore and confirm the boundaries of a property can cause confusion.

The Real Estate Agents Disciplinary Tribunal has, however, confirmed the positive obligation on licensees when they are asked about boundaries, or where they might reasonably expect to be asked about a boundary because it is not clear.

The Disciplinary Tribunal has clarified the following points:

- A licensee has an active role to play in conveying information about the property to potential purchasers and must carry out that role to the best of his or her ability
- Where they are asked about the boundary, licensees should make enquiries and either confirm where the boundaries are or advise the purchasers to obtain a surveyor's advice
- Licensees also have a duty to take either of the steps described above where he or she might reasonably expect to be asked about a boundary. For example, where there is no clearly marked fence, where the fence does not appear to be on the boundary, boundaries appear to be in bushland or where a title is limited as to parcels
- The Tribunal considered that it would be unduly burdensome if, in every case where there is no apparent cause for concern, a licensee was required to verify the

boundary or be liable for failure to do so. Licensees must not, however, mislead or deceive or hide anything from the purchaser

Note – refer to the following cases

*Rae v REAA & Burch* [2013] NZREADT 3

<https://www.justice.govt.nz/assets/Documents/Decisions/2013-NZREADT-3-Rae.pdf>

and *Fitzgerald & Barfoot & Thompson Ltd v REAA & Nilesh Reddy* [2014] NZREADT 43

<https://www.justice.govt.nz/assets/Documents/Decisions/2014-NZREADT-43-Fitzgerald.pdf>

Being able to ascertain the certainty of a boundary may be particularly important for parties who are planning to develop the property in some way. It may be possible to locate the boundary pegs on the property, but on older properties, survey pegs may have disappeared.

Most local council websites and LINZ agencies provide GIS-Mapping or other forms of aerial maps that provide digital overlays which give an indication of legal boundaries in relation to the land and dwellings for any given property. These overlays provide useful information and can be particularly helpful in identifying any encroachment issues.

In all cases, if you are asked to confirm the boundary, or if there are any warning signs that there may be an issue with the boundary, parties must be advised to seek independent legal or technical advice before proceeding to enter into a transaction

This approach, rather than trying to check the boundaries yourself, is recommended as a surveyor is the most appropriately qualified person to confirm the boundaries of a property and you may find that you have made yourself and the vendors liable if you try to give advice and make a mistake.

This approach is also consistent with clause 6.1 of the Agreement for Sale and Purchase which puts the responsibility of investigating and ascertaining boundaries on the purchaser (except in transactions involving vacant residential land).

Read the following case study and answer the questions that follow.

## Case study 1

---

A complaint was made against a licensee who listed a rural property for sale.

The Complainant made an inquiry in response to a Trade Me advertisement for vacant land. Marketing material showed the boundary of the land as being the fence line, with the words "boundary lines are indicative only".

The Licensee sent a geo-technical report [that contained illustrations which correctly showed the boundaries] and site plan to the Complainant, along with a sale and purchase agreement. The reports referred to a possible building site situated approximately mid-level on the section, which was irregularly-shaped, sloping land.

The Complainant and her husband met the Licensee on site to inspect the property. He showed them the proposed building site which was located lower down the hill on the section, as referred to in the reports.

A discussion ensued regarding alternative building sites and the Licensee led the Complainant and her husband to a point at the top of the block to an alternative site where they could get the views they wanted. The Licensee was asked to clarify the boundaries of the property and he informed the Complainant that the fence located on one side of the property was on the boundary, and that they could build anywhere on the section.

A sale and purchase agreement was prepared and included a ten day "due diligence" provision to allow the Complainant time to seek advice about the suitability of the preferred building site. The Licensee assisted the Complainant in locating a builder who checked the geo-technical reports and confirmed they could proceed with building as requested.

The S&P agreement went unconditional and was settled; building plans were drawn up and a deposit of \$60,000 paid to the builder.

Approximately four months later the builder advised the Complainants that the fence line was not the boundary; "the true boundary was on the other side of a paper road not included in the section but running alongside it". The preferred building site was "too close to the paper road for the local authority to agree to construction at that position"<sup>1</sup>.

The Complainant alleged that at no time did the Licensee inform them of the presence of a paper road; this was confirmed by the Licensee, in his response to the investigation, who stated that he "did not draw to their attention the existence of a paper road along the fence line next to the property... as he did not think it would affect them".

The paper road was clearly shown on the survey plans attached to the information initially sent to the Complainant by the Licensee.

The Complainant has been unable to recover the deposit they paid to the builder and say they would not have purchased the section had they known about the true position of the boundary and the existence of the paper road.

### Complaint number: C17280

You can read about this complaint and decision in the REA decisions database at [rea.govt.nz](https://rea.govt.nz).

---

<sup>1</sup> Building line restrictions specify that buildings are not allowed to be situated within a certain distance of the centreline of the road or the road boundary



## Questions

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

**Note:** The Complainant also alleged that the Licensee was not properly supervised. Another Licensee 2 [who was a licensed salesperson] acted as the “first point of contact for salespeople and referred issues to the licensed agent and compliance manager”. Licensee 2 and the agency were joined in the investigation as part of this complaint and the Committee noted that the Licensee was not qualified to provide supervision. Licensee 2 and the agency were also found guilty of unsatisfactory conduct; stating that “this is an instance in which arm’s length supervision has proven unsatisfactory [para 3.28].

