





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

- proposed plans that could adversely affect traffic flows
- 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](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%.

Leasing fees:                                    One month’s rent + 10% GST OR 110% of one month’s rent  
(GST inclusive)

OR

10% of the average annual rent +10% GST OR 11% of the  
average annual rent (GST inclusive)

Management fee                                5% + 10% GST as: 5.5% (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:

- Inspection of premises/report
- Negotiating rent variation
- Preparing/Appearing at Tribunal or Court
- Arranging repairs and maintenance
- Attending and obtaining a Summons
- Service of Notices or Summons
- Applying for a Tribunal or other order
- Obtaining outgoings from tenant
- Facilitate insurance claims
- End of Financial Year Summary
- Midmonth payments
- Exceptional circumstances e.g. disaster/emergency: earthquake, flood, storm and 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](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, and, if the property is currently let, the tenant have authorised otherwise in writing.

#### **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.

**I. Terms and conditions of tenancy**

In this section the term of the tenancy including any option period, the rent, the security deposit/bank guarantee and any other special terms are recorded. Note, cash bonds for retail tenancies are required to be lodged with the NSW Retail Bond Scheme, more information at: <http://www.retail.nsw.gov.au/onlineforms.aspx>

Instructions relating to the security bonds for commercial or industrial tenancies are contained in the lease.

**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. When recovering outgoings from the tenant GST is added.

**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**

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.

<b>EAC MEMBERS</b> can obtain compliance advice and practice support on 1300 137 161
--