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# Real Estate

## Continuing Professional Development

**Sale & purchase agreements and lease agreements:  
Contractual obligations**

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**NOTE: Do not use this material for verifiable CPD. This material has been edited and is provided for information purposes only. Reading this information can count towards your non-verifiable CPD. Only training delivered through a REA approved training provider can count towards verifiable CPD hours.**

**Estimated time needed: 1 hour 30 minutes**

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## Learning objectives

Review and understanding of:

- Sale and purchase agreements, including:
  - Difference between conditional and unconditional agreements
  - General terms used in ASP
- Lease agreements for commercial and industrial space, including:
  - Agreement to lease (Heads of Agreement)
  - Important points about lease agreements
  - Rights and obligations under the Property Law 2007
  - Agreements to lease (Heads of Agreement) forms
  - Drafting an agreement to lease (Heads of agreement)
  - Negotiating terms
- The professional conduct and client care rules that specifically apply to contractual documents
- Who must sign the sale and purchase agreements and lease agreements
  - Proof of identity
  - Licensee to give a copy of contractual document
- Disclosure of information as to transaction and conflicts of interest
- The Contract and Commercial Law Act 2017

## Sale and purchase agreements and lease agreements

In this topic we will look at licensee obligations regarding sale and purchase agreements and lease agreements, with particular reference to legal obligations concerning documentation, drafting and ensuring accuracy.



### Note

For this CPD material we will look at sale and purchase agreements for the sale of real estate and lease agreements for commercial and industrial space (governed by the Property Law Act 2007); licensees also being accountable under the Real Estate Agents Act 2008 and the Real Estate Agents (Professional Conduct and Client Care) Rules 2012 (the Rules).

We will not look at residential leases (governed by the Residential Tenancies Act).

Standard sale and purchase agreements or lease agreements set out in writing all the agreed terms and conditions of the sale or lease of a property, space, or business.

The agreement is a legally binding contractual document that requires the parties to the contract to go ahead with the sale or lease of the property, space, or business once all conditions set out in the sale and purchase or lease agreement are met.

It is essential that the licensee fully understands the legal aspects of the agreement document they are drafting and exercises skill, care, competence, and diligence when writing it up. Importantly the licensee needs to ensure the agreement is enforceable. Almost without exception, when we make a drafting error or omission, we create uncertainty or reduce clarity for the parties to the contract.

In many cases, lawyers acting on behalf of parties to the contract remedy errors that have occurred through the drafting or facilitating process. This is usually done by agreeing to a variation – the parties had a ‘meeting of minds’, and in good faith they wish to confirm that in writing. These errors and omissions do not reduce the number of complaints made to the REA, and in recent years there has been an increasing number of decisions of unsatisfactory conduct due to licensee’s lack of competence.

In the CPD topic *Knowing the parties to the contract*, we look in detail at the entities that can own or lease a property, space, or business. In summary they are:

- Individual
- Joint tenancy
- Trust
- Tenancy in common
- Partnership
- Company

### **Sale and purchase agreements**

Real estate agencies typically use the current Auckland District Law Society and Real Estate Institute of New Zealand form (the ADLS/REINZ form).

The following standard agreements from ADLS/REINZ are commonly used:

- Agreement for Sale and Purchase of Real Estate – Ninth Edition 2012 (8)
- Particulars and Conditions of Sale of Real Estate by Auction - Fourth Edition 2012 (7)
- Particulars and Conditions of Sale of Real Estate by Tender - Fourth Edition 2012 (7)
- Agreement for Sale and Purchase of a Business - Fourth Edition 2008 (5)

The sale and purchase agreement is designed for transactions of dwellings (such as houses, units and apartments), sections, lifestyle blocks, farms and commercial property. It is not suitable for the sale of businesses; these are usually drawn up by a solicitor and customised for the specific business.

The objective is to balance the rights and obligations of vendors and purchasers, although recent editions are more weighted towards purchasers' due to the growth in consumer rights legislation.



#### **Key Point**

Essentially the sale and purchase agreement builds on a platform of contract law but also incorporates consumer, agency and property law.

It is generally considered to be a very practical and user-friendly document that seeks to ensure equity (fairness), clarity and certainty to all parties.

A sale and purchase agreement should confirm the following:

- The full legal name(s) of the vendor(s) and purchaser(s)
- The address of the property
- The type of title (freehold, leasehold etc.)
- The chattels that are to be sold with the property (e.g. whiteware, drapes, etc)
- The price (including or excluding GST as required)
  - the agreement should confirm the GST status of the transaction, per the GST provisions on the front page
- The rate of interest that the purchaser must pay on any overdue payments
- Any deposit that the purchaser must pay
- Any conditions the purchaser wants to be fulfilled before the contract is confirmed. These might typically be any of:
  - Title search – confirmed by the purchaser’s lawyer to check the legal owner and any rights and interests on the property
  - Finance – to allow the purchaser to arrange payment, normally via a loan, by a specified date
  - Valuation report – normally required by a lender, this report is an estimate of the property’s worth on the current market
  - Land Information Memorandum (LIM) report – provided by the local council, this report provides information on things such as rates, building permits and consents, drainage and planning
  - Building inspection report – to help determine the condition of the building and what might need to be repaired
  - Engineer’s report – similar to the above but more focused on the section and structure of the property
  - Sale of another property – the purchaser may need to sell a property before they can buy another
  - Overseas Investment Office consent (if required)
- The date on which the agreement will become unconditional if there are conditions
- The settlement date (the date the purchaser pays the remainder of the amount for the property, usually the day when the purchaser is entitled to take possession of the property)

### Approved guide to be provided

If the sale involves residential property, before the sale and purchase agreement is signed the licensee must also:

- Give both the vendor and purchaser a copy of the approved guide relating to the sale of *residential property* published by the Real Estate Authority, and
- Obtain signed acknowledgement forms from them that they have received it (Real Estate Agents Act 2008 Section 133).

