
Real Estate

Continuing Professional Development

Understanding agency law

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Learning objectives

Understanding:

- What constitutes a contract under agency law, including:
 - Agency agreement
 - Real estate agency work
 - Authorised authority
- When real estate agency work begins and ends, for example:
 - Real estate transaction
 - Exposure of vendor to double commission
- The fiduciary relationship (client)
 - The rules and fiduciary obligations
 - Confidentiality
- Developments in consumer relationships (duty of care to the customer)
- Disclosure of conflicts of interest, including:
 - Acquisition by the licensee or related person
- Buyer's agent rule 11
- Supervisor responsibilities

What constitutes a contract under agency law

Real estate agency work focuses on two major contracts; one is the agency agreement and the other is the sale and purchase or lease agreement. In this topic we will focus on the agency agreement.

A contract can be defined as:

'an agreement (enforceable by the court) under which each party assumes obligations to the other for valuable consideration'.

The Real Estate Agents Act 2008 (section 4) defines an agency agreement as:

agency agreement means an agreement under which an agent is authorised to undertake real estate agency work for a client in respect of a transaction

An 'agent', as referred to in section 4 above, means a licensed agent operating as a business.

Agency agreement

Real estate agent licensees (operating as a business) enter into an agency agreement with their **client**; a term that is used throughout the Real Estate Agents Act 2008 (the Act) and Real Estate Agents (Professional Conduct and Client Care) Rules 2012 (the Rules).

Under the law of agency, the **client** is called the **principal**.

While the details of an agency agreement are usually completed by a salesperson licensee and signed by the client, the **contract is between the agent licensee operating as a business** (i.e. the agency (section 48) for whom the salesperson or branch manager licensee is carrying out real estate agency work for and on behalf of (section 49) - refer to Appendix 1) **and the client** (principal); not the client and the salesperson licensee.

Real estate agency work

Section 4 of the Act sets out the following definition:

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); but

(c) does not include—

(i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or

(ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or

(iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or

(iv) the lending of money on mortgage or otherwise; or

(v) the provision of investment advice; or

(vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006

When a salesperson licensee completes the agency agreement and carries out real estate agency work for a client (principal) they are doing so for and on behalf of the agent they are employed or engaged by.

Traditionally, real estate licensees refer to their clients as vendors or lessors and it is more common for licensees to consider the agency agreement is established with their vendor or lessor (client).

To use contract law terminology, we can say that the agency relationship is therefore between the vendor or lessor as **principal** and the real estate agent licensee (commonly referred to as the real estate agency e.g. Best Real Estate Limited, licensed under the Real Estate Agents Act 2008).



Note:

It is important to understand, at this point, that the buyer or lessee falls outside the agency relationship as third parties. This aspect is covered in more detail later in this topic.

The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) make up the Real Estate Authority code of professional conduct that real estate licensees are required to follow when carrying out real estate agency work (refer Appendix 2). We will refer to the rules throughout this topic.

Buyer's agent

An agent licensee may also undertake real estate agency work for a client in respect of the **purchase** or other acquisition of land or a business on the client's behalf.

In these circumstances, a buyer's agency agreement would need to be signed and the agency relationship would be between the buyer or lessee as principal and the real estate agency. Vendors and lessors as third parties would then fall outside the agency relationship.

Refer to the section on buyer's agent later in this topic.



Key Points

The majority of real estate agency work in New Zealand is in respect of clients as vendor or lessor.

In summary, we can say that the agent agrees to do the work to market and sell (or purchase), or lease the property, space, or business, and the client or principal agrees to pay the agent (commission and expenses) for this work when the land or business is sold (or bought) or leased unconditionally.

Note: we will refer to the 'client' as 'vendor' throughout the remainder of this topic.

Authorised authority

As stated previously, an agency agreement is a contract between the client or principal and the agent licensee and is usually completed by a salesperson licensee; then signed by the client and the agent or their delegated licensee.

A licensed real estate agent is not entitled to be paid commission or expenses from a client for real estate agency work (for example, for the sale or lease of the client's land or business) unless there is a written, signed agency agreement (**contract**) in place, and a copy of the signed agency agreement was given to the client (all parties legally required to sign) within 48 hours after the agreement was signed (refer Section 126 of the Act – Appendix 3).

Section 126(1)(c) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by or on behalf of the client.

Furthermore, licensees must not offer or market a property, space, or business unless an agency agreement is in place.

This is confirmed in Rule 9.6 which says:

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

When real estate agency work begins and ends

It is important to understand when real estate agency work begins and ends.

Real estate agency work begins as soon as you commence work which is aimed at bringing about a transaction.

