

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/?>

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.

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.

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.

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>>

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.

The first step, the initial briefing, is an important one where the agent asks the prospective buyer questions regarding their needs and wants and compiles a 'Buyer's Brief'. Consider whether you need to make specific inquiries in respect of any events or matters that may affect the property or be of relevance to the buyer. Examples include a serious crime or a death by suicide or natural causes having occurred on the premises. If you have any concerns, it might be necessary to seek independent legal advice.

Principal (Buyer)

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 inset the above words and after the signature insert the words "Sole Director/Secretary.

Licensee (Agent)

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.

Agent's Authority and Duties

Most buyers agents offer at least two levels of service, which are outlined below.

1. Full property search service

The agent generally takes care of most aspects of the buying process from establishing the client's requirements, providing advice and research, sourcing properties, negotiating the purchase, bidding at auction through to liaising with the solicitor.

2. Assessment and negotiation

The client may have already identified a potential property and engages the agent to assess it against the client's requirements and the market. The agent advises on strategy including price, offers and auction bidding. The agent may simply be appointed to bid at auction if that is all the client requires. There are legal requirements in NSW for bidding at auction, including the provision of identification details (proof of identification) for the bidders' record, and if bidding on behalf of another person, an authority or a formal power of attorney.

Agent's remuneration

The agent's fee may be a percentage of the purchase price, a flat (fixed) fee or other formula. A fixed fee would possibly be more attractive or acceptable to potential clients, as

this would not appear to be in conflict with the agent's duty to achieve the **lowest** possible price to secure the deal.

A retainer, also known as an engagement fee may also be charged. This fee may be in addition to the buying fee or it may be deducted from the buying fee on a successful outcome.

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 or 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 client and paid by the agent out of funds held on behalf of the client do not have any further GST added.

In order to complete the agreement the amount of an expense or charge such as advertising/marketing 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. If the agent charges an advertising/marketing levy, it is included in 'Section E – Other Services' and GST is included.

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).

Where an agent charges the Buyer a termination fee for terminating the agreement prior to entering into a Contract to purchase, it would be included in this section. 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 the agreement may be terminated. The appropriate wording for when the fee is due and payable will vary to suit the individual circumstances.

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 field.

Where clients engage service providers such as solicitor, finance broker, building inspectors, interior designers, removalists etc. referred to them by the agent, (even if the agent does not receive a commission), ensure full disclosure. More information on disclosure 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