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

### 133 Approved guide to be provided when contractual document provided

(1) An agent must ensure that subsection (2) is complied with before a person signs a contractual document if the contractual document—

- (a) relates to the proposed sale of a residential property in respect of which the agent is carrying out real estate work; and
- (b) was provided to the person by the agent or by a licensee on behalf of the agent.

(2) The agent or a licensee on the agent's behalf must have—

- (a) provided the person with a copy of the approved guide; and
- (b) received a signed acknowledgement from the person that the person has been given the approved guide.

(3) In this section—

*approved guide* means a guide that—

- (a) is about the sale of residential property;
- (b) has been approved by the Authority for the purposes of this section.

(4) A contravention of this section does not affect the validity of any contract.

### The difference between a conditional and an unconditional agreement

A **conditional** agreement refers to the sale and purchase agreement having conditions that need to be met.

An **unconditional** agreement refers to when:

- all conditions in the sale and purchase agreement have been met and the contract is ready to proceed to a change of ownership, or
- there have been no additional conditions specified in the agreement, the requisition period has passed (10 working days: refer Clause 6.2 of the Agreement for Sale and Purchase), and the deposit paid.

### General terms used in the sale and purchase agreements

A sale and purchase agreement includes general terms of sale that set out general obligations and conditions.

These may typically relate to, for example:

- *Access rights* – what access the purchaser can have to inspect the property before settlement (Clause 3 of the ASP)
- *Default by purchaser* – the purchaser may have to compensate the seller, e.g. interest payments (Clause 3 of the ASP)
- *Default by the vendor* – the vendor may have to compensate the purchaser, e.g. accommodation costs (Clause 3 of the ASP)
- *Vendor warranties* – e.g. in relation to compliance with the Building Act and/or the Resource Management Act (Clause 7 of the ASP)
- *Risk and insurance* – the property and chattels remain the risk of the vendor until the purchaser takes possession (Clause 5.0 of the ASP)



#### Notes

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**REINZ/ADLS Sale & Purchase Agreement - Ninth Edition 2012 (8)**

In 2018 the ADLS Ninth Edition 2012 (8) was published with the inclusion of signatory capacity titles on the last page.

These are:

Director / Trustee / Authorised Signatory / Attorney

All licensees are required to ensure accurate deletion of those labels that **do not** apply.

<p><b>Signature of Purchaser(s):</b></p>          <p><b>Director / Trustee / Authorised Signatory / Attorney*</b>  <small>Delete the options that do not apply          If no option is deleted, the signatory is signing in their personal capacity</small></p>	<p><b>Signature of Vendor(s):</b></p>          <p><b>Director / Trustee / Authorised Signatory / Attorney*</b>  <small>Delete the options that do not apply          If no option is deleted, the signatory is signing in their personal capacity</small></p>
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In the case of signature by:

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

*"Signed by [full name of the donor] by his or her Attorney [attorney's signature]"*

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

## Key legislation, regulations and Rules that apply to Sale and Purchase

### Real Estate Agents Act 2008

- **Section 132** Licensee to give a copy of contractual document
- **Section 133** Approved guide to be provided when contractual document provided (in residential sale transactions)
- **Section 134** Contracts for acquisition by the licensee or related person may be cancelled
- **Section 135** Client to be provided with a valuation
- **Section 137** Meaning of licensee and person related to the licensee in sections 134 to 136
- **Form 2** - Client consent for the licensee to acquire an interest in the property
- **Section 136** Disclosure of other benefits that licensee stands to gain from the transaction

### Lawyers and Conveyancers Act 2006

- **Section 36(2)(A)** Licensee must have at least 6 months experience before preparing a sale and purchase agreement and/or giving advice on legal rights and obligations related to an agreement

### The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

- **Rule 5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work
- **Rule 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
- **Rule 9.2** A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure
- **Rule 9.7** Before a prospective client, client, or customer sign 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)
- **Rule 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
- **Rule 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

- **Rule 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
- **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

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

## Scenario 1

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### Complaint No: C18903

Read about this complaint and decision through the 'Search complaints decisions' link at [rea.govt.nz](http://rea.govt.nz)

A vendor complained about two licensed salespersons.

Licensee 1: That they failed to correctly record the GST status on the Agreement for Sale and Purchase by not inserting the vendors GST number in Schedule 2 of the Agreement for Sale and Purchase.

Licensee 2: That they were aware of the vendor's GST status, and when the vendor asked Licensee 2 about completing the GST section of the agreement (Schedule 2 at the time), the response was "...no, your solicitor and accountant will be doing that".

Also, that Licensee 2 was instrumental in putting undue stress on the complainants on settlement day.

The vendor relied upon a clause they had inserted in the agreement (23.0) that was conditional upon the approval of the agreement by both the purchaser's solicitor and the vendor's solicitor, in particular regarding the GST treatment of the transaction.

The sale and purchase agreement settled with the GST incorrectly recorded and, following settlement, the vendor(s) were advised that 15% GST was payable on the sale price (where it should have been zero rated).

[Penalty] Decision on Orders: <http://www.nzlii.org/nz/cases/NZREAA/2018/28.html>

Note the Committee's comments from their Decision:

[para 3.10] That the independent trustee, a company run by the Complainants' solicitor who signed the agreement on behalf of Complainant 1, did not do this [correct the error in relation to GST status] does not, in the Committee's opinion, exonerate Licensee 1 from his responsibilities as defined under the Act and in particular Rule 5.1 (A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work).

[para 3.12] In the Committee's consideration, Licensee 1 acted with complacency and a lack of attention to detail that has resulted in the finding of unsatisfactory conduct against him.