Note the following comments from the Committee:

[para 3.15] “The Licensees agree that [the] Licensee misled the Complainant as to the location of the boundary, but say that because the boundary was correctly depicted in some of the material provided to the Complainant (the title and geo-technical report), that the words “boundaries are indicative only” appeared on marketing material (which the Complainant may not have seen), and that the ASP included a due diligence condition, the Complainant should be responsible for undertaking investigations and the Licensee should not be held responsible for the Complainant being misled as to the correct boundary”

[para 3.17] “The Committee does not accept that the provision of the documents referred to [the geo-technical report and site plan] and the inclusion of the due diligence clause in the ASP excuses the Licensees from their basic responsibility to know what they are selling, which includes identifying the boundaries and any other important matters which might affect a property”

In its discussion, the Committee also referred to *Fitzgerald & Barfoot & Thompson Ltd v REAA & Niles Reddy* [2014] NZREADT 43 as precedent case law.

2. While a due diligence clause was included in the sale and purchase agreement, the CAC confirmed that the clause did not abdicate the licensee from his obligations to be certain that the advice and representations he had given were correct.

What should the licensee have done in this case to avoid a finding of unsatisfactory conduct?

### **Building line restriction**

Building line restrictions specify that buildings are not allowed to be situated within a certain distance of the centreline of the road or the road boundary.

It is important to remember that some properties will have building line restrictions recorded on the title, stating 'subject to building line restriction' (or BLR) plus the document number. In some cases, building line restrictions are not included in the record of title (certificate of title), but are included on the district plan.

The district, city and unitary plans may also include reference to building setback requirements which may place limits on construction near certain boundaries; for example, a boundary adjacent to a cliff face.

When carrying out a physical property inspection on a property to which building line restrictions apply, check that there has not been an encroachment over the building line.

Any restrictions must be fully disclosed, and parties be advised to seek legal advice before proceeding to enter into a transaction.

## Driveways and access

Driveways and access to a property may be shared. Rights and responsibilities vary depending on whether it is held as a cross-lease, strata title, right of way easement or as an access lot.

Cross-lease	<p>If the property is on a cross-lease title, the driveway is usually referred to as 'common area'. Under a cross-lease, the owners must not obstruct the common area driveway in any way and it is to be used only 'for ingress and egress by vehicle or on foot'. It is the responsibility of all cross-lease owners, who have the legal right to use the common area driveway, to meet the costs of upkeep and maintenance.</p>
Strata	<p>If the property is on a strata title (part of a body corporate) there is often a designated common area which is used as the driveway. The rules relating to that common area driveway are governed by the body corporate rules. The body corporate is responsible for upkeep and maintenance of the common area, with such costs being met by the levies paid by the owners.</p>
Right of way easement	<p>Easements generally involve 'servient' and 'dominant' tenements. A servient tenement is the lot that owns the land over which the easement passes. A dominant tenement is the lot that has the right to pass over or access the land over which the easement passes.</p> <p>The easement will determine who has the obligation for upkeep and maintenance. Usually, the responsibility will rest with those owners who have the legal entitlement to use the right of way.</p>
Access lot	<p>In a modern subdivision where a driveway is shared with others, it is likely that each owner will own a share of that access lot which is recorded on the title. A new Property Law Act provision was created due to uncertainty in the past over rights and obligations with access lots. It provides that if an access lot is, or includes, a driveway or proposed driveway then each owner has 'the right to pass and re-pass over and along the access lot'. The obligation to maintain the driveway belongs to those who are the owners of the access lot in proportion to their respective share.</p>

Numerous complaints and disputes between property owners have occurred due to issues relating to shared driveways.

All rights and obligations must be fully disclosed, and parties be advised to seek legal advice before proceeding to enter into a transaction.

## Protected trees

Some trees will be protected under the provisions of the district plan because they are considered to be significant, historic, or important for amenity or preventing erosion. They may also be referred to as listed, notable or scheduled trees.

Trees may also be protected as part of a condition on a resource consent, by covenant or consent notice on the title, or because they are subject to a general protection rule within a 'rural environment' or 'significant ecological area'.

Protected trees are usually noted on planning maps or are listed in the appendices of a district, city or unitary plans. They may also appear on a LIM report.

**Note:** The general tree protection rules within the 'urban environment' that were previously in the Resource Management Act were removed on September 4<sup>th</sup>, 2015.

Any removal, pruning or work (for example, excavation, construction including decks and retaining walls, depositing material and / or storing material beneath branches and around roots) that is carried out near a protected tree may be subject to a fine under the Resource Management Act if it is carried out without a resource consent.

Trees may significantly shade parts of a property; for example, the main dwelling, decks or pool area. As this shading may be material to prospective purchasers, licensees should check whether trees are protected before making any representations.

