

Real Estate

Continuing Professional Development



Marketing

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This topic replaces Marketing: Professional competence and Marketing: Professional competence and ethics.

Contents

Real Estate CPD - Marketing, covers the following information:

Contents	3
Learning outcomes	4
Terms used in this guide.....	4
Identifying the real estate agency and confirming your licence	5
Licensees – personal marketing and advertising	6
Authority to offer and market	7
Advertising, marketing and price	9
Client confidentiality	14
Disclosing defects	16
Additional requirements under the Fair Trading Act 1986.....	17
'As is/where is' provisions do not negate disclosure obligations	21

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Learning outcomes

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

- state where you must display your agency details and confirmation of licensing
- explain when you are allowed to offer or market a property
- describe the rules that set out advertising, marketing and price
- explain the importance of client confidentiality and disclosing defects about a property
- describe the implications of the Fair Trading Act 1986 for licensees
- explain disclosure obligations for properties sold 'as is/where is'.

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')
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Identifying the real estate agency and confirming your licence

Under section 121 of the Real Estate Agents Act 2008, you must clearly and prominently display your name (and your trading name, if different) and the fact that you are licensed, on:

- each office or shop you maintain
- all websites you maintain
- all notices and advertisements
- all other promotional material and documents you use in the course of your real estate work
- all letters, accounts, contractual documents and agreements.

121 Agent to display required name information

(1) In this section,—

business, in relation to an agent, means the agent's business as a real estate agent
required name information, in relation to an agent, means—

(a) the name of the agent and the fact that the agent is licensed under this Act; and

(b) if the agent's business as a real estate agent is not carried on in the agent's name, the name or style under which that business is carried on.

(2) Every agent must ensure that the required name information is displayed in a prominent place—

(a) at each office or shop maintained by the agent for the purposes of the business; and

(b) on every website maintained by the agent for the purposes of the business; and

(c) on all notices, advertisements, and other material published by or on behalf of the agent in the course of the business; and

(d) on all letters, accounts, contractual documents, agreements, and other documents sent or handed out, entered into, or published by or on behalf of the agent in the course of the business.

(3) The required name information must be capable of being easily read from outside each office or shop maintained by the agent for the purposes of the business.

Note

There have been a number of cases where the individual licensee is properly identified but not the real estate agency. You must carefully check that all marketing and advertising information in printed and electronic media and all other documents used in the course of real estate work contain the required information.

Licensees – personal marketing and advertising

You are encouraged to develop your own marketing material including social media channels and professional websites to build your profile and broaden potential client contact opportunities.

It's important to maintain professional boundaries between your personal and professional social media channels. You should use a professional social media channel for real estate agency work. It must comply with section 121 of the REAA 2008. Check your real estate agency's social media policy.



Questions

1. Give examples of business related products where you must ensure your name, trading name and licensed status are prominently displayed as required under section 121 of the Real Estate Agents Act 2008.

Authority to offer and market

Rule 9.6 says you must not begin to offer or market a property, space, or business for sale or lease in any way, unless your client has authorised you through a signed agency agreement.

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.



Question

2. Which of the following are allowed only after the licensee has a signed agency agreement with the client?

<input type="checkbox"/>	Recommend legal advice
<input type="checkbox"/>	Take prospective purchasers to view the property, space, or business
<input type="checkbox"/>	Advertise the property, space, or business
<input type="checkbox"/>	Put up a 'For Sale' or 'For Lease' sign

Marketing plan

You must set out the proposed marketing plan in writing before a prospective client signs an agency agreement. **Rule 10.6 (c) and (d)** says you must also explain to the client that they are not obliged to agree to any additional expenses referred to in the marketing plan.

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

(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)

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

Case study 1

A licensed salesperson showed three prospective purchasers through a property. However, there was no signed agency agreement for the property in place at the time of the showings.

A complaint was made to REA and the situation was investigated by a Complaint Assessment Committee (CAC).

The CAC discovered that in addition to there being no agency agreement, there was no appraisal for the property in the agency's records.

When asked about the missing documents the licensed salesperson replied that it was a 24-hour listing and the documents were not submitted to the office. However, she was unable to provide copies herself.

The CAC found the licensee had engaged in unsatisfactory conduct under s89(2)(b) of the Real Estate Agents Act 2008. The licensee was censured, ordered to undergo further training and was fined \$3,000.

Complaint No: C15000

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



Questions

3. How did the licensee breach Rules 9.6, 10.2 and 10.3?

Advertising, marketing and price

You can begin offering and marketing a property, space, or business for sale or lease when an agency agreement has been signed, and a copy of the agreement has been given to the client.