### **Lease agreements for commercial and industrial space**

Real estate licensees working in the field of leasing commercial and industrial space assume substantial responsibility as they typically put into place contractual relationships between a lessor (landlord) and lessee (tenant) which will often govern the use and occupancy of the property for many years.

The lessee is usually the third party (customer), as the agency relationship in most situations is between the agent and lessor (the client).

As stated previously, almost without exception when we make a drafting error or omission, we create uncertainty or diminish clarity for the parties involved in the agreement.

#### **Agreement to Lease (Heads of Agreement)**

An Agreement to Lease (Heads of Agreement) is an agreement to grant a lease in the future. This document is nearly always the first to be negotiated between lessor and lessee.

The following standard agreements from ADLS are commonly used:

- ADLS/REINZ Agreement to Lease – Fifth Edition 2012 (4)
- ADLS/REINZ Agreement to Assign Lease – Fifth Edition 2012 (2)
- ADLS/REINZ Agreement to Sublease – First Edition 2018 (2) (to be used in conjunction with ADLS Deed of Sublease)

The document will cover:

- those matters that are to be completed prior to occupation by the lessee
- the terms of the Deed of Lease that will apply to the lease

A Deed of Lease (usually prepared by the lessor's solicitor) records the actual grant of the right to lease the premises, by the lessor to the lessee, on the terms and conditions set out in the Deed of Lease itself.



## **Important points about lease agreements for commercial and industrial space**

- Given the changeable nature of business life, it is very important that as much certainty is achieved by providing in the lease agreement for any disputes or other difficulties that may arise
- Licensees need to be aware of the conflicts of interest that could arise and their responsibilities to both the lessor and the lessee
- A fixed term lease must be for a certain time period; a periodic lease ends on notice being given by either party
- The parties are at liberty to negotiate specific terms in the lease agreement that suit their particular requirements. Because of the nature of commercial and industrial space and its uses, the parties may wish to provide in the agreement for issues such as ownership of fixtures and fittings and the intended uses of the space
- Frequently one, if not both, of the parties to the lease will be a company. A lessor may require personal guarantee(s) from representative(s) of the company, usually director(s) or major shareholder(s). The effect of this is that the guarantor(s) will be personally liable (jointly and severally) for any amount owed by the company in the future

### **Rights and obligations under the Property Law Act 2007**

Covenants, conditions and powers of the lessor and lessee are provided for in the Property Law Act 2007 and some are implied by section 218 into all leases. These include the following (see also Schedule 3 of the Property Law Act 2007):

- The lessee must pay the rent when it is due under the lease (Clause 4)
- The lessee will not carry out alterations without the lessor's consent (Clause 5)
- The lessor is entitled to enter the premises at all reasonable times to view their state of repair. (Clause 11)
- The lessor may re-enter (for example, take possession of) the premises if the rent (or part of it) is in arrears for a period of 15 working days (Clause 12)
- The lessor can also re-enter peaceably if the lessee has failed to perform or observe any of the terms of the lease (Section 244)
- The lessee is entitled to quiet enjoyment of the premises (Clause 9)
- Where consent is required as a term of the lease, it must not be unreasonably withheld (Section 224)
- The lessor can exercise these rights to re-enter the premises either personally or through an agent. If the lessor does re-enter, this does not relieve the lessee of liability for the overdue rent or other breach (Clause 12)

## Agreements to Lease (Heads of Agreement) forms

The form of Agreement to Lease (Heads of Agreement) to be used will need to be discussed in consultation with both lessor and lessee.

Options that are available include:

- The ADLS/REINZ Agreement to Lease (Heads of Agreement)
- The ADLS/REINZ Agreement to Assign Lease (Heads of Agreement)
- The ADLS/REINZ Agreement to Assign Sub-Lease (Heads of Agreement)
- Forms prepared (usually by solicitors) by either the lessor or the lessee
- The Property Council (Property Council of New Zealand) (formerly BOMA) Standard Office Lease
- The Property Council Standard Industrial Lease
- The Property Council Standard Retail Lease

The ADLS lease is used throughout New Zealand and is widely accepted and known by many lessors and lessees.

The ADLS lease is suitable for use in the leasing of a wide variety of premises. However, the ADLS lease may not be suitable for:

- Shopping centres
- Major office buildings
- Some large industrial or commercial premises

In these situations, the lessor will either have a suitable precedent or will use another format, such as the Property Council Standard Lease. These leases are very long and detailed and would be used for complex leases; for example, a lease in a shopping mall.

## Drafting an Agreement to Lease (Heads of Agreement)

When drafting an Agreement to Lease (Heads of Agreement) for commercial and industrial space, careful consideration needs to be given to key lease clauses. These include:

- |   |                                  |
|---|----------------------------------|
| • The description of the premises   | • Car parks                      |
| • Outgoings or operating expenses   | • Rent review                    |
| • Lessee maintenance obligations  | • Lessor maintenance obligations |
| • Use of the premises   | • Assignments and subletting     |
| • Renewal of the term   | • Lessor and lessee amendments.  |
| • Guarantees in support of the lessee (if for example, the lessee is a type of legal entity such as a company or partnership) |                                  |

## Negotiating terms

During the course of negotiations, various adjustments will most likely need to be recorded within the document. Lengthy bargaining between the lessee and lessor is likely to occur.

Examples of adjustments that may be made include:

- The lessee negotiating a limitation to the liability that the lessee would otherwise incur, on an assignment of the lease
- The standard ADLS Deed of Lease may be amended to vary the provisions relating to rent review, personal guarantees, limitations on the type of outgoing that the lessor can charge the lessee, amendments to maintenance obligations usually incurred by the lessee, amendments to the provisions relating to the state of repair at the end of the lease term
- Negotiations on the principal terms such as annual rent, rights of renewal, description of premises, commencement of rent payments, etc
- Authorisations given to the lessee to carry out the fit out of the premises; ownership of fixtures and fittings



### Note

With a sub-lease, an Agreement to Lease (Heads of Agreement) should always be drafted so that the sub-lease is subject to the lessee of the lease obtaining the lessor's consent.