Licensees must make sure that the presence of any protected trees on a site they are marketing is fully disclosed and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Coastal zoning

Under the Resource Management Act 1991 most activities in the coastal marine area are subject to restrictions.

Such activities include:

- reclamation
- drainage
- building or demolishing structures
- introducing exotic plants
- depositing material or disturbing the foreshore and seabed, where this adversely affects plants or animals or their habitat

The coastal marine area lies between mean high water springs (the highest level reached by spring tides taken as an average over a period of time) and the limit of the territorial sea (12-mile limit).

Licenses who are involved in selling or leasing coastal properties must draw the attention of prospective customers to such restrictions.

Licenses must make sure that the presence of any restrictions on a site they are marketing is fully disclosed and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## **Subsidence**

Certain areas of the country are susceptible to land subsidence, serious erosion, sinkholes, earthquakes, and other geotechnical defects that may mean land is unsuitable for building on.

In many areas land instability is common to an entire locality, and district, city and unitary plans take this into account when determining their zoning pattern. In other areas the chance of such defects is more random.

In areas where these defects may occur, authorities usually require suitable geotechnical reports to be submitted before they will approve a development. Areas such as Huntly, Rotorua and parts of the Coromandel suffer from these inherent defects.

If a registered owner of a property located in an area of active subsidence is unable to sell because of public concern about subsidence, the property may be purchased by the Crown at what the current market value would be if no subsidence had occurred or was expected. For example, Huntly East houses may be acquired by the Crown under the Huntly East Subsidence Policy.

District, city and unitary plans may contain specific details when additional work is required for the foundations of buildings, but in many council areas this is often only dealt with at the building stage.

Licenses must make sure that any known subsidence issues at a site they are marketing is fully disclosed and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Drainage

The district, city and unitary authorities own and maintain public pipes, manholes, catchpits<sup>2</sup> and other assets that manage stormwater flow, quantity and quality.

Landowners are responsible for maintaining assets on their property up to the point where it connects to the main public connection. This includes roof gutters, downpipes, grates and catchpits.

The point between public and private assets can be determined as:

- The connection to the public stormwater system regardless of the location or number of properties serviced
- The point where the service connection serves more than one property
- The point where the service connection crosses the property boundary

Wastewater pipes have a lifespan of about 80 years and are designed to withstand normal tree root and traffic loadings. Age is often a factor when pipes become blocked or seep, so be wary of properties with old pipes.

Signs of seepage to look out for include wet patches which are present during dry weather. Signs of mould or fungi on the ground may also indicate seepage.

Licensees must make sure that any known issues at a site they are marketing are fully disclosed and parties be advised to seek independent legal / technical advice before proceeding to enter into a transaction.

## Flooding

District, city and unitary plans must show any susceptibility of land to flooding. This can mean building is prohibited entirely, or that it is prohibited on certain parts of land holdings.

Alternatively, buildings might need to have higher 'minimum floor levels' than normal. Areas that are frequently subject to flooding, such as the Firth of Thames, have such controls.

Licensees working in flood-prone areas should also be aware of ponding areas that may be designated on the district, city or unitary plan.

---

<sup>2</sup> Catchpits: located at low points to capture ponding of surface water; located to reduce stormwater flow at pedestrian crossing points

Licensees must familiarise themselves with the local controls. Any issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### **Minimum floor levels**

Under the Building Code, the Building Act 2004 sets minimum floor level requirements for building work in houses and other habitable buildings. This is to ensure there is adequate drainage and sub-floor ventilation, which helps to prevent moisture damage.

The Building Code states that houses must be built so that a 50-year flood will not enter the building.

Acceptable Solution E2/AS1 says that, on near-level sites, the floor level must be no less than 150 mm above the crown of the road or the lowest point of the boundary. For steep sites, specific design and consent as an Alternative Solution is required.

E2/AS1 gives minimum heights of finished floor levels above ground for concrete slab floors and suspended timber floors, the measurements depending on whether there is grass or paving outside.

NZS 3604 sets a minimum height above ground for wood-based products used for flooring. E2/AS1 also gives a minimum threshold height of 100 mm at an opening onto a waterproof deck.

Building Code requirements for floor levels are the absolute minimum. In some areas the required minimum floor levels are established for all buildings by the authority and are specified in the district, city or unitary plan. This occurs in areas deemed to be high risk or hazard zones. For example, flood zones which are designated on the district, city or unitary plan, coastal areas because of the risk of potential storm surges and future sea level rise associated with climate change, low-lying parts of the region, especially where they adjoin rivers and tributaries.

A code compliance certificate or minimum floor level certificate will confirm that buildings meet requirements. It is, however, important that when carrying out a physical property inspection, licensees are aware of any warning signals that may alert them to a problem.

Low floor levels, or raised ground levels surrounding a building, can result in excess sub-floor moisture. If there are obstructions to the sub-floor ventilation, moisture may eventually cause damage to the floor structure.

Warning signs that this is an issue include presence of mould or fungi in the ground (that is also hazardous to human health), visible signs of dampness such as water droplets on sub-floor timber, particularly on the colder, southern side of the house, decay or borer attack of sub-floor timber and water stains on the timber.