Transaction

Section 4 (of the Act) – Interpretation, sets out the following meaning:

transaction means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
 - (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
 - (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 1952:
 - (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
 - (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).
- (2) To avoid doubt, the sale, purchase, or other disposal or acquisition of shares comes within the definition of transaction in subsection (1) if, and only if, the shares entitle the holder to a licence that is registrable under Part 7A of the Land Transfer Act 1952.

In [2012] NZREADT 65¹ the licensee argued that a failure to provide an appraisal to a client was not unsatisfactory conduct because it was only a prerequisite to real estate agency work and was not the performance of real estate agency work itself. The Disciplinary Tribunal disagreed with this and said that preliminary work such as providing an appraisal still fits within the definition of real estate agency work because such activities are for the purpose of bringing about a transaction.

The Disciplinary Tribunal has shown that it will apply a broad definition of real estate agency work. In [2014] NZREADT 4² the Disciplinary Tribunal held that a possible or potential transaction commenced as soon as the licensee took a consumer's phone call.

In certain circumstances, real estate agency work may also continue after settlement.

¹ <http://www.nzlii.org/nz/cases/NZREADT/2012/65.html>

² <http://www.nzlii.org/nz/cases/NZREADT/2014/4.html>

The following cases clarify these points.

In the past, it was widely accepted that 'real estate agency work' was completed when a transaction became unconditional. However, in a decision of the High Court, *House v REAA* [2013] NZHC 1619, the judge determined that 'real estate agency work' continues until settlement of a transaction.

In some circumstances 'real estate agency work' can continue after settlement. For example, in a decision by the Disciplinary Tribunal [2013] READT 92 the Tribunal determined that settling a commission dispute (after settlement) is also 'real estate agency work', therefore 'real estate agency work' is not completed until that dispute is resolved.

Cases: *House v REAA* [2013] NZHC 1619 / [2013] READT 92

No marketing or advertising without an agency agreement

Remember, a licensee is **not** entitled to carry out any real estate agency work until an agency agreement is signed; this includes any marketing or advertising of a (prospective) client's property.

Rules that apply to agency agreements - review

We have covered the rules that apply to real estate agency agreements in other Continuing Professional Development (CPD) topics.

Answer the following questions to review your knowledge. Refer to Appendix 2 – the Rules.

Exposure of vendor to double commission

If a vendor or prospective client has an existing agency agreement in place, it is essential that a licensee complies with rule 9.10, as follows:

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

As an example, it is important to remember that the existing agency agreement might have a 7-day cancellation clause, so any new agency agreement **must not** commence before that date.

Licensees must exercise appropriate skill, care, competence and diligence (rule 5.1), proactively addressing this issue with a prospective client from the outset of their relationship; furthermore, acting in compliance with rules 6.3, 6.4, and 9.2 (refer Appendix 2).

The fiduciary relationship with the client

When an agent and client enter into an agency agreement, they are entering into a **fiduciary relationship**.

This means that the agent has an obligation to act in the best interests of the client and must act with the utmost good faith in relation to their dealings with them. The fiduciary relationship recognises that the agent has knowledge, expertise and skill in relation to their client and are in a position of trust.

In the context of real estate agency work, licensee salespersons are also bound by the fiduciary relationship.

The word 'fiduciary' itself comes originally from the Latin words - *fides*, meaning faith, and *fiducia*, meaning trust. The fiduciary relationship requires the licensee to fully comply with their legal obligation to their client and is based on the **duty of loyalty of the agent to the client**. This is further clarified through the Latin term '*uberrimae fidei*' which means *to 'act in the utmost good faith'*. Therefore, an agency agreement is a contract of utmost good faith. Normal commercial contracts are regarded as a '*contract of good faith*'.

There are various duties owed by an agent or licensee to their client (the principal): duties implied by law (fiduciary); duties expressed in the agency agreement; duties expressed in the Real Estate Agents Act 2008 and duties expressed in the Rules.

The fiduciary relationship relies on the express obligation of the client to disclose all things material to the agent. The client's obligation needs to be clearly defined within the agency agreement.

Likewise, the licensee's duties are straightforward: to fully disclose all information **material** to the client, to act in their best interests, and to abide by the contract of agency.

The rules and fiduciary obligations

The Rules set out requirements that a real estate licensee is required to abide by, and Rule 6 specifically covers Standards of Professional Conduct, beginning with the following requirement:

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

Rule 9.1 reinforces the fact that the primary duty of a licensee is to the client; it further clarifies that this duty does not extend to breaking the law.

Rule 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.

