

influence a reasonable tenant. Individual circumstances will vary. Examples of possible material facts include:

- renovations including additions or structural changes
- electrical re-wiring
- drainage or plumbing work
- issues affecting lawful occupation e.g. smoke alarms and 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 in the regulations at:

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

THE AGENCY AGREEMENT FORM

Part 1 – The Particulars

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.

A. Grant of Agency

The Principal grants the agent exclusive leasing and management rights until such time that the agreement is terminated by giving the specified notice in writing by either party. Good risk management practices include:

- checking with the principal that all other agreements have been properly terminated
- contacting the principal prior to entering into a new tenancy agreement.

B. Authority/Duties of Licensee

In this section, record the agent's duties as agreed with the Principal with "yes" or "no" as appropriate. The list is not exhaustive and duties may depend upon individual cases. For example, the Principal may require the agent to seek the Principal's instructions concerning any re-lettings or rent increases. Record any additional duties as agreed. Note clause 4 in Part 2 of the agreement sets out the duties the agent is authorised to carry out on behalf of the Principal.

C. Licensee's Remuneration

If a real estate agent is registered for GST, the fees charged for services performed by the agent will be taxable supply. For example, letting fees, lease preparation fees, statement and administration fees and property inspection fees are all paid to the real estate agent as consideration for services provided and are subject to GST.

All amounts referred to in the agreement are required to be expressed as GST inclusive. Below are examples of how to express GST inclusive prices based on a rate of 10%:

Lease preparation fee: \$33 (GST inclusive)

Letting fees: (i) One week's rent + 10% GST OR 110% of one week's rent (GST inclusive)

OR

(ii) 50% of one week's rent +10% GST OR 55% of one week's rent (GST inclusive)

Management fee 7% + 10% GST as: 7.7% (GST inclusive)

Monthly statement charge \$3.50 (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 Items C and D. A reimbursement is when the agent is compensated exactly for any amount incurred by the agent (such as advertising, bank fees, telephone charges and postage) and paid for by the agent out of agent 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. council/water rates, repairs and maintenance, insurance and strata levies) and paid by the agent out of funds held on behalf of the owner do not have any further GST added.

An agent may need to estimate the amounts for expenses and charges in order to complete the agreement for instance such as advertising the letting. The agent claims the actual expenditure of the advertising up to but not exceeding the upper limit as specified.

Subject to how the costs and services are charged by the agent, a practical approach to recoup administrative costs such as postage, telephone calls, bank and general administration costs is a monthly statement charge (GST inclusive). Examples of administration costs could include postage, telephone calls, bank charges, electronic funds transfers, the arranging of repairs and maintenance, administration of all expenses and general administration costs.

E. Other services

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). 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. Examples of services include:

- Attending and obtaining a Summons
- Service of Notices or Summons
- Preparing/Appearing at Tribunal or Court
- Applying for a Tribunal or other order e.g. an order for possession
- Inspection of premises/report
- Arranging repairs and maintenance
- Negotiating rent variation
- Obtaining water usage payments from tenant
- Facilitate insurance claims
- End of Financial Year Summary
- Additional midmonth payments
- Exceptional circumstances e.g. disaster/emergency: earthquake, flood, storm, fire.

More information - Rules of Conduct – property management available at http://www.fairtrading.nsw.gov.au/Property_agents_and_managers/Rules_of_conduct/Real_estate_agents/Property_management_conduct.html#Top.

F. Advertising and promotion

This section relates to instructions as to 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 inspections.

G. Inspections

An agent must accompany a prospective tenant on an inspection of the property. An agent must not give a prospective tenant keys to a property unless the Principal has authorised otherwise in writing. Record in this section access arrangements such as preferred days and times for inspections and tenant contact details. If the property is currently let, both the tenant and Principal must provide written authority to give prospective tenants a key. If a tenant is in occupation, refer to the legislation and the residential tenancy agreement (lease) for details regarding inspection access.

H. Limit on cost or repairs/maintenance

The Principal authorises the agent to effect repairs and maintenance to a maximum cost for any one item without obtaining prior approval from the Principal.

Irrespective of the specified limit, the Licensee is authorised to the extent of the Principal's obligations under the Residential Tenancy Agreement or in the opinion of the agent, it is necessary to safeguard the premises or the supply of essential services to the tenant.

It is advisable where practicable for the principal to nominate an alternative contact in the event of an emergency and they cannot be contacted. In the absence of specific instructions, the agent will need to take appropriate action in accordance with the governing legislation and sound agency practice.

I. Terms and conditions of tenancy

The details of the tenancy including period, rent, bond, are recorded in this section.

J. Principal's outgoings

Record in this section the Principal's instructions to pay any outgoings. Prepare and attach an annexure if there is insufficient space. If an agent charges the principal a fee to pay any disbursements, the service must be listed in **section D 'Other services'** and GST is payable, (*the service is a taxable supply*).

GST

Where an agent pays for an outgoing in their capacity as agent for the Principal and the account is addressed to the Principal, no GST is added e.g. water and council rates, strata levies and accounts for repairs.

Insurance renewals

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. An agent should obtain specific written instructions from the Principal to pay insurance renewals on each occasion the renewal falls due.

K. Remittances

In this section, the agent records how the agent will account for monies to the Principal. For example, email statement and deposit money in the Principal's bank account.

L. 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 and commissions on landlord insurance. 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.

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