

NOTES CONCERNING THE FORM YOU ARE USING BUSINESS Sales Inspection Report & OPEN 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 Regulations 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 *Regulations 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 on agency agreements at:

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

The Act:

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

The Regulations:

<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

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

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 and record supporting evidence (if required) of correct service. For example, a copy confirmation letter with postage recorded in a mail book or an 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 of expenses and charges and fees on services, such services and amounts cannot be varied except with the agreement in writing of the principal.

Schedules

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

Misrepresentation and Material Fact

It is recommended that you read the Office of 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:

- adjoining developments (or potential)
- current development applications
- illegal activities
- hooligan behaviour
- industrial smells or noises
- **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 go to

<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>

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.

The Particulars

A. Agency appointment

The principal grants the agent open (non-exclusive) selling rights until the agency is terminated by giving seven days notice in writing by either the principal or the agent.

B. Price

In this section record, the listing price, which is the price the business, is to be offered for sale. GST is not applicable where a business is sold as a 'Going Concern'.

C. Remuneration

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 and courier costs) 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 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 fees for other services such as marketing, negotiating leases and inventory or stocktaking. 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 business 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 business is to be advertised or promoted. For instance, whether there will be a signboard, specific print and electronic media.

For example, for a marketing campaign, write 'See Annexure 1 attached Auction Marketing Campaign.' Note: Ensure that this advertising schedule specifies when the amount is due and payable.

G. Inspection of business

Record in this section access arrangements such as preferred days and times for inspections and 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 at [http://www.fairtrading.nsw.gov.au/About us/Forms/Property agents forms.html](http://www.fairtrading.nsw.gov.au/About_us/Forms/Property_agents_forms.html) and for more information on Duty of Disclosure go to [http://www.fairtrading.nsw.gov.au/Property agents and managers/Rules of conduct/Conduct requirements/Duty of disclosure.html](http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Rules_of_conduct/Conduct_requirements/Duty_of_disclosure.html).

EAC MEMBERS can obtain agency compliance and risk management services from EAC on 1300 137 161