A sub-lease exists where a lessor grants a lease of premises to a lessee who in turn sub-leases the same premises to another lessee, called the 'sub-lessee' or 'sub-tenant'.

The term of the sub-lease cannot be longer than the term of the head lease.

The sub-lessee's right to occupy the premises is based on the terms of:

- The 'head lease' - the lease between the lessor and the lessee
- The 'sub-lease' - the lease between the lessee and the sub-lessee
- The lessor's consent

## Assignment of Leases

With an assignment of lease, similarly to a sub-lease, the Heads of Agreement must include a requirement to obtain the landlord's consent as a condition of the assignment.

**Rule 9.7** sets out the requirement for licensees to advise all parties to seek legal or other advice prior to signing any contractual document, and to allow all parties a reasonable opportunity to obtain any advice sought. This ensures that the assignors' obligations under a lease are effectively transferred to the assignee and that the assignee understands the commitment they are undertaking.

The assignee in these situation takes on the full obligations of the lease, and consideration needs to be given to (amongst other things):

- The terms and obligations of the existing lease
- Any proposed change of use by the new tenant (assignee), and whether these will be acceptable to the landlord
- Any variations that may have been agreed between the outgoing lessee and the landlord during the lease term
- Guarantor requirements
- Any make-good arrangements, and tenant chattels

Read the following scenario and consider if the licensee has breached section 123 of the Real Estate Agents Act 2008 (refer to Appendix 2) and/or the Rules (refer Appendix 1).

## Scenario 2

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A complaint was made by three trustees of a trust who signed a listing agreement with an agency to find a new commercial tenant for their property. During negotiations with a prospective tenant, the trustees countersigned a lease agreement which had been significantly changed by them.

Licensee 1 who was involved with the negotiations, did not talk with the clients about the changes. Nor did Licensee 1 discuss the changes with the prospective tenant. The prospective tenant signed the lease agreement without initialling all the changes that the clients had made. Licensee 1 then informed the clients that she had the signed agreement and that the prospective tenant had paid the deposit. The Licensee failed to send a copy of the signed lease agreement to the trustee's solicitor, as directed by them.

The following day the prospective tenant realised there had been several changes made to the lease agreement and notified the licensee they did not wish to proceed with the lease.

Five days after the lease agreement had been signed and the deposit had been paid, Licensee 2 (from the listing agency) refunded the prospective tenants' deposit without consent from the clients.

### Complaint No: C06047 / [2016] NZREADT 23

<http://www.nzlii.org/nz/cases/NZREAA/2015/44.html>

Note the Committee's comment:

4.11 The Licensee did not exercise a duty of care and even though she had not expected to receive the contract from the Trustees, once she did the Licensee was **obliged to be clear about its contents and advise all parties accordingly**.

Licensee (2) appealed the CAC decision to the Disciplinary Tribunal (refer [2016] NZREADT 23); the Tribunal upheld the CAC findings and penalty.

<http://www.nzlii.org/nz/cases/NZREADT/2016/23.html>

## Rules that specifically apply to contractual documents

There are specific rules that apply to real estate agency work when drafting both sale and purchase agreements or lease agreements. In particular, the section in the Rules on *Agency agreements and contractual documents*.

It is important to highlight the following:

Rule 9.9 requires that all material particulars (relevant details and information) must be included in or attached (e.g. accurate property and party’s information, special conditions, confirmation of chattels included in the sale or lease, required forms etc) to sale and purchase agreements and lease agreements before the licensee submits the document for signing.

**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.

This rule aims to ensure the integrity of the sale and purchase agreement or lease agreement (enforceability) and helps to protect the interests of both clients and customers who may be inexperienced dealing with contractual documents, as required in rule 9.8.

**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.

As the ‘steward of the transaction’, the licensee’s professional competence must be paramount throughout the transaction. This includes ensuring the prospective client, client, or customer is recommended to seek legal advice, and made aware they may need to obtain technical or other advice AND given a reasonable opportunity to obtain the advice.

<p><b>9.7</b> Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—</p> <p>(b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and</p> <p>(c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).</p>	<p><i>Technical or other advice:</i></p> <p><i>Rule 9.7(b) and 9.7(c)</i></p>
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Rule 9.7 intends to reduce the risk for clients and customers in situations where there is a sense of urgency to complete contractual documents but where there is also a need for independent advice to be obtained.



### Note

Compliance with rule 9.7 applies to ALL signatories in a transaction. Care should be taken when dealing with entities that require more than one signature (for example a trust, or company). This requirement was substantiated in a CAC decision in 2016 (C10750).

The Committee referred to the failure of the licensee to fully comply with Rule 9.7 in ensuring ALL parties are recommended to seek legal advice and made aware they may need to obtain technical or other advice and are ALL given a reasonable opportunity to obtain the advice. In this case, the complainant was not given this opportunity, and the Committee stated:

'it is incumbent on a licensee to ensure all clients have an opportunity to seek legal advice prior to signing an agency agreement or an ASP'



### Note

Any verbal advice given to either party of the transaction, as required in rule 9.7, should be confirmed in writing. This practice of written confirmation is essential to ensure that if, after the transaction has been completed, a complaint is made, there is written evidence to substantiate the licensee's behaviour.

It is worth remembering that section 12 of the Rules sets out clear requirements of the licensee to ensure prospective clients and customers are:

- Aware of written in-house procedures for dealing with complaints (rule 12.2)
- Aware they may access the Authority's complaint process without first using the in-house procedures (rule 12.3)

## Who signs sale and purchase agreements and lease agreements

As we saw earlier:

- A sale and purchase agreement is between the vendor(s) and the purchaser(s)
- A lease agreement for commercial or industrial property, space, or business is between the lessor(s) and lessee(s)

A sale and purchase agreement or a lease agreement must be signed by the parties above or an 'authorised person' on each party's behalf, e.g. a person who has power of attorney, company director, trustee.