Your client must approve the promotional activities outlined in the marketing plan, and these must be within a marketing budget the client has agreed. This is in accordance with rule 10.6(c) and 10.6(d) as mentioned above.

Ensure you understand the client's pricing expectations and ensure that all marketing and advertising material accurately reflects these expectations. This includes advertising the property in the correct price range for online searches.

The following rules set out the responsibilities you must comply with in relation to advertising, marketing and price.

Rules:

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

Costs (for marketing) must be appropriate in terms of the property value and the benefit gained from marketing.

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

Activities must reflect the marketing plan, and any terms as subsequently authorised by the client.

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

Licensees **must not** under quote price expectations to a potential purchaser with the aim of securing an offer.

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

Licensees **must not** advertise an ambiguous price range or minimum price contrary to the client's expectations.



Questions

Answer the following questions by selecting the correct answers.

4. Licensees must ensure they understand the client's pricing expectations before creating marketing material.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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5. Any activities different to the marketing plan must be authorised by the client.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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6. Licensees must not under-quote price expectations to a potential purchaser with the aim of securing an offer, nor mislead them in any way as to the price expectations of the client.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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7. A licensee is able to run a Buyer Enquiry Over \$xxxx advertisement which indicates a price lower than the minimum price a client is willing to accept.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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8. Licensees must explain to clients that they are not obliged to agree to any additional expenses incurred through marketing or advertising and must ensure any costs incurred are appropriate.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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Breach example:

A Complaint Assessment Committee (CAC) charged a licensee with misconduct following a complaint made by vendors of a property the licensee was engaged to market.

The licensee failed to provide a written appraisal and explanation of pricing for the property as required by rules 10.2 and 10.3.

During the marketing, the licensee decided to take an interest in purchasing the property himself. Although aware of the statutory requirements that he had to comply with (sections 134 to 137 Real Estate Agents Act 2008) and with adequate time to correct procedural failures before the licensee settled the purchase, this was not done. Marking an Agreement for Sale and Purchase (ASP) as a 'private sale' does not absolve a licensee of their obligations under the Act and Rules.

The licensee's failure to take any steps to seek advice as to whether he was acting in accordance with the requirements of the Act and Rules must be taken seriously.

The licensee was censured and ordered to pay a \$10,000 fine.

Complaint No: C08720

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

[2017] NZREADT 6

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

Case study 2

A complaint was made to REA from prospective purchasers about a licensed salesperson who was marketing a property for sale by tender. The property was acknowledged as having a unique style and design.

The property was advertised as *'buyer budget up (BBU) from \$595,000'*.

The complainants submitted a tender with an offer of \$620,000.

After the tender closed, the complainants were informed by the licensed salesperson that their tender was unsuccessful and that the property did not sell. They were also told that the vendors had decided to rent the property rather than sell it.

The complainants contacted one of the vendors directly (by phone) to ask if he could make an improved offer to negotiate an agreed sale price. The vendor told him that they were looking for a minimum of \$700,000 for their property and that they had made this expectation very clear to the licensed salesperson from the start.

The complainants requested the committee to consider the following remedies:

- "a) Financial compensation to them and other unsuccessful tenderers for time spent and costs incurred to submit tenders which were never going to be considered.*
- b) Compensation for the emotional harm associated with participating in a stressful tender process."*

The Committee's investigation found the following:

[para 3.5] *"Although the complaint was made about the complainant being misled as to the vendors' price expectations, the committee's investigation identified three other issues arising which require addressing. These matters are directly related to, and arise out of, the complaint. They are the quality of the appraisal and comparative market analysis (CMA), a failure to provide mandatory information to a vendor client and a misleading email sent to the disappointed tenderers after their offers were not accepted."*

The Committee found the licensee had breached rules 5.1, 6.4, 9.1, 9.4, 10.2, 10.3, 10.4 and 10.6 and the agency had breached rules 8.3 and section 50. The licensee was censured and fined \$1,000. The agency was censured fined \$5,000 and \$1,070 settlement.

The Tribunal subsequently dismissed the licensee's appeal against the unsatisfactory conduct decision, but partially allowed the appeal against the penalty orders and quashed the \$1,000 fine.

