
Real Estate

Continuing Professional Development

Marketing: Law of agency

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Learning objectives

At the end of this topic, you will be able to:

- state where you must display your agency details and confirmation of licensing
- explain when you are allowed to offer or market a property
- describe the rules that set out advertising, marketing and price
- explain the importance of client confidentiality and disclosing defects about a property
- describe how the Fair Trading Act 1986 has implications for licensees.

Identifying the real estate agency and confirming your licence

Under section 121 of the Real Estate Agents Act 2008, you must clearly and prominently display your name (and your trading name, if different) and the fact that you are licensed, on:

- each office or shop you maintain
- all websites you use
- all notices and advertisements
- all other promotional material and documents you use in the course of your real estate work
- all letters, accounts, contractual documents and agreements.

121 Agent to display required name information

(1) In this section,—

business, in relation to an agent, means the agent's business as a real estate agent
required name information, in relation to an agent, means—

- (a) the name of the agent and the fact that the agent is licensed under this Act; and
- (b) if the agent's business as a real estate agent is not carried on in the agent's name, the name or style under which that business is carried on.

(2) Every agent must ensure that the required name information is displayed in a prominent place—

- (a) at each office or shop maintained by the agent for the purposes of the business; and
- (b) on every website maintained by the agent for the purposes of the business; and
- (c) on all notices, advertisements, and other material published by or on behalf of the agent in the course of the business; and
- (d) on all letters, accounts, contractual documents, agreements, and other documents sent or handed out, entered into, or published by or on behalf of the agent in the course of the business.

(3) The required name information must be capable of being easily read from outside each office or shop maintained by the agent for the purposes of the business.



Note

There have been a number of cases where the individual licensee is properly identified but not the real estate agency. You must carefully check that all marketing and advertising information in printed and electronic media and all other documents used in the course of real estate work contain the required information.

Licenseses – personal marketing and advertising

You are encouraged to develop your own marketing material including social media channels and professional websites to build your profile and broaden potential client contact opportunities.

It's important to maintain professional boundaries between your personal and professional social media channels. You must use a professional social media channel for real estate agency work. It must comply with section 121 of the REAA 2008. Check your real estate agency's social media policy.

Authority to offer and market

Rule 9.6 says you must not begin to offer or market a property, space, or business for sale or lease in any way, unless your client has authorised you through a signed agency agreement.

9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

Marketing plan

You must set out the proposed marketing plan in writing before a prospective client signs an agency agreement. **Rule 10.6 (c) and (d)** says you must also explain to the client that they are not obliged to agree to any additional expenses referred to in the marketing plan.

10.6 Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing – ...

(c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur:

(d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c)

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 1

A licensed salesperson showed three prospective purchasers through a property. However, there was no signed agency agreement for the property in place at the time of the showings. A complaint was made to REA and the situation was investigated by a Complaint Assessment Committee (CAC).

The CAC discovered that in addition to there being no agency agreement, there was no appraisal for the property in the agency's records.

When asked about the missing documents the licensed salesperson replied that it was a 24-hour listing and the documents were not submitted to the office. However, she was unable to provide copies herself.

The CAC found the licensee had engaged in unsatisfactory conduct under s89(2)(b) of the Real Estate Agents Act 2008. The licensee was censured, ordered to undergo further training and was fined \$3,000.

Complaint No: C15000

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Advertising, marketing and price

You can begin offering and marketing a property, space, or business for sale or lease when an agency agreement has been signed, and a copy of the agreement has been given to the client.

Your client must approve the promotional activities outlined in the marketing plan, and these must be within a marketing budget the client has agreed. This is in accordance with rule 10.6(c) and 10.6(d) as mentioned above.

Ensure you understand the client's pricing expectations and ensure that all marketing and advertising material accurately reflects these expectations. This includes advertising the property in the correct price range for online searches.

The following rules set out the responsibilities you must comply with in relation to advertising, marketing and price.

Rules:

9.13 When authorised by a client to incur expenses, a licensee must seek to obtain the best value for the client.

Costs (for marketing) must be appropriate in terms of the property value and the benefit gained from marketing.