If there are any indications that the property being offered does not meet minimum floor level requirements, this must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Inspection of buildings and other structures

### Number of bedrooms

The number of bedrooms marketed when offering a residential property must reflect bedroom requirements as permitted by the Housing Improvement Regulations 1947.

The minimum standards for a bedroom under the **Housing Improvement Regulations** are as follows:

- Every bedroom shall have a minimum width of 1.8 metres
- Every bedroom shall have an area of not less than 6 square metres
- There must be a height from finished floor to finished ceiling of at least 2.1 metres in an existing house (as at 1975), or 2.4 metres in a new house
- In computing the area of a bedroom, any part of the room with a finished floor to finished ceiling height of less than 1.5 metres shall be excluded
- There must be at least one window situated in an external wall to admit adequate light
- The aggregate area of glass in the windows shall not be less than one-tenth of the floor area of the room
- Windows with an area of not less than one-twentieth of the floor area must be able to be opened to allow air circulation, or in accordance with the local authority requirements

There are some exceptions to these regulations for modern residential apartments. These exceptions are in accordance **with local authority 'minimum residential building standards'**.

For example, bedrooms can have internal windows which may use the principles of 'borrowed light' from an adjacent room.

The following provides an example of an exception to the regulations in accordance with **Auckland Council's 'minimum residential building standards'**:

Minimum Daylight Standards (i) Accommodation units shall be designed to achieve the following minimum daylight standards:

a) Living rooms and living/dining areas – a total clear glazed area of exterior wall no less than 20% of the floor area of that space.

b) Bedrooms – a minimum of one bedroom with a total clear glazed area of exterior wall no less than 20% of the floor area of that space.

c) No more than one bedroom in an apartment may rely on natural light borrowed from another naturally lit room provided:

(i) the maximum distance of the bedroom from the natural light source window shall be 6m; and

(ii) the minimum total clear glazed area of the light source shall be no less than 20% of the floor area of the bedroom.

d) Entrance halls, kitchens, kitchen/dining rooms, bathrooms, toilets, and laundries - may rely on borrowed or artificial light however where such building elements contain a window placed in an exterior wall parallel to a site boundary, other than the street boundary, then that window or wall shall be set back from the boundary by a minimum of 1m.

When carrying out a physical inspection, licensees should use the benchmarks shown above to determine whether a small room can genuinely be marketed as a bedroom or not.

## Construction type

All buildings have the potential to develop weathertightness problems.

The building styles considered to be most at risk are:

- Spanish or Mediterranean style with shallow roof pitches and recessed windows
- those with multiple rooflines
- buildings of two or more storeys
- buildings that contain multiple units (such as apartments and townhouses)
- decks and balconies with solid balustrades
- internal guttering systems
- insufficient flashings to parapets or windows
- those with exterior cracks, allowing moisture to penetrate
- those where cladding continues below ground level

### *Modern home with potential leaky home risks*



## Leaky building risks

1. Ground clearance: Not enough space between the cladding and the ground, paving or deck or insufficient slope away from the edge of the building. The clearance to solid ground (concrete, asphalt, paving or decking timber) should be 150mm. The clearance to soil should be 225mm.
2. Cracking in cladding: Look for hairline cracks in the cladding, typically found close to windows and doors, or discoloured cladding in these areas.
3. Joinery: Check for cracks along the joinery seals between the joinery and the cladding.
4. Penetrations or openings: Check all penetrations or openings in the cladding (for example, around pipes, vents or meter boxes) for gaps and lack of sealant. Also, check that meter boxes have appropriate flashing. Lack of flashing or reliance on sealant may allow water to penetrate.
5. Pergolas: If a pergola frame penetrates or is directly fixed through the cladding, water may be able to seep inside.
6. Windows: Check window flashings (thin pieces of waterproof material that direct water out and down, rather than into a building). Round or corner windows are difficult to flash, increasing the risk of water getting in.
7. Enclosed balcony/cantilever deck: These can present a multitude of risks:
  - A lack of slope on the balustrade.
  - Hand railings attached through the plaster cladding.
  - Poorly applied waterproof membrane.
  - Insufficient drainage holes allowing water to pool after rain.
  - Lack of clearance between the cladding and deck floor.

## Stigmatised materials

Stigmatised materials include: asbestos (in cladding or stippled ceilings in residential properties, or in other locations of commercial buildings), monolithic cladding and Dux Quest (a plumbing product), oil tempered hardboard (for example, weatherside), old electrical wiring (for example, conduit wiring), scrim wall underlay, unreinforced masonry, fibre cement sheets.

Suspected presence of any stigmatised materials must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

Read the following scenario and consider if the licensee(s) has breached the Code of Conduct.

Read the following case study and answer the questions that follow.

## Case study 2

---

The Complainants purchased a property that was listed by a Licensed Salesperson (Licensee) who was a cousin of one of the vendors. The Licensee stated that he was familiar with the property and that it had been well cared for and well loved by the current owners of 35 years.