Complaint No: C20767

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



Question

9. How did the licensee breach rules 5.1, 6.4, 9.1, 9.4, 10.2, 10.3, 10.4 and 10.6?

10. How did did the agency breach rules 8.3 and section 50?

Furthermore, the committee stated:

- [para 3.6] 'The appraisal and CMA were prepared on 3 April 2017. The appraisal states an appraised price "\$590,000-\$650,000-\$725,000." The range is \$135,000. Under comments, it is noted the property is unique. Fifteen sold properties are identified. The lowest price is \$571,000 and the highest price is \$759,300 (a range of \$188,300 and a median of \$662,000). Five properties have a price of \$700,000 or higher. They are not described as comparable sales and none of the information provided about each property indicates how it is comparable with the property.'
- [para 3.7] 'The TradeMe advertising describes the property as '*uniquely designed*' and '*one of a kind*'.'
- [para 3.12] 'The appraisal and CMA is useless. It refers to 15 allegedly comparable sales when licensee A considers it difficult for a valuer to find comparative sales and to put a price on it. It has a price range of \$135,000. There is no indication as to why any of the comparable sales are comparable sales. It

does note the property is unique but does not provide any explanation as to how its uniqueness affects an assessment of the likely selling price.'

Client confidentiality

Any information confidential to a client must be kept confidential. Confidential information must not be used to benefit any other person, including you, the licensee (rule 9.16). Furthermore, confidential information must not be disclosed unless in accordance with the circumstances outlined in rules 9.17 and 9.18.

For example, knowledge that a client-vendor needs a quick sale due to financial difficulties must not be disclosed when marketing a property unless the client-vendor consents in writing for such information to be disclosed.

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.



Questions

Answer the following questions by selecting the correct answer(s).

11. Under rule 9.17(a), in what form must client consent to disclose confidential personal information be given?

<input type="checkbox"/>	Verbal	<input type="checkbox"/>	Written
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12. If confidential personal information is required to be disclosed under rule 9.17 (b), (c), or (d), to whom may it be given to? Choose all that apply from the following list:

<input type="checkbox"/>	Only to the person or entity requesting the information
<input type="checkbox"/>	Only to the extent necessary for the permitted purpose
<input type="checkbox"/>	Only to the appropriate person or entity
<input type="checkbox"/>	Only to the extent a licensee deems necessary

Breach example:

Vendors of a property that was listed for sale made a complaint to the REA regarding the conduct of the licensed salesperson. They allege that the licensed salesperson disclosed confidential financial information about the vendors to the purchaser of the property (breach of rule 6.1) and put them under undue and unfair pressure to accept the purchaser's offer for the property, in breach of rules 6.3 and 9.2.

The committee, on the balance of probabilities, determined that the licensed salesperson had disclosed to the purchasers that the complainants were in financial difficulty and had to sell the property.

The licensee was charged with unsatisfactory conduct and the committee ordered censure, continuing education, commission refund of \$10,150.64 plus GST and a \$6,000 fine. Following appeal the Tribunal reduced the fine to \$4,000 and the commission refund to \$4,000. The orders for censure and CPD remained in place.

Complaint Number: C11489

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

[2018] NZREADT 17

Disclosing defects

There is certain information about a property that must be disclosed to customers (prospective purchasers) or lessees interested in buying or leasing the property.

You must make sure your client vendor or lessor is aware of the obligations to disclose to customers (prospective purchasers) or lessees before the client signs an agency agreement.

These disclosure obligations are covered in more detail by Rules 6.4, 10.7 and 10.8.

Key Points

Rule 6.4 places an obligation on licensees to disclose information that should in fairness be provided to customers and clients.

Rules 10.7 and 10.8 seek to balance the legitimate interests of buyers or lessees to have relevant information about a property they are interested in buying or leasing against realistic limits and expectations of a licensee's ability to know details about that property.

These rules seek to set a consistent standard of disclosure of defects that all licensees can be held to (disclosure required when it appears likely to a 'reasonably competent' licensee that there is a defect).

If a 'reasonably competent' licensee considers that there may be a hidden or underlying defect, the licensee may discharge his or her disclosure obligations to the customer (prospective purchaser or lessee) in one of two ways:

- Obtain confirmation from the client supported by evidence or expert advice, that the land is not subject to defect; or
- Inform the customer of any significant potential risk so that the customer can seek expert advice if he or she chooses. If a client is unable to provide evidence that there is no defect, the licensee must inform the customer of the potential risk, so they can seek their own expert advice

Since a licensee is required under the rules to disclose knowledge of defects to a customer, if a client directs the licensee not to make such a disclosure, the licensee must adhere to rule 10.8 and terminate the agency agreement and not continue to act for the client.

Additional requirements under the Fair Trading Act 1986

Section 9 of the Fair Trading Act 1986 deals with misleading and deceptive conduct.

9 Misleading and deceptive conduct generally

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

Section 14 deals with false representation and other misleading conduct in relation to land.

14 False representations and other misleading conduct in relation to land

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

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

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

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

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

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

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

Other sections in the Fair Trading Act are relevant and have implications for real estate agencies and licensees.