10.9 A licensee must not advertise any land or business on terms that are different from those authorised by the client.

10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

9.4 A licensee must not mislead customers as to the price expectations of the client.

Activities must reflect the marketing plan, and any terms as subsequently authorised in writing by the client.

Licensees **must** ensure there is effective communication and understanding with clients around pricing.

Licensees **must not** under quote price expectations to a potential purchaser with the aim of securing an offer.

Licensees **must not** advertise an ambiguous price range or minimum price contrary to the client's expectations.

Breach example:

A Complaint Assessment Committee (CAC) charged a licensee with misconduct following a complaint made by vendors of a property the licensee was engaged to market.

The licensee failed to provide a written appraisal and explanation of pricing for the property as required by rules 10.2 and 10.3. In advising that their property would not exceed the RV, the licensee did not act in the best interests of his clients in achieving the highest possible price for them (as required by rule 9.1).

During the marketing, the licensee decided to take an interest in purchasing the property himself. Although aware of the statutory requirements that he had to comply with (sections 134 to 137 Real Estate Agents Act 2008) and with adequate time to correct procedural failures before the licensee settled the purchase, this was not done. Marking an Agreement for Sale and Purchase (ASP) as a 'private sale' does not absolve a licensee of their obligations under the Act and Rules.

The licensee's failure to take any steps to seek advice as to whether he was acting in accordance with the requirements of the Act and Rules must be taken seriously.

The licensee was censured and ordered to pay a \$10,000 fine.

Complaint No: C08720

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

[2017] NZREADT 6

Read the following scenario and answer the questions about the rules. (Refer to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012).

Scenario 2

A complaint was made to REA from prospective purchasers about a licensed salesperson who was marketing a property for sale by tender. The property was acknowledged as having a unique style and design.

The property was advertised as '*buyer budget up (BBU) from \$595,000*'.

The complainants submitted a tender with an offer of \$620,000.

After the tender closed, the complainants were informed by the licensed salesperson that their tender was unsuccessful and that the property did not sell. They were also told that the vendors had decided to rent the property rather than sell it.

The complainants contacted one of the vendors directly (by phone) to ask if he could make an improved offer to negotiate an agreed sale price. The vendor told him that they were looking for a minimum of \$700,000 for their property and that they had made this expectation very clear to the licensed salesperson from the start.

The complainants requested the committee to consider the following remedies:

- "a) Financial compensation to them and other unsuccessful tenderers for time spent and costs incurred to submit tenders which were never going to be considered.
- b) Compensation for the emotional harm associated with participating in a stressful tender process."

The Committee's investigation found the following:

[para 3.5] "Although the complaint was made about the complainant being misled as to the vendors' price expectations, the committee's investigation identified three other issues arising which require addressing. These matters are directly related to, and arise out of, the complaint. They are the quality of the appraisal and comparative market analysis (CMA), a failure to provide mandatory information to a vendor client and a misleading email sent to the disappointed tenderers after their offers were not accepted."

The Committee found the licensee had breached rules 5.1, 6.4, 9.1, 9.4, 10.2, 10.3, 10.4 and 10.6 and the agency had breached rules 8.3 and section 50. The licensee was censured and fined \$1,000. The agency was censured fined \$5,000 and \$1,070 settlement.

The Tribunal subsequently dismissed the licensee's appeal against the unsatisfactory conduct decision, but partially allowed the appeal against the penalty orders and quashed the \$1,000 fine.

Complaint No: C20767

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz



Furthermore, the committee stated:

- [para 3.6] 'The appraisal and CMA were prepared on 3 April 2017. The appraisal states an appraised price "\$590,000-\$650,000-\$725,000." The range is \$135,000. Under comments, it is noted the property is unique. Fifteen sold properties are identified. The lowest price is \$571,000 and the highest price is \$759,300 (a range of \$188,300 and a median of \$662,000). Five properties have a price of \$700,000 or higher. They are not described as comparable sales and none of the information provided about each property indicates how it is comparable with the property.'
- [para 3.7] 'The TradeMe advertising describes the property as '*uniquely designed*' and '*one of a kind*'.'
- [para 3.12] 'The appraisal and CMA is useless. It refers to 15 allegedly comparable sales when licensee A considers it difficult for a valuer to find comparative sales and to put a price on it. It has a price range of \$135,000. There is no indication as to why any of the comparable sales are comparable sales. It does note the property is unique but does not provide any explanation as to how its uniqueness affects an assessment of the likely selling price.'