Where a sale of a property or business involves more than one vendor or purchaser, all vendors or purchasers must sign the sale and purchase agreement; or (written) confirmation from all other vendors or purchasers will be required that one vendor or purchaser has the authority to sign on behalf of the others.

Where a lease agreement for commercial or industrial space involves more than one lessor or lessee, all lessors or lessees must sign the lease agreement; or (written) confirmation from all other lessors or lessees will be required that one lessor or lessee has the authority to sign on behalf of the others.



### Note

Where an 'authorised person' has been nominated to sign, the licensee is required to confirm this by ensuring the relevant legal document is obtained e.g. power of attorney.

A power of attorney requires a Certificate of non-revocation; an enduring power of attorney requires a Certificate of non-revocation and non-suspension of the enduring power of attorney; a trustee requires a trust deed; a company director requires written authority to sign from Company Directors or company rules or a shareholder agreement; an executor of an estate requires a grant of probate.

### Proof of Identity: clarification and verification

From 1 January 2019 the *Anti-Money Laundering and Countering Financing of-Terrorism Act 2006* (AML/CFT Act) applies to all real estate agents who are considered as 'reporting entities' and are required to fully comply with the AML/CFT Act.

Therefore, **ALL licensees** who work for a real estate agent and in the ordinary course of business carry out real estate agency work, and manage client funds in relation to that activity, are required to fully comply with the AML/CFT Act.

To comply with the Act, and meet basic/standard Customer Due Diligence (CDD) requirements, licensees must ensure appropriate personal identification (for example, driver's licence, passport) is provided to ensure those parties signing the agreement (vendors or purchasers) are in fact who they say they are and that they have legal authority to sign; ensuring the names are spelt accurately. Additional care should be taken when writing foreign names.

Also, licensees are required to obtain 'information about the nature and purposed business relationship with the customer, and sufficient information to determine whether enhanced CDD needs to be completed on the customer' (s17).

However, it is important that not only is proof of identity required but that this identity proof is verified.

CDD must be conducted before the agent enters into an agency agreement.

Notwithstanding the AML/CFT Act, it is and has always been prudent to ensure that the identities and legal authority of all parties is verified.

In a CAC case heard in 2015 (C07683), three development properties were marketed and sold by a salesperson licensee who was the subject of a complaint.

The complainant, who was the registered owner of all three properties, said the properties were sold without her knowledge.

Of relevance, in this case, is the Committees comment in paragraph 3.14:

'...Any licensee when listing a property for sale is under an absolute obligation to verify the identity and bona fides of the person who is their client'.

A licensee must ensure they **deal** with **ALL** parties that hold legal authority to sign as vendors or purchases for the property, space, or business e.g. **ALL** trustees; **ALL** directors; or authorised signatories; e.g. Power of Attorney.

In a 2017 CAC case (C10750) the Committee found a licensee and the agency guilty of unsatisfactory conduct when dealing a property that was owned by a trust.

The complainant was one of the three trustees and the complaint was based on issues relating to the agency agreement, sale and purchase agreement, trustee authorisation and other concerns.

Of specific relevance for this topic is that the licensee noted the 'vendor' on the agency agreement as three individual trustee names but without mention of the trust. In addition, the agency agreement was signed by only one of the three trustees and although details of the other trustees were included, no attempt was made by the licensee to contact the other trustee(s) to clarify or verify their authority to sign on behalf of all trustees. Subsequently, other licensees involved in the sale were unaware the vendors were, in fact, a trust.

The CAC stated:

[para 3.20] '...there is legal danger associated with a licensee accepting an agency agreement signed by one owner of a property on behalf of the other owners, particularly where the ownership is by trustees, but it is considered as a matter of law the signature of all trustees is not required' [though written authorisation 'to act on behalf of' is required]

[para 3.48] 'The Committee considers that the trustees are not the owners in their individual capacities but as trustees of the trust. While the trust may have no legal identity as such, when an individual named party to a transaction is acting as a trustee, it is prudent and proper that the other party be made aware they are dealing with a trust. So, in this case, the licensee should have added the words 'as trustee of the [trust]' after the names of the trustees. It was also important [for] any other agency salesperson using the agency agreement to be able to readily advise a prospective purchaser they would be dealing with a trust.'

**Case:** <http://www.nzlii.org/nz/cases/NZREAA/2016/186.html>

As such, the Committee found the licensee did not exercise skill and care in this regard and was in breach of:

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

### Licensee to give a copy of contractual document

Section 132 of the Real Estate Agents Act 2008 requires licensees to make sure that an accurate copy of the signed sale and purchase agreement or lease agreement is given to the vendor and purchaser, lessor and lessee 'as soon as practicable'.

#### **132 Licensee to give a copy of contractual document**

As soon as practicable after a person signs a contractual document and gives that document to a licensee carrying out real estate agency work in connection with the document, the licensee must give the person an accurate copy of the document.



## Contract and Commercial Law Act 2017

### Cancellation under the Contract and Commercial Law Act 2017

The Contractual Mistakes Act 1977 and Contractual Remedies Act 1979 were repealed in September 2017 and replaced by the Contract and Commercial Law Act 2017 (the CCL Act) (refer section 345(1)(c) and (d)). The CCL Act expressly states that it is not intended to change the effect of existing law.

Part 2 of the CCL Act deals with Contracts legislation and includes matters relating to:

- contractual mistakes
- contractual remedies (in particular, provisions relating to damages for misrepresentation and to cancellation)

### Contractual Mistakes covered under Subpart 2.

Under section 24 (previously sections 6 and 7 of the Contractual Mistakes Act 1977), parties to a contract may seek relief (that could be cancellation, or variation of the contract; or restitution or compensation). Relief may be granted where 'mistake by one party is known to the opposing party, or is common or mutual'. The nature of relief is set out in section 28.

