

NOTES CONCERNING THE FORM YOU ARE USING
AUCTION EXCLUSIVE SELLING AGENCY AGREEMENT

(WARNING: These notes are to direct you to specific parts of the document for you to be concerned with. It is not intended and cannot be relied upon as any form of legal advice or recommendation as to what should be included or not included in the agreement. At all times when you have queries or concerns as to what information is to be included or excluded, you must seek your own independent legal advice and rely on it.)

The *Property, Stock and Business Agents Act 2002* and the *Property, Stock and Business Agents Regulation 2003* require all agreements to be in writing and contain prescribed terms.

Knowledge of Act and regulations

An agent (a holder of a licence or certificate of registration) must have knowledge and understanding of the *Property Stock and Business Agents Act 2002* (the Act) and *Regulation 2003* (the regulations) and any other relevant laws including fair trading, trade practices, privacy, residential tenancy and anti-discrimination. An agent must understand the terms of the agency agreement and be able to explain them to the principal.

More Information

Agency agreements

http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Agency_responsibilities/Agency_agreements.html

Property, Stock and Business Agents Act 2002

<http://www.legislation.nsw.gov.au/maintop/view/inforce/act+66+2002+cd+0+N>

Property, Stock and Business Agents Regulation 2003

<http://www.legislation.nsw.gov.au/fullhtml/inforce/subordleg+490+2003+FIRST+0+N>

Rules of conduct

http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Rules_of_conduct.html

IMPORTANT INFORMATION

The *Residential Tenancies Act 2010* and *Regulation 2010* commenced 31 January 2011. You are required to have thorough knowledge and understanding of legislation and recommend that you familiarise yourself with all of the provisions – see links below.

Residential Tenancies Act 2010

<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+42+2010+FIRST+0+N>

Residential Tenancies Regulation 2010

<http://www.legislation.nsw.gov.au/fullhtml/inforce/subordleg+664+2010+FIRST+0+N/>

Because of disclosure requirements contained in the residential tenancies legislation, it is important to be aware that certain information is required to be collected from the landlord. The EAC *Residential Leasing Marketing Assistance Form* can be used for this purpose. The information collected will also assist in satisfying inquiries from prospective tenants as

well as certain questions contained in the *Condition Report* such as installation of water saving devices, dates of when work was last done, communication facilities and health issues.

Under section 26 (1)(2) of the *Residential Tenancies Act 2010* it is an offence for a landlord or agent to induce a tenant to enter into a tenancy agreement by a **statement, representation or promise**, that the landlord or agent knows is false or misleading or by knowingly concealing a material fact. A landlord or agent is required to disclose:

- any proposed sale, if contracts are prepared
- mortgagee action for possession of the premises.

Refer to the regulations for details regarding prescribed material facts.

Definition of residential property

Residential property is defined in the Act as having the same meaning as in Division 8 of Part 4 of the *Conveyancing Act 1919*, more information available at:

<http://www.legislation.nsw.gov.au/fullhtml/inforce/act+6+1919+FIRST+0+N>

Approved guide for residential agreements

If the agreement is for the sale of residential property, the client **MUST** be given a copy of the approved Fair Trading consumer fact sheet entitled '*Agency agreements for the sale of residential property FTR32*' **BEFORE** the agreement is signed, but not earlier than one month before the agreement is signed, (see section 56 of the Act). Access the consumer fact sheet '*Agency agreements*' at:

http://www.fairtrading.nsw.gov.au/Factsheet_print/Tenants_and_home_owners/Selling_property/Using_an_agent/FTR32_Agency_agreements.pdf

Duty to provide copy of signed documents

An agent who submits a document to a person for signature must immediately after the person has signed the document give a copy of the document to that person.