In addition to the duties laid out in the Real Estate Agents Act 2008 and the Rules, the agent's duties include:

- Performing all tasks undertaken to be performed
- Following all legal instructions of the client

- Exercising due skill and care, to fully disclose to the client all matters which may be material, e.g. might affect them
- Keeping proper accounts and documented records
- Not disclosing confidential information about the client
- Not allowing their personal interests to conflict with the interests of the client

A real estate agent's duty, as stated or implied in the contract of agency, also extends to:

- Endeavouring to effect a sale or purchase, or lease agreement - the agent must demonstrate some effort to sell (or buy), or lease the property

Confidentiality

The obligations of a licensee to the client in terms of confidentiality are covered in Rules 9.16, 9.17 and 9.18.

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

This rule acknowledges that when carrying out real estate agency work, a licensee may become aware of certain confidential information about their client. They must not use that information to benefit themselves or another person; e.g. knowledge of a relationship breakup, financial difficulties, or a health challenge.

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

- (a) the client consents in writing; or
- (b) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client; or
- (c) the licensee is required by law to disclose information; or
- (d) the disclosure is consistent with the information privacy principles in Section 6 of the Privacy Act 1993.

This rule details the limits of disclosure of a client's confidential personal information.

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.

This rule limits the extent to which information can be disclosed, and to whom, if consent has not been given in writing by the client.

Note: A licensee's obligations to their client in terms of confidentiality continue even when an agency agreement has ended.

Rules 10.7 and 10.8 relate to information about a property that must be disclosed to customers interested in buying that property.

Rule 10.7 covers disclosure of any known defects and/or hidden or underlying defects that a reasonably competent licensee should be aware of. 10.8 covers what a licensee must do if a client-vendor instructs that such defects to not be disclosed.

Developments in consumer relationships – duty of care to the customer

Previously, at common law, the agent's duty was exclusive to the principal (the client).

The purchaser or lessee could not rely on the agent for advice or assistance. The purchaser or lessee was expected to rely on their own judgement and would be subject to the principle of *caveat emptor* (let the buyer beware).

However, consumer-focused legislation and court decisions have added a range of stringent rights for the third party to the contract (the customer), offering protection and recourse.

The Real Estate Agents Act 2008 is consumer legislation. Other consumer legislation includes:

- Fair Trading Act 1986
 - e.g. sections 9, 12A, 14, 26A, 36L, and 36ZA – ZE
- Contract & Commercial Law Act 2017
 - e.g. section 35

Under consumer law, the customer is now protected from misleading statements, misrepresentation, false representation, or being actively misled by a licensee, e.g. remaining silent.

When a licensee acts wrongfully towards a third party on the express instructions of the client, the licensee is jointly and severally liable.

The introduction of the Fair Trading Act 1986 means that purchasers can sue agents directly if the agent was found to have engaged in misleading and/or deceptive conduct.

The Contract & Commercial Law Act 2017, (which replaced the Contractual Remedies Act 1979) deals with contractual arrangements between parties, e.g. between the vendor and purchaser, or the lessor and lessee (refer section 35). If an agent (or a licensee working on their behalf) makes a misrepresentation to a purchaser, this could give the purchaser a right to claim damages from the vendor or lessor (but not the agent). However, the client might then, in turn, have a claim against the agent (and/or licensee working on their behalf), which would be directed, in the first instance, to either the agency concerned or to the Real Estate Authority.

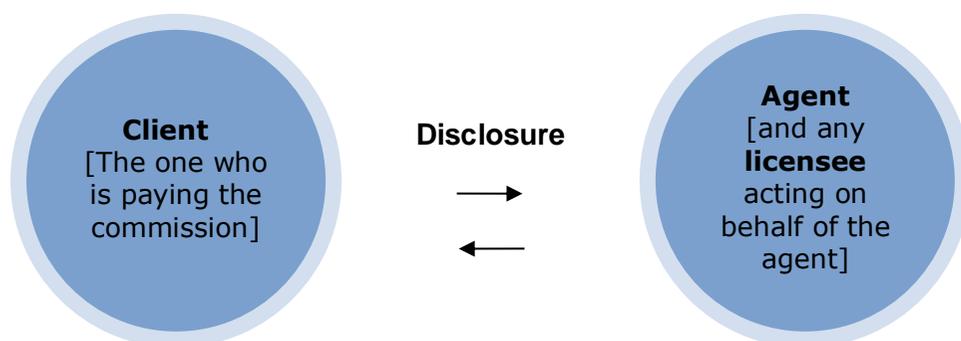
Real estate licensees carrying out real estate agency work are required to meet the expectations of both parties to the sale or lease transaction e.g. vendor or lessor, and purchaser or lessee.