Client confidentiality

Any information confidential to a client must be kept confidential. Confidential information must not be used to benefit any other person, including you, the licensee (rule 9.16). Furthermore, confidential information must not be disclosed unless in accordance with the circumstances outlined in rules 9.17 and 9.18.

For example, knowledge that a client-vendor needs a quick sale due to financial difficulties must not be disclosed when marketing a property unless the client-vendor consents in writing for such information to be disclosed.

Confidentiality

9.16 A licensee must not use information that is confidential to a client for the benefit of any other person or of the licensee.

9.17 A licensee must not disclose confidential personal information relating to a client unless—

- (a) the client consents in writing; or
- (b) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client; or
- (c) the licensee is required by law to disclose the information; or
- (d) the disclosure is consistent with the information privacy principles in section 6 of the Privacy Act 1993.

9.18 Where a licensee discloses information under rule 9.17(b), (c) or (d), it may be only to the appropriate person or entity and only to the extent necessary for the permitted purpose.

Breach example:

Vendors of a property that was listed for sale made a complaint to the REA regarding the conduct of the licensed salesperson. They allege that the licensed salesperson disclosed confidential financial information about the vendors to the purchaser of the property (breach of rule 6.1) and put them under undue and unfair pressure to accept the purchaser's offer for the property, in breach of rules 6.3 and 9.2.

The committee, on the balance of probabilities, determined that the licensed salesperson had disclosed to the purchasers that the complainants were in financial difficulty and had to sell the property.

The licensee was charged with unsatisfactory conduct and the committee ordered censure, continuing education, commission refund of \$10,150.64 plus GST and a \$6,000 fine. Following appeal the Tribunal reduced the fine to \$4,000 and the commission refund to \$4,000. The orders for censure and CPD remained in place.

Complaint Number: C11489

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

[2018] NZREADT 17

Disclosing defects

There is certain information about a property that must be disclosed to customers (prospective purchasers) or lessees interested in buying or leasing the property.

You must make sure your client vendor or lessor is aware of the obligations to disclose to customers (prospective purchasers) or lessees before the client signs an agency agreement.

These disclosure obligations are covered in more detail by Rules 6.4, 10.7 and 10.8.

Disclosure of defects

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

10.7 A licensee is not required to discover hidden or underlying defects in the land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects*, a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

**For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weather-tightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weather-tightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.*



Key Points

Rule 6.4 places an obligation on licensees to disclose information that should in fairness be provided to customers and clients.

Rules 10.7 and 10.8 seek to balance the legitimate interests of buyers or lessees to have relevant information about a property they are interested in buying or leasing against realistic limits and expectations of a licensee's ability to know details about that property.

These rules seek to set a consistent standard of disclosure of defects that all licensees can be held to (disclosure required when it appears likely to a 'reasonably competent' licensee that there is a defect).

If a 'reasonably competent' licensee considers that there may be a hidden or underlying defect, the licensee may discharge his or her disclosure obligations to the customer (prospective purchaser or lessee) in one of two ways:

- Obtain confirmation from the client supported by evidence or expert advice, that the land is not subject to defect; or
- Inform the customer of any significant potential risk so that the customer can seek expert advice if he or she chooses. If a client is unable to provide evidence that there is no defect, the licensee must inform the customer of the potential risk, so they can seek their own expert advice

Since a licensee is required under the rules to disclose knowledge of defects to a customer, if a client directs the licensee not to make such a disclosure, the licensee must adhere to rule 10.8 and terminate the agency agreement and not continue to act for the client.