Commission and expenses entitlement

In order to safeguard commission, fees and expense entitlements an agent must ensure that the agency agreement is correctly completed and served on the principal within 48 hours after the agreement is signed (in accordance with the Act and the regulations). A copy of the agreement may be served in person or by facsimile, more information available at

<http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Agency_responsibilities/Agency_agreements.html>. Agents must ensure that:

- All fees, expenses and costs are included in the agreement.
- All parts are completed correctly; do not leave blanks; if there is to be no charges write NIL in the space provided; do not delete any provision.
- Office procedures are in place that provide supporting evidence (if required) of correct service. For example, a confirmation letter or email to the principal confirming the date the copy of the agreement was given.
- Disclose any rebates, discounts or commissions that the agent may receive e.g. advertising rebate.

Expenses and Charges and Other Services

In respect to expenses and charges and fees on services, such services and amounts cannot be varied except with the agreement in writing of the principal.

Listing multiple properties

Where a property consists of multiple lots within the one development and is firstly to **be offered in 'one line', and if not sold then offered individually, then each lot must** have the reserve price and the agent's estimate of selling price. **If the property is residential, it**

must also include a commission calculation based on the agent's estimate. If there is insufficient space to list these lots, prepare an annexure and refer to it in the Sales Inspection Report under 'Property' with e.g. 'see Annexure A'. In the annexure, itemise each lot to be offered and show the following for each:

- the reserve price or 'to be advised'
- the agent's opinion of the estimated selling price or price range
- if residential property, the commission calculation based on the estimate for each lot.

The annexure forms part of the agency agreement, it must be signed and dated by all the parties i.e. the principal and the agent.

Schedules

Whenever there is insufficient space in the agreement or you prepare a schedule or marketing campaign, give the annexure a name, for example, 'Auction Marketing Campaign Annexure 1' and refer to it in the appropriate section of the agreement, 'Advertising and promotion' write 'See attached Auction Marketing Campaign Annexure 1.'

Misrepresentation and Material Fact

It is recommended that you read the guidelines on misrepresentation from Fair Trading available at

http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Agency_responsibilities/Misrepresentation_guidelines.html

Material Fact is an important area introduced into legislation. Material facts relate to the property. A material fact is a fact that would be important to a reasonable person in deciding whether or not to proceed with a particular transaction. They are facts which:

- a) may be sufficiently significant or relevant to influence decisions on whether to buy, sell or rent; and/or
- b) what market value would apply to buying, selling or renting.

Prior to marketing it is suggested that whilst collecting relevant information from the principal that the agent include possible material facts that may be sufficiently significant or relevant to influence a reasonable purchaser. Individual circumstances will vary. Examples of possible material facts include:

- removal (or replacement) of inclusions not included in the sale
- noteworthy features
- renovations including additions or structural changes
- electrical re-wiring
- drainage or plumbing work
- builder's warranty insurance
- **any defects or stigmatising events.**

If you have any concerns, it might be necessary for you or the principal to seek independent legal advice.

Financial and investment advice

Agents must not give financial and investment advice. Note that insurance is a financial service and unless an agent is authorised in accordance with the *Financial Services Reform Act 2001*, an agent is limited in what they can do and say. More information on Duty of Disclosure available at

<http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Rules_of_conduct/Conduct_requirements/Duty_of_disclosure.html> and section 10 of the regulations <http://www.legislation.nsw.gov.au/fullhtml/inforce/subordleg+490+2003+FIRST+0+N>

Notifying managing agent of appointment to sell residential property

If an agent is appointed to sell residential property that is tenanted, the agent must immediately give written notice of the appointment to any agent responsible for managing the property.

A minimum of 14 days written notice must be given to the tenant prior to the first inspection. If a tenant is in occupation, refer to the *Residential Tenancies Act 2010* (sections 53 and 55) and the residential tenancy agreement (the lease) for details regarding inspection access. See also the section under 'Important Information' in these notes.

