

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

NOTE: Sections 72, 73, 74 of the Act refer to transactions relating to **residential** property. On page 4 in the final paragraph of the Commissioner's Guidelines '*Estimated Selling Price Guideline for Agents*' it states

"These provisions, and others in the Act and regulations, extend the requirements in relation to estimated price to the sale and purchase process for **rural** and **commercial** transactions.'

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. Follow the link for a copy of the Estimated Selling Price Guideline for Agents

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

Schedule of Property Particulars

The schedule of property particulars are particulars that the agent must collect and forms part of the Sales Inspection Report. These particulars are important to ensure that the property is correctly represented to the market.

Misrepresentation and Material Fact

It is recommended that you read the Fair Trading guidelines on misrepresentation <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:

- notifiable stock diseases
- any chemical contamination
- noxious weeds
- significant give and take boundaries

- local/regional development (i.e. coal and gas)
- any notices from local government or livestock authorities
- **any defects or stigmatising events.**

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

Part 2 The Particulars

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.

B. Price

In this section record the price the property is to be offered for sale. If GST is applicable, the price is expressed as GST inclusive. Note that some items that may be included such as livestock and items of plant and equipment may attract GST. Vendors should seek their own independent advice on GST prior to marketing.

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. If a real estate agent is registered for GST, the fees charged for services performed by the agent will be a taxable supply and required to be expressed as GST inclusive

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 marketing levy or 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 for a marketing levy 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>
Marketing levy	\$500	'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 advertising campaign, write 'See Annexure 1 attached – Advertising Campaign.' Ensure that this advertising schedule specifies when the amount of money 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.

If there is a residential dwelling on the property that is leased under a Residential Tenancy Agreement, refer to sections 53 and 55 in the *Residential Tenancies Act 2010* and the residential tenancy agreement (the lease) for details regarding inspection access.

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/psbasection59form.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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