Weather-tightness issues

You have a clear duty towards purchasers in respect of disclosing issues about weather-tight building profiles.

Rule 10.7 states that *'where it would appear likely to a reasonably competent licensee that the land may be subject to hidden or underlying defects*'* a licensee must either confirm this with the client or ensure that a customer is informed of any potential risk.

Furthermore, rule 10.7 specifically includes a subscript in relation to properties that may be at risk of likely weather-tightness issues:

**For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weather-tightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weather-tightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.*

A *'reasonably competent licensee'* is expected to be able to identify possible weather-tightness issues in a property. They are also required to disclose relevant information in relation to weather-tightness issues if they:

- know the property has been the subject of prior sales which have fallen through following building reports
- know the property is of materials and design which render it likely to have weather-tightness issues
- know other units in a complex which have weather-tightness issues
- suspect from his or her experience that the premises may have weather-tightness issues.

You will be in breach of the Rules unless you either raise the weather-tight building issue with the vendor (and obtain confirmation supported by evidence or expert advice that the property is weather-tight, but disclosure still should be made as a matter of fairness); or raise the issue and potential risk with any prospective purchaser.

Breach example - Unsatisfactory Conduct

Licensee H engaged in unsatisfactory conduct under the Act and breached Rules 5.1 and 8.3 of the 2012 Code of Conduct when he failed to properly supervise the multi-offer process, allowed agents under his supervision to downplay significant weather-tightness issues with the property, and did not note the issues on the agency agreement or property file.

The agency engaged in unsatisfactory conduct under the Act and breached section 50 of the Act by failing to have a system to properly process and retain information it had received for the property, and not having an adequate or effective system or process for information about buildings with monolithic cladding.

Licensees W and F engaged in unsatisfactory conduct under the Act and breached Rules 5.1 and 6.4 of the 2012 Code of Conduct when they misrepresented the property's weather-tightness by omitting or minimising the issues.

Licensee V engaged in unsatisfactory conduct under the Act and breached Rules 6.2, 6.4, and 10.7 of the 2012 Code of Conduct. The licensee had prior knowledge of the property, having received a copy of a 2015 building report, but he downplayed the issues with the property with customers and colleagues.

- Licensee H: Censure; \$4,000 fine; \$600 in legal expenses
- Licensee W: Censure; \$2,000 fine; \$600 in legal expenses
- Licensee F: Censure; \$2,000 fine; \$600 in legal expenses
- Licensee V: Censure; \$5,000 fine; \$600 in legal expenses
- The agency: Censure; \$5,000 fine, \$600 in legal expenses; make its business available for inspection

Complaint number: C19769

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Breach example - Misconduct

The Tribunal accepted the licensee's admission of misconduct under s 73(b) of the Real Estate Agents Act 2008 and the issue to be determined was penalty.

The conduct included him downplaying the significance of a prior building report which was the basis for successful tenderers to cancel their contract; suggesting the complainant and vendor jointly obtain a new building report; and providing a blank sale and purchase agreement without all material particulars completed.

The Tribunal reiterated that the penalty imposed in any particular case must be appropriate for the circumstances.

The property defects should have been obvious to the licensee, and it was unacceptable for him not to recommend that the complainant undertake her own due diligence, and to minimise a report which addressed those defects.

Providing a blank sale and purchase agreement was also patently in breach of the licensee's obligations.

Taken cumulatively, the licensee's failures were at the mid-level of misconduct and the penalty reflected this:

- \$5,000 fine and censure;
- Completion of Unit Standard 23136 (knowledge of misleading conduct and misrepresentation);
- \$30,518.85 compensation under s 110(2)(g) - made up of \$10,518.85 reimbursement of specific costs and \$20,000 as a contribution towards other losses suffered as a result of the licensee's conduct

Complaint number: C12642

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Further information about disclosure obligations

The following Disciplinary Tribunal decisions highlight other implications for licensees to be aware of in terms of a licensee's disclosure obligations.

Obligation to disclose all material information

[2017] NZREADT 78

Misconduct

The licensee withheld a Methamphetamine Initial Contamination Report that should in fairness have been provided to the purchasers of the property, failed to disclose a known defect to the purchasers and allowed them to access the property without determining whether it was safe to access.