The Property was represented in marketing material as being 130 square metres when in fact it was 108 square metres and that the cladding was mixed, with no further explanation. The Property was located near the ocean and within the Canterbury earthquake area.

After purchase, the Complainants commissioned an engineering report which identified several defects, stating that they "need to be rectified as soon as possible". Defects identified showed the Property was not well cared for and included:

- the subfloor was poorly constructed and did not meet current requirements
- stacks of bricks had been used to support bearers
- concrete piles had been pulled out of the ground and left below the floor
- the Property was not held down to the footings and piles

During the investigation the Licensee acknowledged he had failed to disclose there was mixed cladding on the Property, including the use of a product possibly containing asbestos. There were also issues surrounding the fireplaces that the Licensee did not disclose.

### **Complaint number: C18008**

You can read about this complaint and decision in the REA decisions database at [rea.govt.nz](https://www.rea.govt.nz/).

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



## Questions

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

Note the following comments by the Committee:

[para 3.1 (a)] "Licensee was in breach of Rule 6.4 when he misrepresented the size of the property and when he misled the Complainants that the Property had been well cared for and well loved"

[para 3.1 (b)] "Licensee was in breach of Rule 10.7 when he failed to disclose known defects to the Complainants"

4. In terms of the issue with the mixed cladding and use of a product possibly containing asbestos, what should the licensee have done to avoid a finding of unsatisfactory conduct?

## **Warning signals to watch out for when inspecting a building**

There are a number of warning signals that a licensee needs to watch out for when inspecting a building. These are as follows:

### ***Exterior wall cladding***

If the exterior cladding has the appearance of being a textured sheet, a gentle tap with the back of the knuckles will give a clue as to whether it is a monolithic system or stucco. If it is monolithic, it will feel and sound hollow. Stucco has a much harder texture (usually like that of concrete).

Fibre cement sheets, which are not necessarily monolithic, may also be a warning signal for licensees.

Remember to check all exterior walls for signs of cracks, chips, or bubbles under the paint surface. Also, check for adequate clearance between the wall cladding and the ground, which may be covered by soil or a surrounding paving material. Pay particular attention to walls that are subject to most weather exposure or prevailing winds.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### ***Flat roof with narrow eaves***

The eaves are an extension of the roofline, intended to deflect water away from the building, especially where there are joints, such as between the roof and the exterior walls. If these are narrow (or non-existent), this may suggest that the building is at risk.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### ***Windows***

Certain window styles are more prone to leaking than others. Windows that are recessed into the wall (in the Mediterranean style) may be at risk, but also corner windows, which are joined by silicone, and windows on sloping angles (such as skylights) may be at risk.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### ***Concealed guttering and downpipes***

Some buildings have been designed so that the guttering and downpipes are concealed within the wall cavity. If these become blocked or damaged, they can release water into the cavity of the building, rather than transport it to a drainage system.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### **Complex building design**

Buildings that are designed to have complex or numerous angles may be more at risk, because of the number of joins between different surfaces (mainly walls and roofing).

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### **Interior signs of dampness**

Be on the lookout for signs of dampness around doors and window-sills, ceilings, architraves and enclosed areas such as cupboards and wardrobes. With timber joinery, obvious signs include damp patches, dark stains (especially on unpainted surfaces), deterioration of paintwork, and the growth of mould.

At floor level, watch out for swelling of fibreboard skirting boards, or damp areas of carpet or other flooring material, especially at the corners and edges of rooms. Vinyl and similar types of flooring will sometimes start to lift or bubble when left damp over an extended period.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## **Guidance from the Disciplinary Tribunal regarding weathertightness issues**

In *Munley v REAA & Ors* [2016] NZREADT 53, at paras [38]-[42], the Tribunal offered the following principles in regard to weathertightness issues:

Licenses are expected to be able to identify properties that need maintenance or may suffer from issues associated with plaster-type exteriors (at [42]);

1. If Rule 10.7(b) is engaged, a licensee must inform potential purchasers of a potential risk of weathertightness issues so that they can seek expert advice (at [38]);
2. The obligation to disclose is even more important when the potential purchaser is unfamiliar with the widespread leaky home problem (for example, not being a resident of Auckland or New Zealand during the leaky home crisis) (at [38]);
3. To comply with Rule 10.7(b), it is not sufficient to rely on a vendor's statement that there are no issues or to just recommend a building report be obtained (at [39] and [53]). Rather, the licensee must also "at the very least point out the nature of the cladding to a potential purchaser and strongly suggest that the potential purchaser obtain a comprehensive building report" (at [41]).

4. If a vendor client does not want a defect disclosed to a potential purchaser then the licensee should discuss the issue with their client first, and if the client remains of the view that the defect (or potential defect) should not be disclosed to the purchaser, then the licensee is required to no longer act for them under 10.8

### **Insulation and clean heating grants**

Local authorities may provide loans to home owners to convert to cleaner heating or to install insulation.

Government grants for insulation also apply to residential rental properties. A government grant of up to 50% of the cost for underfloor and ceiling insulation is available in many areas of New Zealand for rental properties built before 2000.