Licensees are considered 'stewards of the (real estate) transaction' and as such, are required to act in the best interests of their principal, the client, whilst also dealing fairly with the third party, the customer. Refer to the chart on the following page:

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.

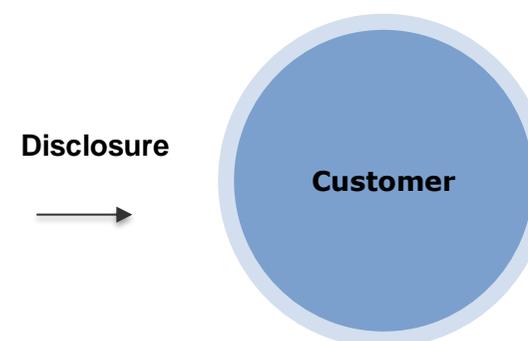


Important rules and legislation (in addition to fiduciary duty):

- 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 rules that apply to the consumer relationship

As set out in the chart above, licensees are required to comply with the Rules and legislative requirements which create obligations towards purchasers.

Rules 6.2, 6.3 and 6.4 set out the requirements of licensees in relation to dealing with a third party (purchaser) to a contract:

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

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

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

Licensees must, therefore, balance their traditional duty of absolute loyalty to their client (the vendor or lessor) with their obligation not to mislead or treat purchasers or lessees unfairly.

Rule 5.1 confirms that standards of professional care and competence must be upheld when dealing with both clients and customers.

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

Disclosure of conflicts of interest

Acquisition by the licensee or related person

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



Note:

Complying with section 134 to 137 as well as 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).

Section 134

Under Section 134 of the Real Estate Agents Act 2008, if you, the licensee, are carrying out real estate agency work directly or indirectly for a client, you cannot acquire the property or business concerned without the written consent of the client on the prescribed form. This also applies to any person related to you, the licensee (as defined in section 137); (refer to Appendix 4 for sections 134 to 137).

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...

Independent valuation required

An independent valuation must also be provided by the licensee to the client (refer to Section 135). The same requirement applies to **any person related to you, the licensee** (as defined in Section 137).

The valuation must be obtained at the licensee's expense and been made by:

- (a) an independent registered valuer; or
- (b) in the case of a business, by an independent qualified statutory accountant (within the meaning of section 5(1) of the Financial Reporting Act 2013).

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.

Managing conflict of interest and informed consent

Licenses wishing to take an interest in a client's property or who are seeking consent on behalf of a related person taking an interest, are required to 'step back' 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 are seeking consent on behalf of a related person to take an interest.

When a 'conflict of interest' is identified, the agency should conduct negotiations with the client. For example, 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 between the client and the purchaser, ensuring that the client has given 'informed consent'. Negotiations must then proceed in accordance with Section 134 and 135 of the Act.

Refer: Barfoot & Thompson v REAA [2016] Court of Appeal NZCA 105:

<http://www.nzlii.org/nz/cases/NZCA/2016/105.html>

Section 136

Under Section 136, 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 (as defined in Section 137), **may benefit financially** from the transaction.

For example, any licensee listing their own property for sale, or the property of a related party, are 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 **does not** cover disclosure of rebates, discounts, and commissions in relation to expenses incurred on behalf of a client, for example, marketing or advertising expenses. These are covered in Section 128 of the Real Estate Agents Act 2008.

Section 136 **does not** cover the constraints 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 and 135 of the Real Estate Agents Act 2008 as noted above.

Buyer’s agent – rule 11

Rule 11 Client and customer care for buyers’ agents was introduced in the 2012 publication of the Rules to ensure that licensees acting as buyers’ agents undertake real estate agency work in a way that is transparent and has appropriate minimum standards without being subject to obligations that are not relevant to this type of relationship.

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

As with 9.7 which relates to agency agreements and contractual documents, licensees who act as a buyer’s agent are required to comply with rule 11.2:

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

- (a) the conditions under which commission must be paid and how the commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the average of the estimated price range of the land or business that the client is seeking to purchase:
- (b) when the agency agreement ends:
- (c) any additional services that the licensee will provide, or arrange for the provision of, on the client’s behalf and the expenses relating to those services payable by the client:
- (d) that the client is not obliged to agree to the additional expenses referred to in rule 11.2(c):
- (e) that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

This rule lists the matters that must be explained and set out in writing to a prospective client before the client signs an agency agreement.

Likewise, a buyer's agent is required to comply with the following rules:

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

This rule confirms that real estate agency work (e.g. negotiating with vendors or lessors, or other licensees) must be carried out on terms agreed with the client.

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

This rule aims to ensure that all written offers made by a client are submitted to a vendor or lessor rather than a licensee 'filter' information.