The licensee's conduct did not amount to willful or reckless misconduct, but did amount to seriously incompetent or seriously negligent.

The licensee was censured, suspended from holding a licence for three months, and ordered to pay a fine of \$3,000.

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Disclosure obligations under Rule 6.4 and 9.1

[2017] NZREADT 39 (Previous finding by CAC overturned by Tribunal on appeal)

Misconduct

The Tribunal found that Rules 9.1 and 6.4 are core obligations; a breach of these rules cannot be regarded as anything other than misconduct.

It was not for the licensee to decide whether or not to pass on information to a vendor concerning a potential purchaser; this is information that must be passed on in order for licensees to comply with their obligation to act in their client's best interests.

The conscious decision to tell the vendors that there were no other buyers was sufficient to take this conduct outside the realm of unsatisfactory conduct under s72 of the Act.

Licensee contravened Rules 6.4 and 9.1

The licensee was censured and fined \$8000.

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Disclosure requirements to the customer and reporting to the client

[2017] NZREADT 52

Misconduct

The Licensee failed to meet a number of obligations owed to every purchaser in every transaction.

In two transactions, the Licensee failed to provide the approved guide (section 133), failed to recommend independent legal advice (rule 9.7), and failed to inform the complainants about complaints processes (rules 12.2 and 12.3).

In respect of the second transaction, the Licensee failed to disclose in writing that one of his sisters was the vendor and would financially benefit (section 136).

The Licensee failed to exercise care, skill, competence and diligence (rule 5.1), failed to act in good faith (rule 6.2), and his conduct was likely to bring the real estate agency into disrepute (rule 6.3).

Cumulatively the Licensee's conduct amounted to seriously incompetent or seriously negligent real estate agency work. The penalty was: censure, suspension of licence for three months; \$2,500 fine and further education.

Complaint: C09310

Penalty decision: [2017] NZREADT 76

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

[2017] NZREADT 18

Misconduct

The licensee acted as a buyer's agent, without disclosing this to her agency, as well as facilitating the sale of a property as a *private sale*, when in fact was undertaking real estate agency work for the property owner.

The licensee forwarded price information learned from the vendor on to the buyer.

The penalty was suspension for 6 months from the date of the decision (22 March 2017) and completion of Unit Standard US 26149 - *Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agency Act 2008*, before the licence may be reinstated or revived.

Complaint: C08457

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz

Ongoing disclosure obligation before settlement

[2018] NZREADT 30

Misconduct

Licensee X did not disclose his relationship with the purchaser (which arose after the agreement became unconditional, 10 days before settlement), and he did not obtain the vendor's consent, or provide a valuation.

The Tribunal accepted that Licensee X did not have any dealings with the vendor as the vendor had listed with another agent, and there was no potential for him to have any input into the eventual purchase price. However, the obligations under sections 134 and 135 are fundamental to the Act's purpose of promoting public confidence in the performance of real estate work, and they continue to apply after a sale and purchase agreement becomes unconditional, until settlement.

Licensees are expected to know what their obligations are, and that they persist until settlement.

The Tribunal found that while Licensee X had no involvement with the vendor, and no input into negotiations leading to the agreement for sale and purchase, that did not absolve him from liability, or lessen his culpability to the extent of reducing liability from misconduct to unsatisfactory conduct.

The Tribunal found him guilty of misconduct under section 73(b) of the Act.

Penalty: Censure, fine of \$3,000 and further training on managing conflicts of interest and compliance with sections 134 and 135 of the Act.

Complaint: C18115

You can read about this complaint and decision in the REA decision database which you can find at the top of the homepage at rea.govt.nz



Notes

Additional requirements under the Fair Trading Act 1986

Section 9 of the Fair Trading Act 1986 deals with misleading and deceptive conduct.

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Section 14 deals with false representation and other misleading conduct in relation to land.

14 False representations and other misleading conduct in relation to land

(1) No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—

(a) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or

(b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land.