All wood burners installed after 1 September 2005 on properties less than 2 hectares in size must have emissions of less than 1.5 grams of particles per kilogram of dry wood burnt and a thermal efficiency of not less than 65 per cent. These requirements are set out in the wood burner standards which are part of the National Environmental Standards for Air Quality. The standard two-hectare rule applies throughout New Zealand including rural areas.

Log burner installation must meet local authority regulations and requires a signed off building permit or code compliance certificate. Some regional councils have imposed emission requirements which take precedence over the National Environmental Standards.

As local authority loans can 'run with land', a purchaser could find themselves liable for outstanding amounts. Licensees should therefore confirm whether such loans exist; for example, through discussions with the vendor and by checking the rates demand.

Clarification must be made as to whether or not the vendor will be responsible for the payment of any outstanding amount on settlement.

It is important to check that any log burner(s) on the property are compliant; for example, code compliance certificate.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Decks, balconies and verandas

A deck, balcony or veranda must comply with the Building Act 2004 and the Building Code, and higher structures require a building consent.

Under Schedule 1 of the Building Act, decks, platforms, bridges, boardwalks etc. from which it is not possible to fall more than 1.5 metres even if the structure collapses do not require a building consent, but their construction must comply with the Building Code to ensure they are safe for people to use.

The following requirements also apply:

- Any deck or balcony within district plan setbacks (distance from property boundary) may require resource consent and / or neighbours' consent.
- Upper level decks and balconies may have separation and privacy requirements and are also subject to height restrictions in relation to boundaries.
- To comply with the Building Code, a balustrade needs to be 900mm in height for stairs or ramps, 1-metre-high (from finished floor level) and must be installed on all decks above 1 metre in height on residential properties, and 1.1 metres high for commercial properties and all other locations. The balustrade must not be climbable. Clause F4 of the Building Code provides further details.
- Decks and balconies that act as the roof to a room below, and are exposed to the weather, require a waterproofing coating or membrane on the floor area to seal and waterproof the area.
- All timber in contact with the ground needs to be H5 treated (50-year durability requirement of the Building Code). This includes house piles, veranda and deck posts that are embedded in concrete, or posts for carports. Joist and decking timber also need to meet the external durability Building Code requirement (H3.2 treated) as they are exposed to the weather.

When carrying out a physical property inspection, licensees should consider the following warning signs that an issue may be present:

- If structures are enclosed, do they have solid balustrades, or are they designed in a manner that leads to slow dispersal of water? If so, there may be a risk factor.
- Translucent (usually corrugated) sheeting is sometimes used as a roofing material for decks, conservatories and walkways. This tends to become crazed (scratched) and brittle over time, usually as a result of exposure to ultra-violet light.
- Fixing screws must be applied to the top of the ridges to prevent moisture penetration. Are there any such fixing issues present?
- Have durable treated timbers been used for the construction of open decks?
- Are there any signs of water penetration where the deck meets the wall(s) of the house?
- Is there is suitable waterproofing around the cantilevered joists or around other joists that penetrate the house wall(s)?
- Are there any signs of decay on the timber elements like excessive cracking or softness?
- Are there any signs of corrosion on galvanized connectors or fasteners?
- Are bolted connections and nuts especially on handrails, joists and bearers etc. tight?

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Other improvements

### Retaining walls

Retaining walls are designed to create a barrier that prevents soil or other material following a natural slope. The retaining wall creates a flat space to be used for landscaping, traffic flow, or another purpose. They are commonly built using concrete, concrete blocks, or timber. In some places, large wire mesh structures are filled with rocks to create a retaining wall.

These walls are subject to considerable pressure from the land they retain.

Retaining walls need to be engineered specifically for the location. Failure to do so, or failure to maintain the wall in good condition, can result in loss of the wall's structural integrity, with the resulting effect that it might collapse.

Retaining walls should be inspected for signs of damage or deterioration, especially after severe weather or seismic events such as earthquakes.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

### Fences

Property owners are generally entitled to build a fence on a common boundary or upgrade an inadequate existing fence in consultation with the neighbour(s) who own the affected property. Fencing between adjacent properties is covered by the Fencing Act 1978. The Act contains provisions for owners of adjacent properties to split the cost of 'reasonable' fencing equally between them, and also deals with matters such as fencing notices and fencing disputes.

Only fences over 2.5m will generally need a building consent; however, local authority requirements may mean some fences below this height need a resource consent.

Fencing covenants may place restrictions on fences, shrubbery or trees, in order to maintain certain specified height limits, or may have the effect of allowing a sub divider or developer to avoid their contribution to a fence between their property and adjoining land.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Swimming pools and spa pools

Swimming pools and small heated pools (e.g. spa pools) are subject to special fencing requirements under the Building Act 2004 and the Building (Pools) Amendment Act 2017.

Specific provisions for pools include the following requirements:

- Fences must be at least 1.2m high on all sides. If the fence is made of perforated material, netting or mesh, or any other material that might enable children to climb the fence, it must be 1.8m high
- Fences must be made of durable materials and built in such a way that children under 6 years are not able to climb them
- There must be no gaps wider than 100mm which may enable a child to squeeze through the fence to the pool area
- All parts of fencing that are not vertical and may present an opportunity for climbing by a child, shall be inaccessible from outside the pool area
- Any gate in the fence has to be self-closing and self-latching. In most cases, the latch must be at least 1.5m above ground level

District, city and unitary authorities are required to inspect residential pools within its jurisdiction at least once every three years.