Prohibition against listing residential or rural land subject to sole or exclusive agency

An agent must not knowingly enter into a selling agency agreement with a principal in respect of the sale or purchase of residential or rural property at a time when the property is or is to be the subject of a sole or exclusive agency agreement with another agent. The agent should ascertain from the principal whether there are any current sole or exclusive agency agreements with other agents. If possible, ask the principal to show you copies of any termination notices that they have issued.

THE AGENCY AGREEMENT FORM

Principal

Where there is more than one principal the agreement must be signed for and on behalf of all principals. It is advisable from a risk management perspective to obtain the signatures of all parties concerned. The full names of each principal are to be inserted in the agreement.

If the principal is a corporation then the agreement must be signed in accordance with the Corporations Act 2001. If the Corporation has a common seal it should be inserted in the signatory section of the agreement and be accompanied by the signature of at least one director and the secretary. If the company has no common seal then if there are two or more directors the agreement must have the signatures of at least two directors and or secretary together with the words "Executed for and on behalf of ABC Pty Ltd (ACN 1234) in accordance with Section 127(1) of the Corporations Act 2001". Where there is only a sole director then you insert the above words and after the signature insert the words "Sole Director/Secretary."

Licensee

The licensee is the legal entity under which the real estate business (agency) operates. If an individual is carrying on business in his/her own name (with or without a trade/business name) – it is the licence number of that person which is recorded in this section. If a corporation/company is carrying on business (with or without a trade/business name) – it is the licence number on the Corporation Licence which is recorded. If there are two or more persons/corporations carrying on business in partnership (with or without a trade/business name) – it is the licence number of each person/corporation in the partnership which is recorded.

Licensee's estimate of selling price

The agent's estimate of the selling price must be the agent's true opinion. It can be expressed as one single amount or a price range. Where GST applies to the property the agent's opinion is based on a **GST inclusive** basis. The Agent **MUST** keep on file evidence to show how the estimate was determined. For more information go to http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Agency_responsibilities/Price_substantiation.html

Prohibition on engaging in legal practice when not entitled

Only qualified legal practitioners are entitled to give advice on legal matters. Agents must not provide advice on the validity or otherwise of an agency agreement between a principal and an agent.

A. Agency appointment

The principal grants the agent exclusive selling rights until the expiry of the exclusive agency period. The agency then continues as an open (non-exclusive) agency. The open agency can be terminated by giving seven days' notice in writing by either the principal or the agent.

Further, the Licensee is authorised to submit the property for sale by auction on the date recorded or as soon as is practicable thereafter. If a date has not been chosen, write, 'To be advised'.

If the agency agreement is for residential property and the exclusive term exceeds 90 days, the principal is entitled to terminate the agreement by giving 30 days written notice to the agent at any time after the end of the first 90 days. This entitlement does not apply to an agency agreement for the sale of residential property where the contract for sale provides for the construction by the principal of a dwelling on the land such as in 'off the plan' sales.

B. Reserve Price

In this section record the price the principal authorises the agent to sell the property. At the time of completing the agreement, if the reserve price is unknown, write, 'To be advised'.

C. Remuneration

The remuneration, (also referred to as commission or selling fee) can be charged as a flat fee, a percentage of the sale price, or a formula.

In respect of the agent's ESTIMATE of the sale price; if it is expressed as a single amount, the commission is also expressed as a single amount; if it is expressed as a price range, the commission is also be expressed as a price range.

D. Expenses and charges

In accordance with the terms and conditions of the agency agreement, the agent is entitled to be reimbursed for expenses, charges and fees on services as set out in Sections D and E.

A reimbursement is when the agent is compensated exactly for any amount incurred by the agent (such as advertising, bank fees, courier and 149 Certificate) and paid for by the agent out of the agent's funds. With such reimbursements, the agent deducts the input tax credit they are entitled to receive (assuming it is a taxable supply) and then adds the appropriate GST to the owner's charge.

Any expense invoiced directly to the owner (e.g. cleaning, repairs and maintenance) and paid by the agent out of funds held on behalf of the owner do not have any further GST added.