#### **24 Relief may be granted if mistake by one party is known to another party or is common or mutual**

(1) A court may grant relief under section 28 to a party to a contract if,—

(a) in entering into the contract,—

(i) the party was influenced in the party's decision to enter into the contract by a mistake that was material to that party, and the existence of the mistake was known to the other party or to 1 or more of the other parties to the contract; or

(ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) the party and at least 1 other party were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and

(b) the mistake or mistakes resulted, at the time of the contract,—

(i) in a substantially unequal exchange of values; or

(ii) in a benefit being conferred, or an obligation being imposed or included, that was, in all the circumstances, a benefit or an obligation substantially disproportionate to the consideration for the benefit or obligation; and

(c) in a case where the contract expressly or by implication provides for the risk of mistakes, the party seeking relief (or the party through or under whom relief is sought) is not obliged by a term of the contract to assume the risk that that party's belief about the matter in question might be mistaken.

(2) The relief may be granted in the course of any proceeding or on application made for the purpose.

(3) For the purposes of subsection (1)(a)(i) and (iii), the other party or other parties must not be a party or parties who have substantially the same interest under the contract as the party seeking relief

Compare: 1977 No 54 s 6(1)

A basic summary of the requirements to obtain relief are:

- Is there a common, mutual or unilateral mistake?
- Did the mistake influence the parties to enter the contract?
- Did the mistake result in a substantial inequity of exchange?

A mistake, in relation to that contract, does not include a mistake that was known about, but the party decided to proceed with the contract regardless (Section 26), or a mistake in its interpretation (Section 25).

### **Contractual Remedies – covered under Subpart 3**

A purchaser or lessee only has a right to cancel an unconditional agreement (i.e. bring it to an end without penalty when the vendor or lessor is otherwise willing, ready and able to settle) if they are induced to enter into the agreement by misrepresentation (refer section 37).

Breach of Section 37 (previously section 7 of the Contractual Remedies Act 1979) means if the vendor or lessor or their agent:

- Misrepresents an aspect of the property, space, or business, or breaches a term of the contract that was essential to the purchaser or lessee and the parties had expressly or impliedly agreed that it was essential (e.g. misrepresentation of zoning or intended use), and;
- The impact of the misrepresentation or breach substantially reduces the benefit, or increases the burden, or makes the benefit or burden substantially different from that represented or contracted for by the purchaser or lessee. (e.g. a building built without building consent that has weather tightness issues and has significant repair costs). Note: less costly repairs would justify damages, but not a cancellation.

**37 Party may cancel the contract if induced to enter into it by misrepresentation or if the term is or will be breached**

(1) A party to a contract may cancel it if—

- (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
- (b) a term in the contract is breached by another party to the contract; or
- (c) it is clear that a term in the contract will be breached by another party to the contract.

(2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—

(a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or

(b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—

- (i) substantially to reduce the benefit of the contract to the cancelling party; or
- (ii) substantially to increase the burden of the cancelling party under the contract; or
- (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

(3) Subsection (1) is subject to the rest of this subpart but does not limit section 36.

Compare: 1979 No 11 s 7(3), (4)

Damages for misrepresentation (previously section 6 of the Contractual Remedies Act 1979) are set out in section 35:

### **35 Damages for misrepresentation**

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

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

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

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

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

(b) subject to section 34.

Compare: 1979 No 11 s 6

If a purchaser or lessee cancels a contract without due cause, the vendor or lessor can:

- Insist that the agreement remains, and claim penalty interest on the unpaid purchase or lease price indefinitely, and/or
- After the expiry of a settlement notice served on the purchaser (Clause 11 ADLS ASP ninth edition 2012(8)) or lessee, either:
  - Sue the purchaser or lessee for specific performance, requiring the purchaser or lessee to buy or lease the property, space, or business; or
  - Cancel the agreement, keep the deposit up to the value of 10 % of the purchase or lease price, and sue the purchaser or lessee for damages, if the vendor or lessor's actual loss is greater than 10% of the purchase or lease price.

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

### Scenario 3

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The REAA [now REA] initiated a complaint against a licensed salesperson who marketed a property (placed signage) before the signed agency agreement for the property had been finalised [Property A].

Further, he made alterations to the sale and purchase agreement (adding 14% interest for late settlement) after it had been signed by all parties concerned [Property B].

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

#### **Complaint No: C21141**

[2018] NZREADT 66 (26 October 2018) <http://www.nzlii.org/nz/cases/NZREADT/2018/66.html>

Note the Committees comments:

[para 3.10] The Committee considers that any alteration made to a completed contract without reference to the parties is a very serious matter. In law, a contract for the sale of land is only binding if in writing. The contract serves as the proof of the bargain made by the parties. Changes can be negotiated to a fully signed contract, but this needs to be done between the parties or their lawyers and both parties must agree to any change.

[para 3.13] The Licensee excuses this by saying the parties were aware of changes and he advised his clients that it could be corrected via the respective solicitors. In this, the Licensee shows faith in the power of solicitors to amend an existing signed contract. In reality, such changes can only be made by consent of the parties and the vendors could have refused to agree to the change.

[para 3.15] The Committee takes this admission that he added a late settlement interest rate into a signed contract without the authority of either party very seriously.

[para 3.16] For a Licensee of (at that time) some seven years' experience to so glibly dismiss an action which could have had serious consequences is most concerning. Whether or not the Licensee has ever had a contract go into default is irrelevant, the potential is always there for that to occur and had either party failed to settle then the matter of whether or not they had agreed to the penalty interest rate of 14% would have been very much on point.