Specific provisions for small heated pools (e.g. spa pools) include the following requirements:

- All small heated pools below 760mm are required to be fenced
- All small heated pools above 760mm are not required to be fenced, but must have a lockable cover

Under the Building Act, the occupier of the property at which there is an inadequately fenced pool or small heated pool, may be held liable. This means that tenants are not excluded from liability.

Look out for any issues with the pool itself as well as the fencing meeting the Building Act requirements.

All in-ground pools have the potential to rise out of the ground and become distorted if they are left empty. This is because the water pressure in the ground under the pool becomes greater than the weight of the pool itself. This is a problem in areas with a high-water table (the level at which ground becomes saturated with water).

Concrete pools may be prone to cracking, especially in cases of ground movement, or an alteration in the surrounding soil moisture. They may also be subject to spalling (breaking off thin pieces) of the concrete, because of corroded fittings or through incorrect pool maintenance.

Fibreglass pools may become delaminated, blistered or cracked, either through a fault in the manufacturing process or if not maintained in good year-round condition.

Vinyl-lined pools can deteriorate, developing wrinkling or shrinkage of the liner through normal ageing, or excessive or inappropriate use of chemicals. If used carelessly, the liner can become torn or stained.

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Accessory buildings

Accessory buildings are buildings such as garages, sleepouts, granny flats, cabins and garden sheds.

Building consents and code compliance certificates are not required provided the accessory building:

- is less than 10 square metres in floor area
- is more than its height away from all boundaries and other dwellings
- meets all other requirements of the Building Act 2004
- does not contain cooking or sanitary facilities, or a potable (drinkable) water supply

Any accessory building that does not meet all of the criteria above requires a building consent and code compliance certificate.

Depending on the rules in the applicable district, city, or unitary plan, the accessory building may also need a resource consent, regardless of its size.

To add value and / or capacity to a property, many owners may choose to convert a non-habitable building to a habitable space. For example, by converting a garage.

A basic conversion is where the room just adds space to the existing home but cannot be let as a separate tenancy. For this a building consent and code compliance certificate is required. Kitchen and laundry facilities cannot be legally put into a basic conversion.

Any accessory building that has the potential to be self-contained (with its own kitchen and laundry facilities) constitutes a minor dwelling (also known as a minor household unit). This is a self-contained unit. A legal attached or detached minor dwelling can be let to tenants but requires resource consent as well as building consent. Some councils may restrict occupation of minor dwellings or granny flats to dependent relatives. A restrictive resource management covenant to that effect may be registered on the title. A minor dwelling on a property also affects the way the rates are calculated.

If a bathroom or toilet is included in the accessory building, a building consent and code compliance certificate are required.

A kitchen or kitchenette needs a building consent and code compliance certificate and may need a resource consent.

If the required consents for an accessory building are not in place, the owner may be fined and / or be required to dismantle it. Any incidents that arise in relation to an illegal conversion, for example fire damage in an unpermitted kitchen may also invalidate insurance.

Check that any accessory buildings on the property are compliant and have the appropriate consents.

Check to ensure that positive representations are not made in advertising material in relation to additional income streams for non-complying structures (for example, home and income).

Any identified issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## Claims made in relation to damage of the property

Some properties may have been affected by damage that resulted in a claim being approved via a pay-out for weather-tightness issues, or an EQC claim.

It is important for licensees to check that work was actually completed in accordance with any pay outs made.

There have been many recent examples of incidents, particularly in Christchurch, where a pay-out has occurred, but the property owner may not have spent the money, or all the money, on repairs.

### Weathertightness pay-outs

Under the Building Act 2004, there is an absolute limit on legal proceedings of 10 years from the date of the act or omission that gives rise to any claim relating to building work or alterations. This also applies to claims under the Weathertight Homes Resolution Services Act 2006 (WHRS). The 10-year cut off usually means 10 years from the date of issue of the code compliance certificate (CCC), though in some cases the relevant date may be earlier.

Claims are made via the Ministry of Business, Innovation and Employment (MBIE) and the Weathertight Homes Tribunal (WHT), or via the District or High Court.

If building inspections were carried out, and a code compliance certificate was issued by the local authority for a property subsequently found to have weathertightness issues, the government and that local authority each contribute 25% of the 'agreed repair cost'. This arrangement is known as the Financial Assistance Package scheme (FAP). The owner must agree not to sue the contributing council and the government, although they can still litigate against other liable parties such as builders, developers and manufacturers of defective products. This scheme has now expired.

It is important to be aware that while authorities must identify properties that are or have been subject to WHT claims in the LIM report, properties that have been subject to weathertightness claims through the courts or private litigation do not have to be identified.

If the property being offered is affected, it is important to check that improvements were made accordingly and to collect all relevant documentation.