12A Unsubstantiated representations

Section 12A was introduced in 2013 and prohibits the use of unsubstantiated representations by a person in trade in respect of goods, services, or an interest in land (s12A(4)(a)), and specifically in regard to 'the sale or grant or possible sale or grant of the interest in land' (s12A(4)(b)(ii)).

The meaning of *unsubstantiated* is provided in subsection (2):

Section 12A (2)

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

Section 12A (3)

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

This section applies to representations which a reasonable person would expect to take seriously and be substantiated. An example could be advertising a property as 'Home and Income' when there is a restrictive covenant preventing this.

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

This includes representations in relation to the sale of property made by agents, licensees (and developers) all of whom are 'in trade'

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

Licensees are not able to make representations in trade (even if they are true) without having reasonable grounds at the time for making them.

The key point is that if a licensee makes a statement or representation without making sufficient enquiries to check whether it was true or not, they will fall foul of this section of the FTA.

The law requires a licensee to make sure they have reasonable grounds at the time for making any statement about a property or business they are marketing before they make those statements.

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

Claims that are regarded as clearly an exaggeration and are so obvious that no one ought to reasonably believe they are not covered by Section 12A.

An example might be "*This is the best property ever!*"

It is, however, risky to rely on this exception of puffery (exaggeration or false praise), except where it is very obvious that what you are saying about a property is clearly not meant to be taken as fact.

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

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

(b) in connection with—

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

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

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

Section 12A applies to all types of representations made by licensees about property, space, or businesses including:

- statements made within marketing brochures
- on websites, or any electronic media
- verbal statements made by a licensee

Section 12A addresses the following issues:

- A prospective purchaser or lessee has the right to rely on statements made in good faith by a licensee.
 - It is unfair on licensees who have gone to the trouble of ensuring any representations they made can be substantiated, when a competitor makes a representation without doing this.
- Unsubstantiated representations act as an inducement to attract purchasers or lessees and may entice prospective purchasers or lessees to enter into negotiations to buy or lease a property based on information that has not been substantiated
 - This could deny other licensees who comply with the legislation from having free and equal competition for the business of that purchaser or lessee.

Breaches of the Fair Trading Act 1986 carry additional penalties

Breaching the Fair Trading Act 1986 could mean individual licensees face fines of up to \$200,000, and real estate agencies up to \$600,000. The courts can also grant an injunction and can order corrective advertising to cure any misrepresentation.

The Commerce Commission is responsible for prosecutions under the Fair Trading Act 1986 and the Real Estate Authority will work closely with them on any matters regarding real estate licensees.

What real estate agencies and licensees should do to manage risk in relation to the Fair Trading Act 1986

- Real estate agencies should look at their advertising and business practices to ensure that they meet the requirements of Section 12A of the Fair Trading Act 1986.
- Real estate agencies may need to ensure processes or procedures (if not already in place) can show if required, that they have reasonable grounds for making specific representations. For example, prepare and retain documentation before making representations.
- Agencies and licensees need to think carefully about how property, space, or businesses for sale or lease are described and whether claims are being made that cannot be verified.
- Real estate agencies need to be vigilant and take steps to ensure that any statements they and their licensees make (whether verbally to a prospective purchaser or in advertising) are accurate, genuine and can be substantiated.



Questions

Answer the following questions by selecting the correct answers.

13. Under Section 12A of the Fair Trading Act 1986, a buyer or lessee may make a claim against a private vendor or lessor involved in the transaction.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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14. If a representation made by a licensee about a property, space, or business is true, this is an offence under Section 12A of the Fair Trading Act 1986.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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15. 'Puffery' is covered by Section 12A of the Fair Trading Act 1986 (s12A(1)(3)) but can still be a risky approach for licensees to take when marketing property, space, or business.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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16. Section 12A of the Fair Trading Act 1986 only applies to printed marketing information.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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17. Real estate agencies can be fined up to \$200,000 under the Fair Trading Act 1986.

<input type="checkbox"/>	True	<input type="checkbox"/>	False
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'As is/where is' provisions do not negate disclosure obligations

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

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

- is sold in a mortgagee sale
- needs extensive or significant repair
- has illegal occupants
- has issues with title and non-complying structures
- has issues associated with its zoning or locality
- has issues of uncertainty associated with the title and compliance, for example, remediation following earthquake damage.

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

However, the 'as is/where is' provision does not negate a licensee's disclosure obligations under rules 6.4 and 10.7. If a licensee is aware or should be aware of anything that may be material to a prospective purchaser, that information needs to be fully disclosed before the sales and purchase agreement is signed.

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

Any verbal advice given should be followed up with written confirmation and clarification, for example, email.

In a sale and purchase agreement, the standard vendor warranties would be crossed out. Licensees are also reminded of their obligations to comply with rule 10.8:

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.