[para 3.18] We consider that the Licensee's conduct overall demonstrates a casual if not slapdash approach to the 'paperwork' side of a Licensee's role. This is particularly concerning given his responsibility in his role as a partner in a franchised branch of the Agency at the time of this conduct.

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

## Scenario 4

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The REA received a report based on rules 7.1 and 7.2 (licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct or misconduct, may/must make a report to the Authority) and decided to inquire into it.

Licensee 1 listed a property for sale and a licensee engaged by another agency (the Conjunctional Licensee) introduced a prospective purchaser who submitted a signed offer of \$950,000. The offer was emailed to the vendors who were out of town; the vendors instructed the licensee to counter-offer on their behalf at \$1,100,000 and to 'PP' alongside the amended price. Licensee 1 then emailed the Conjunctional Licensee informing him of the counteroffer. There was no other alteration and no vendor initials or signatures on the ASP. The Conjunctional Licensee and his agency expressed concern over Licensee 1's 'PP' treatment of the ASP.

For the sake of peace and of trying to get an agreement together, Licensee 1 explained to the Vendors what had happened. They drove to Auckland and counter-signed the offer.

At all times the Vendors were aware of what Licensee 1 was doing and that he was always acting under their instructions.

### Complaint No: C21645

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

Note the Committee's comments:

[para 3.7] ...on this occasion he failed to exercise sufficient skill and care in ensuring the Purchaser was not misled as to the true position of his offer. Contrary to his assertion in the email to the Conjunctional Licensee there was no counter-offer from the Vendors. We consider the accurate representation of current contract negotiations a fundamental competence on the part of a licensee and in failing to do so Licensee One was in breach of Rule 5.1.

[para 3.11] Notwithstanding Licensee 1's experience in the industry and his belief that he was acting correctly, his conduct demonstrated a serious misunderstanding of his obligations under the Act and the Rules. The provisions of Rules 5.1, 6.2, 6.3 and 6.4 are fundamental to the Act's purpose of promoting public confidence in the performance of real estate agency work...

It should also be noted that in this case, the supervising licensee [Licensee 2] believed Licensee 1 to be a competent licensee. The Committee stated that:

[para 3.17] It is disappointing that Licensee 2 [supervising licensee] does not think there was a problem with Licensee 1's conduct and that she was surprised to receive this complaint. Hopefully, this matter will be a good lesson to Licensee 2 of the responsibility that being a supervisor brings and the need to pay attention and to comply with the requirements of the Act.

**Note:** The Committee decided to take no further action on the complaint against Licensee 2 [supervising licensee].

### Importance of getting it right and the implications of getting it wrong

If you are unsure, in any way, about any aspect of the transaction you are dealing with, ask your supervising agent or branch manager for advice and support.

It is important to understand your obligations in relation to the transaction, to comply, then verify!

Keep copies of all relevant documents and correspondence.



### Important

Finally, remember:

- In many cases, the lawyers (or the parties) remedy our errors by agreeing to a variation – the parties had a 'meeting of minds', and in good faith, they wish to confirm that in writing
- We are left to look incompetent and damage is done to our reputation
- Buyer's or seller's remorse – the contract is uncertain and therefore may be unenforceable
- Buyers, and sometimes sellers seek to re-open negotiations on price
- Sellers use the error or omission to re-negotiate commission
- One of the parties (or occasionally both) complain to the REA
- The possible finding of unsatisfactory conduct

## Appendices

### Appendix 1 – Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

#### Contents

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

#### Rules

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

#### Important note

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

#### 1 Title

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

#### 2 Commencement

These rules come into force on 8 April 2013.

#### 3 Scope and objectives

- 3.1 These practice rules setting out a code of professional conduct and client care have been prepared by the Real Estate Agents Authority (**the Authority**). They constitute the Professional Conduct and Client Care Rules required by section 14 of the Real Estate Agents Act 2008.
- 3.2 These practice rules set out the standard of conduct and client care that agents, branch managers, and salespersons (collectively referred to as **licensees**) are required to meet when carrying out real estate agency work and dealing with clients.
- 3.3 These practice rules are not an exhaustive statement of the conduct expected of licensees. They set minimum standards that licensees must observe and are a reference point for discipline. A charge of misconduct or unsatisfactory conduct may be brought and dealt with despite the charge not being based on a breach of any specific rule.

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

#### **4 Interpretation**

- 4.1 In these rules,—

**Act** means the Real Estate Agents Act 2008.

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

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

**regulations** means regulations made pursuant to the Act.

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

#### **5 Standards of professional competence**

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- 5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

#### **6 Standards of professional conduct**

- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

#### **7 Duty to report misconduct or unsatisfactory conduct**

- 7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct<sup>1</sup> may make a report to the Authority.
- 7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct<sup>2</sup> must make a report to the Authority.
- 7.3 A licensee must not use or threaten to use, the complaints or disciplinary process for an improper purpose.

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<sup>1</sup> Unsatisfactory conduct is defined in the Act: see section 72

<sup>2</sup> Misconduct is defined in the Act: see section 73

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

## **8 Duties and obligations of agents**

### Promoting awareness of rules

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

### Supervision and management of salespersons

- 8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.<sup>3</sup>

### Ensuring knowledge of regulatory framework and promoting continuing education

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

## **9 Client and customer care**

### General

- 9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.
- 9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.
- 9.3 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest unless otherwise instructed by the client.
- 9.4 A licensee must not mislead customers as to the price expectations of the client.
- 9.5 A licensee must take due care to—
- (a) ensure the security of land and every business in respect of which the licensee is carrying out real estate agency work; and
  - (b) avoid risks of damage that may arise from customers or clients that are not the owner of the land or business, accessing the land or business.