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

This rule aims to ensure that a thorough paper trail is recorded and communicated to the agent by the licensee.

Rule 11.6 An agent must retain, for a period of 12 months, a copy of every written offer submitted. This rule applies regardless of whether the offer was submitted by the agent or by a licensee employed or engaged by the agent and regardless of whether the offer resulted in a transaction.

Agents must keep copies of all offers submitted by them or by licensees they employ or engage for a period of 12 months.

Supervisor responsibilities

All licensees must be aware that a real estate agency has an obligation to ensure that ALL licensees carrying out real estate work on their behalf are properly supervised and managed and are given the support they need.

Section 50 of The Real Estate Agents Act 2008 says:

50 Salespersons must be supervised

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.
- (2) In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—
 - (a) that the work is performed competently; and
 - (b) that the work complies with the requirements of this Act.

Section 50 is reinforced by Rules 8.3 and 8.4 of the Rules.

Supervision and management of salespersons

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

Ensuring knowledge of regulatory framework and promoting continuing education

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



Note:

The Lawyers and Conveyancers Act 2006 (Section 36(2)(a)) allows real estate licensees with six months' or more experience to prepare sale and purchase or lease agreements and to give advice about legal rights and obligations relating to such contracts.

However, it should be clear that Section 50 of the Real Estate Agents Act and Rules 8.3 and 8.4 extend agency responsibilities for supervision and management of licensees to all salespeople carrying out real estate work on their behalf, regardless of their level of experience.

Professional Standard on Supervision

The Real Estate Authority (REA) has issued the Professional Standard on Supervision (July 2017) to provide guidance to all licensees about their obligations in regard to supervision under the Act and the Rules.

The Standard applies to all licensees and states:

“It is anticipated that Complaints Assessment Committees and the Real Estate Agents Disciplinary Tribunal will also have regard to the Standard when considering matters that raise supervision issues.”

Appendices

Appendix 1 – Section 48 of the Act

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 a partnership or otherwise.
- (2) An agent’s licence authorises the licensee to sell or offer to sell land by auction and operates as an exemption from the requirement in the Auctioneers Act 2013 to be registered as an auctioneer.
- (3) However, every licensee who conducts an auction of land must comply with the rules about the conduct of auctions set out in sections 36Y to 36ZE (but not the rule in section 36ZF) of the Fair Trading Act 1986.

Appendix 2 – Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

Contents

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

Rules

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

Important note

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

1 Title

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

2 Commencement

These rules come into force on 8 April 2013.

3 Scope and objectives

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

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

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

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

4 Interpretation

4.1 In these rules,—

Act means the Real Estate Agents Act 2008.

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

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

regulations means regulations made pursuant to the Act.

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

5 Standards of professional competence

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

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

6 Standards of professional conduct

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

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

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

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

7 Duty to report misconduct or unsatisfactory conduct

7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct³ may make a report to the Authority.

7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct⁴ must make a report to the Authority.

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

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

8 Duties and obligations of agents

Promoting awareness of rules

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

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

³ Unsatisfactory conduct is defined in the Act: see section 72

⁴ Misconduct is defined in the Act: see section 73

Supervision and management of salespersons

8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.⁵

Ensuring knowledge of regulatory framework and promoting continuing education

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

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

9 Client and customer care

General

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

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

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

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

9.5 A licensee must take due care to—

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

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

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

Agency agreements and contractual documents

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

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

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

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

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

⁵ The Act defines what is meant by a salesperson being properly supervised and managed by an agent or a branch manager for the purposes of section 50 of the Act: see section 50(2)

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

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

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

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

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

Conflicts of interest

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

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

Confidentiality

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

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

(a) the client consents in writing; or

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

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

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

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

10 Client and customer care for sellers' agents

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

Appraisals and pricing

10.2 An appraisal of land or a business must—

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

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

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

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

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

Agency agreements

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

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

Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in the land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects⁶, 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

⁶ For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.⁶

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

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

Advertising and marketing

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

Contractual documentation and record keeping

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

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

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

11 Client and customer care for buyers' agents

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

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

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

(b) when the agency agreement ends:

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

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

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

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

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

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

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

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

12 Information about complaints

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

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

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

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

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

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

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

13 Revocation

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

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

Appendix 3 – Section 126 of the Act

126 No entitlement to commission or expenses without an agency agreement

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

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

(i) the client; and

(ii) the agent; and

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

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

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

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

(a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and

(b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and

(c) failure to make the order would be unjust.

(4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017.

Appendix 4 – Sections 134 to 137 of the Act

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.

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

136 Disclosure of other benefits that licensee stands to gain from the 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.

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).