In order to complete the agreement the amount of an expense or charge such as advertising costs may need to be estimated. The agent claims the actual expenditure of the advertising up to but not exceeding the upper limit as specified in section D of the agreement. In the case where there is an advertising schedule, include it as an annexure and specify when the amount is due and payable.

E. Other services

The terms of the agency agreement and circumstances will determine whether a particular amount forms part of the consideration for the supply of agency services, an expense or a reimbursement of costs. In this section the agent itemises all the services (if required) the Licensee will carry out and the specified fee (GST inclusive) or (NIL fee).

For example, the agent may charge a fee to coordinate cleaning or refurbishment. If the charge forms part of the consideration for the services performed by the agent, GST will be payable by the agent on these amounts.

Take care specifying fees, charges and expenses and when they are due and payable. Consider the recovery of these fees in the context that you may not be successful in selling the property or the listing is withdrawn. Below is an example of a service fee to coordinate refurbishment work for section E of the agreement. The appropriate wording for when the fee is due and payable will vary to suit the individual circumstances.

Example

<i>Service</i>	<i>Amount (GST inclusive)</i>	<i>When due and payable</i>
Coordination fee for refurbishment	\$200	'within 7 days of signing the agreement' or 'at settlement or on withdrawal' or 'by account 30 days'

F. Advertising and promotion

This section relates to instructions on HOW the property is to be advertised or promoted. For instance, whether there will be a signboard, specific print and electronic media and open for inspection. For example, in the case of an auction campaign, write 'See Annexure 1 attached – Auction Marketing Campaign.' Ensure that this advertising schedule specifies when the amount is due and payable and it is dated and signed by all parties.

G. Inspection of property

Record in this section access arrangements such as preferred days and times for inspections and tenant contact details.

H. Disclosure of rebates, discounts and commissions

An agent is not entitled to recover any expense in connection with a real estate transaction claimed under the agreement unless the agent has disclosed in the agency agreement that they may receive rebates, discounts or commissions in respect of those services e.g. advertising rebates. The source and estimated amount of them to the extent that the amount can reasonably be estimated must be specified in the agreement. If no rebates, discounts and commissions are received, write 'NIL' in each box.

Other disclosures

Note there are other disclosure requirements in respect of referring a principal or prospective buyer to service providers (Section 47) and acquiring a beneficial interest in any property that the agent has listed (Section 49). Download forms here:

http://www.fairtrading.nsw.gov.au/pdfs/About_us/Forms/psbsection47form.pdf

http://www.fairtrading.nsw.gov.au/pdfs/About_us/Forms/psbsection49form.pdf

More information on Duty of Disclosure available at:

http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Rules_of_conduct/Conduct_requirements/Duty_of_disclosure.html

Cooling-off period

If the agreement is for the sale of residential property or rural land, the principal (client) has a cooling-off period. The cooling-off period commences when the client signs (or where there is more than one client, when the last client signs) the agreement and ends at 5 pm on the next day that is a business day or a Saturday.

The agent may extend this cooling off period in the agreement or in writing before the end of the cooling off period. The client can waive their cooling-off right when signing the agency agreement by signing a separate waiver form, download here http://www.fairtrading.nsw.gov.au/pdfs/About_us/Forms/psbsection59form.pdf

Waiver of cooling-off rights

There is no cooling-off period if:

- (a) at least 1 business day before the client signs the agency agreement the agent provides the client with a copy of the proposed agency agreement together with (in the case of an agreement that relates to residential land) a copy of the approved consumer fact sheet, 'Agency Agreements for the sale of residential property', <http://www.fairtrading.nsw.gov.au/Factsheet_print/Tenants_and_home_owners/Selling_property/Using_an_agent/FTR32_Agency_agreements.pdf> and
- (b) before the client signs the agency agreement the client signs the waiver form.

EAC MEMBERS can obtain compliance advice and practice support on 1300 137 161
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