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<sup>3</sup> The Act defines what is meant by a salesperson being properly supervised and managed by an agent or a branch manager for the purposes of section 50 of the Act: see section 50(2)

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

#### Agency agreements and contractual documents

- 9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—
- (a) recommend that the person seek legal advice; and
  - (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
  - (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).
- 9.8 A licensee must not take advantage of a prospective client's, client's, or customer's inability to understand relevant documents where such inability is reasonably apparent.
- 9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.
- 9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.
- 9.11 On notice of cancellation of an agency agreement being given or received by the agent under the agreement, the agent must advise the client, in writing, of the name of each customer (if any) in respect of whom the agent would claim a commission, were the customer to conclude a transaction with the client.
- 9.12 An agent must not impose conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent.
- 9.13 When authorised by a client to incur expenses, a licensee must seek to obtain the best value for the client.

#### Conflicts of interest

- 9.14 A licensee must not act in a capacity that would attract more than 1 commission in the same transaction.
- 9.15 A licensee must not engage in business or professional activity other than real estate agency work where the business or activity would, or could reasonably be expected to, compromise the discharge of the licensee's obligations.

#### Confidentiality

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

- 9.17 A licensee must not disclose confidential personal information relating to a client unless—
- (a) the client consents in writing; or
  - (b) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client; or
  - (c) the licensee is required by law to disclose the information, or
  - (d) the disclosure is consistent with the information privacy principles in section 6 of the Privacy Act 1993.
- 9.18 Where a licensee discloses information under rule 9.17(b), (c) or (d), it may be only to the appropriate person or entity and only to the extent necessary for the permitted purpose.

## **10 Client and customer care for sellers' agents**

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

### Appraisals and pricing

- 10.2 An appraisal of land or a business must—
- (a) be provided in writing to a client by a licensee; and
  - (b) realistically reflect current market conditions, and
  - (c) be supported by comparable information on sales of similar land in similar locations or businesses.
- 10.3 Where no directly comparable or semi comparable sales data exists, a licensee must explain this, in writing, to a client.
- 10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

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

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

### Agency agreements

- 10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing—
- (a) the conditions under which commission must be paid and how the commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2;
  - (b) when the agency agreement ends;

(c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur:

(d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c):

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

### Disclosure of defects

- 10.7 A licensee is not required to discover hidden or underlying defects in the land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects<sup>4</sup>, a licensee must either—
- (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
- (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses. 10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

### Advertising and marketing

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

### Contractual documentation and record keeping

- 10.10 A licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land or business, provided that such offers are in writing.
- 10.11 If a licensee is employed or engaged by an agent, the licensee must provide the agent with a copy of every written offer that the licensee submits.
- 10.12 An agent must retain, for a period of 12 months, a copy of every written offer submitted. This rule applies regardless of whether the offer was submitted by the agent or by a licensee employed or engaged by the agent and regardless of whether the offer resulted in a transaction.

## 11 Client and customer care for buyers' agents

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

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<sup>4</sup> For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.<sup>4</sup>

- 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 <sup>5</sup>preclude their making a complaint to the Authority.
- 12.4 A licensee employed or engaged by an agent must advise the agent within 10 working days of becoming aware of—

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

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

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

### **13 Revocation**

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

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

## **Appendix 2 – Section 123**

### **123 Money to be held by the agent for 10 working days**

(1) When an agent receives any money in respect of any transaction in his or her capacity as an agent, he or she must not pay that money to any person for a period of 10 working days after the date on which he or she received it.

(2) Despite subsection (1), a Court order or an authority signed by all the parties to the transaction may require the agent to pay the money before the expiry of the period specified in that subsection.

(3) If at any time while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections in respect of the title to any land affected by the transaction, the agent must not at any time pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction.

## Appendix 3 – Sections 134 to 137 and Form 2

### 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 chartered accountant.

(3) The licensee must give the client the valuation either—

(a) before seeking the consent of the client; or

(b) with the agreement of the client, within 14 days after obtaining that consent.

(4) Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.

(5) Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—

(a) the client gives his or her consent in accordance with subsection (3)(b); and

(b) the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.

### **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).

### **Clause 5 of the Real Estate Agents (Duties of Licensees) Regulations 2009**

which specifies the following:

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

(1) A client's consent given for the purposes of **Section 134** of the Act must be in **form 2** as prescribed in the Schedule.

(2) The notes under the heading '**Important information for clients**' on the front page of [form 2](#), and the heading itself must—

- (a) appear in a prominent position on the form; and
- (b) be in a font and font size that is easily readable.

## Form 2

### FORM 2: CLIENT CONSENT FOR LICENSEE TO ACQUIRE INTEREST IN PROPERTY

*Section 134 Real Estate Agents Act 2008*

#### Important information for clients

1. This form has legally binding consequences. You may wish to seek legal advice before signing it.
2. This form is required by the Real Estate Agents Act 2008. The licensee must ask for your consent, using this form, if any of the following people want to acquire an interest in your land\* or business:
  - a) an agent†, branch manager, or salesperson (licensee) who is working for you; or
  - b) a person related to that licensee (related person‡).

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

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

‡For the definition of related person, see below.

3. The licensee must give you this form before you agree to grant, sell, or otherwise dispose of your land or business, or an interest in your land or business, to the licensee or related person. If the licensee gives you this form after that, do not sign it.
4. The licensee must give you a valuation\* of the land or business at his or her own expense. The licensee must give you the valuation either-
  - a) before seeking your consent; or
  - b) with your agreement, within 14 days after obtaining your consent.

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

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

5. If you have not given your consent by signing this form, or you did not receive a valuation, you are entitled to—
  - a) cancel the contract for the grant, sale, or other disposal of the land or business; and
  - b) recover any commission you may have paid to the agent.

### Meaning of related person

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

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).



provisionally valued at

- \$ ..... and
- [provisional value];

**\*Select one.**

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

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

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

**\*Select one.**

**†Select the subparagraph that applies.**

Signature(s):..... Date \_\_/\_\_/\_\_\_\_

(client(s))

Last updated January 2018