Any issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction. Verbal disclosure should be confirmed in writing; for example, by email.

## EQC claims

EQC deals with claims made for damage which occurs due to a natural disaster and is required to apply, and act in accordance with, the detailed provisions of the Earthquake Commission Act 1993.

When a residential property suffers damage due to a natural disaster and the vendor has private insurance, a claim may have been filed with EQC. It's important to ask the vendor about any claims they have submitted and the outcome because potential buyers can now request this information directly from EQC.

We recommend that you or your vendor request this information directly from EQC and provide it to buyers during the disclosure process to prevent unnecessary delays.

If the property being offered is affected, it is important to check that improvements were made accordingly and to collect all relevant corroborating documentation.

Any issues must be fully disclosed, and parties be advised to seek independent legal or technical advice before proceeding to enter into a transaction.

In relation to EQC claims for property and land, pertinent information to check includes:

- EQC claim numbers lodged or transferred
- Confirmation of whether EQC had inspected the property (and when)
- EQC report or scope of works
- The point in the approval process that the claim has reached
- A cost breakdown of what will be paid out
- Confirmation of any payment made
- Party handling the repairs
- Confirmation of whether repairs have been completed

In relation to insurance claims for property and land pertinent information to check includes:

- Insurer details and policy number
- Details of any claims lodged for non EQC damage
- The point in the approval process that the claim has reached
- A cost breakdown of what will be paid out
- Confirmation of any payment made
- Confirmation of whether repairs have been completed

Read the following case study and answer the questions that follow.

### Case study 3

Having clarified that they wanted to purchase a property in Christchurch that had been built after the 2011 earthquake, prospective purchasers were assured by a licensed salesperson that the house they were purchasing had been built in 2012 and was not subject to any EQC claims.

Promotional material for the property also included reference to the built date as 2012.

After purchasing the property, the purchasers found that the house had been built prior to the earthquake and there had been an EQC claim.

A LIM report, that included details as to the date of issue of the Code Compliance Certificate, was available to download during the marketing period from the agency's web site. The purchasers did not do so.

Prior to their successful bid at auction, they also waived their right to seek legal advice on a document that included disclaimers about representation.

The salesperson stated that he was relying on information provided by the vendor as to when the house had been built.

The purchasers complained to the Real Estate Authority.

#### Complaint number: C22539

You can read about this complaint and decision in the REA decisions database at [rea.govt.nz](http://rea.govt.nz).



### Questions

Answer the following questions by entering the correct answers.

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

6. In what ways did the conduct of the licensee fail to meet expected professional standards in this case??

**Answer the following questions by selecting 'True' or 'False'.**

7. If property related documents are not available at the time of inspection, any property inspection report or appraisal report provided must be made subject to reviewing those documents which may indicate material matters such as encumbrances, and or compliance related issues.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

8. Building line restrictions and building setback requirements are always recorded on the record of title (certificate of title).

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

9. Rights and responsibilities in relation to shared driveways and access are the same for properties held as a cross-lease, strata title, right of way easement or as an access lot.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

10. Protected trees are usually noted on planning maps or are listed in the appendices of a district plan. They may also appear on a LIM report.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

11. In subsidence prone areas, district plans will always contain specific details showing when additional work is required for the foundations of buildings.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

12. Wastewater pipes have a lifespan of about 80 years and are designed to withstand normal tree root and traffic loadings. Age is often a factor when pipes become blocked or seep, so it is important to be wary of properties with old pipes.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

13. District plans will always show any susceptibility of land to flooding.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

14. Building Code requirements for floor levels are the absolute minimum. In some areas the required minimum floor levels are established for all buildings by the authority and are specified in the district plan. This occurs in areas deemed to be high risk or hazard zones.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

15. The following provides a description of interior signs of dampness that should signal warning signs to licensees.

Signs of dampness around doors and window-sills, ceilings, architraves and enclosed areas such as cupboards and wardrobes. With timber joinery, obvious signs include damp patches, dark stains (especially on unpainted surfaces), deterioration of paintwork, and the growth of mould.

At floor level, swelling of fibreboard skirting boards, or damp areas of carpet or other flooring material, especially at the corners and edges of rooms. Vinyl and similar types of flooring will sometimes start to lift or bubble when left damp over an extended period.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

16. Local authority loans provided for insulation and / or clean heating do not 'run with land', the party who has taken out the loan is the only accountable party.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

17. Decks, platforms, bridges, boardwalks etc. from which it is not possible to fall more than 1.5 metres do not require a building consent under Schedule 1 of the Building Act 2004. Their construction must, however, comply with the Building Code to ensure they are safe for people to use.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

18. Licensees should be aware that small heated pools under 760mm required to be fenced, as specified in the Building Act 2004.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------

19. Any accessory building that has the potential to be self-contained (with its own kitchen and laundry facilities) constitutes a minor dwelling. A legal attached or detached minor dwelling can be let to tenants, regardless of the local authority jurisdiction, and requires resource consent as well as building consent. A minor dwelling on a property also affects the way the rates are calculated.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
--------------------------	------	--------------------------	-------