

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:

- proposed plans that could adversely affect traffic flows
- issues that may affect lawful occupation e.g. smoke alarms, building compliance
- **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>>

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.

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

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

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'.

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. 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 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

Service	Amount (GST inclusive)	When due and payable
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 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.

H. Disclosure of rebates, discounts and commissions

Under section 57 (2) of the Act, real estate transactions for the purposes of commercial or industrial exempt the agent from having to disclose any rebates, discounts or commissions (e.g. advertising rebates) that the agent may receive. In the interest of transparency, it is recommended that the agent disclose by completing this section. Specify the source and the estimated amount to the extent that the amount can be reasonably estimated. If there are no rebates, discounts and commissions 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

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