(2) No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.

(3) In this section interest, in relation to land, means a legal or equitable estate or interest in the land; and includes—

(a) a right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in a company that owns the land or building; or

(b) a right, power, or privilege, over, or in connection with, the land.

Other sections in the Fair Trading Act are relevant and have implications for real estate agencies and licensees.

12A Unsubstantiated representations

Section 12A was introduced in 2013 and prohibits the use of unsubstantiated representations by a person in trade in respect of goods, services, or an interest in land (s12A(4)(a)), and specifically in regard to 'the sale or grant or possible sale or grant of the interest in land' (s12A(4)(b)(ii)).

The meaning of *unsubstantiated* is provided in subsection (2):

Section 12A (2)

A representation is **unsubstantiated** if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.

This section applies to representations which a reasonable person would expect to take seriously and be substantiated. An example could be advertising a property as 'Home and Income' when there is a restrictive covenant preventing this.

(1) A person must not, in trade, make an unsubstantiated representation.

This includes representations in relation to the sale of property made by agents, licensees (and developers) all of whom are 'in trade'

(2) A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading.

Licensees are not able to make representations in trade (even if they are true) without having reasonable grounds at the time for making them.

The key point is that if a licensee makes a statement or representation without making sufficient enquiries to check whether it was true or not, they will fall foul of this section of the FTA.

The law requires a licensee to make sure they have reasonable grounds at the time for making any statement about a property or business they are marketing before they make those statements.

(3) This section does not apply to a representation that a reasonable person would not expect to be substantiated.

Claims that are regarded as clearly an exaggeration and are so obvious that no one ought to reasonably believe they are not covered by Section 12A.

An example might be "*This is the best property ever!*"

It is, however, risky to rely on this exception of puffery (exaggeration or false praise), except where it is very obvious that what you are saying about a property is clearly not meant to be taken as fact.

(4) In this section and sections 12B to 12D, representation means a representation that is made—

(a) in respect of goods, services, or an interest in land; and

(b) in connection with—

(i) the supply or possible supply of the goods or services; or

(ii) the sale or grant or possible sale or grant of the interest in land; or

(iii) the promotion by any means of the supply or use of the goods or services or the sale or grant of the interest in land.

Section 12A applies to all types of representations made by licensees about property, space, or businesses including:

- statements made within marketing brochures
- on websites, or any electronic media
- verbal statements made by a licensee

Section 12A addresses the following issues:

- A prospective purchaser or lessee has the right to rely on statements made in good faith by a licensee.
 - It is unfair on licensees who have gone to the trouble of ensuring any representations they made can be substantiated, when a competitor makes a representation without doing this.
- Unsubstantiated representations act as an inducement to attract purchasers or lessees and may entice prospective purchasers or lessees to enter into negotiations to buy or lease a property based on information that has not been substantiated
 - This could deny other licensees who comply with the legislation from having free and equal competition for the business of that purchaser or lessee.

Breaches of the Fair Trading Act 1986 carry additional penalties

Breaching the Fair Trading Act 1986 could mean individual licensees face fines of up to \$200,000, and real estate agencies up to \$600,000. The courts can also grant an injunction and can order corrective advertising to cure any misrepresentation.

The Commerce Commission is responsible for prosecutions under the Fair Trading Act 1986 and the Real Estate Authority will work closely with them on any matters regarding real estate licensees.

What real estate agencies and licensees should do to manage risk in relation to the Fair Trading Act 1986

- Real estate agencies should look at their advertising and business practices to ensure that they meet the requirements of Section 12A of the Fair Trading Act 1986.
- Real estate agencies may need to ensure processes or procedures (if not already in place) can show if required, that they have reasonable grounds for making specific representations. For example, prepare and retain documentation before making representations.
- Agencies and licensees need to think carefully about how property, space, or businesses for sale or lease are described and whether claims are being made that cannot be verified.
- Real estate agencies need to be vigilant and take steps to ensure that any statements they and their licensees make (whether verbally to a prospective purchaser or in advertising) are accurate, genuine and can be substantiated.