



27 August 2009

Kristy McDonald QC  
Chair, Real Estate Agents Authority  
PO Box 25-063  
Wellington 6146

Dear Kristy

## **Draft Code of Professional Conduct and Client Care**

### **1 Introduction**

- 1.1 Thank you for your letter of 12 August 2009, inviting comment in relation to the draft Code.
- 1.2 The Executive Committee of the NZLS Property Law Section (“Committee”) appreciates the opportunity to comment.
- 1.3 Unfortunately, due to the very limited time available for comment, the Committee has not been able to consult with Section members, nor to give the draft Code the degree of consideration which the Committee would have wished.
- 1.4 In broad terms, the Committee considers that the draft Code is appropriate and desirable. However, some comments and issues are set out below.

### **2 Definitions – Rule 2**

- 2.1 It is suggested that the first statement in Rule 2 is not as well worded as it might be. It would be more accurate for it to be worded along the following lines:

*“Unless defined below, terms used in these Rules which are defined in the Act have the same meaning as they have under the Act.”*

- 2.2 It would be desirable to state whether or not headings in the Rules form part of the Rules and accordingly whether or not they are to be taken into account in interpreting the Rules.

### **3 Standards of Professional Competence – Rule 3**

- 3.1 Rule 3.1 requires a licensee to exercise “skill, care, competence and diligence at all times when carrying out real estate agency work”. However, the Rule does not indicate what level of skill, etc, is required. It may be desirable to state that an appropriate level of skill, care, competence and diligence is required.
- 3.2 Alternatively, the Rule could be recast to correspond more with Rule 3 of the Lawyers Conduct and Client Care Rules (“RCCC”). In that event the Rule could read along the following lines:

*“When carrying out real estate agency work a licensee must at all times act competently and with due care and diligence.”*

#### **4 Disclosure Obligations – Rules 4.4-4.6**

- 4.1 These Rules raise a number of issues, some of which are addressed below.
- 4.2 Whilst the definition of “land” in the Act includes any building and any part of a building, this is rather unlikely to be apparent to a lay person. Accordingly, it may be desirable to point this out in an explanatory note. Whilst the Rule is directed to the obligations of licensees who must be taken to be familiar with the provisions of the Act, nevertheless it is desirable that the extent of the obligations imposed by the Rule be understood by clients and customers.
- 4.3 Rule 4.5 refers to known defects and underlying defects in land. It is not clear whether these are intended to be confined to defects of a physical nature or whether other defects come within the ambit of this Rule. The example of weathertightness contained in the footnote to Rule 4.5 relates to a physical defect, but the footnote states that the example is provided by way of guidance only and does not limit the range of issues to be taken into account.
- 4.4 It is suggested that the combined effect of Rules 4.4 and 4.5 is likely to require a licensee with knowledge of the position to disclose matters like the following:
- a Encroachment by a building on the land over the boundary of an adjoining property.
  - b Non-compliance by buildings with bulk and location requirements.
  - c The likelihood of a property being adversely affected by a proposed development on a neighbouring property.
  - d The fact that fencing does not correspond with the legal boundary.
  - e Non-compliance by a building with a height restriction.
- 4.5 Rule 4.4 insofar as it relates to the withholding of information from a client is clearly entirely appropriate and would be part of the agent’s contractual or fiduciary obligations to the client.
- However, the requirement that information must not be withheld from a customer where it should in fairness be provided is likely to occasion difficulty in practice. Fairness can be an elusive and ill-defined concept which depends very much on the viewpoint of the persons involved. A purchaser may well claim that any problem or shortcoming should be disclosed. This is likely to be particularly problematic in the case of the sale of a business.
- 4.6 The duty of disclosure is wide but will arise only in transactions in which a real estate agent is involved. The duty would not exist where:
- a A prospective vendor does not engage a real estate agent but lists the property on Trade Me or markets it in some other way.
  - b A lawyer carries out the real estate work for a prospective vendor. The lawyer’s duty is to the client vendor and this duty would be inconsistent with the disclosure of defects (known or suspected) to prospective purchasers, unless the client wished the disclosure to be made.

Some prospective vendors who are aware of these matters may feel less inclined to engage real estate agents to market their properties or businesses.

4.7 It is not clear how long the duty of disclosure under Rules 4.4 and 4.5 continues. Will it cease when an Agreement for Sale and Purchase is signed? If so, would it cease if the agreement has a due diligence condition for the benefit of the purchaser? It would be desirable to clarify the position.

4.8 It is suggested that Rule 4.6 should refer to information of the type referred to in Rules 4.4 and 4.5.

Would agents need to include a provision in their agency agreements permitting them to withdraw in the circumstances set out in Rule 4.6? It is unlikely that the Rules would bind clients (see s 107 Lawyers and Conveyancers Act 2006).

## 5 Duty to report Misconduct

5.1 It may be desirable for Rule 5.2 to indicate whether the report to the Authority may be confidential (see Rule 2.8 of the RCCC).

## 6 Rule 6

6.1 The expression “*agent who is operating a business*” in Rules 6.1, 6.3 and 6.4 seems questionable. Would it not be preferable to say “*an agent who is carrying out real estate agency work*”? This is the expression consistently adopted in the Act.

6.2 If the expression “*operating as a business*” is to be retained, it would seem desirable to amend it to read “*operating as a real estate agency business*”. Subject to Rule 7.20, an agent is entitled to operate a business other than a real estate agency.

## 7 Client Care and Dealings with Customers – Rule 7

7.1 It is suggested that the latter part of Rule 7.1 be extended to read:  
*“unless to do so would be contrary to law or to the licensee’s obligations under these Rules”.*

7.2 It is suggested that in Rule 7.4 the words “*with a client*” be inserted after the words “*timely manner*”.

7.3 **Rule 7.5:** This Rule seems to be ambiguous. It is not clear whether it is intended to require a licensee to provide an appraisal, or whether it is directed to requirements where an appraisal is given.

Some prospective vendors, particularly those familiar with the property market, may not wish to have an appraisal of their property.

7.4 **Rules 7.6 and 7.7:** Rule 7.6 appears to go further than the Explanatory Note suggests. Situations can arise where a prospective vendor wishes to advertise a property at a price which considerably exceeds that which the vendor realistically expects to obtain. Presumably, there is no reason why a prospective vendor should not be free to do this. However, Rule 7.6 as currently worded would appear to preclude this. Would it not be preferable to say: “*An advertised price must first be approved by the client*”?

On a minor note, Rule 7.6 refers to “*pricing expectations*” whilst Rule 7.7 refers to “*price expectations*”. It would be desirable to adopt consistent terminology.

- 7.5 **Rule 7.8:** It is suggested that the words in parentheses in the second line of the first bullet point be amended to read “actual \$ amount, inclusive of GST.” Lay people do not always appreciate that GST is payable on an agent’s commission.
- 7.6 **Rule 7.9:** In the second line, it would be desirable to replace “*should*” with “*must*”. This would be consistent with the terminology used in other Rules.
- 7.7 **Rule 7.14:** This Rule appears to apply to all offers whether or not they are in writing. Is this intended? The difficulty with an oral “offer” is that its terms may well be incomplete and/or ambiguous and there can often be doubt as to whether or not it amounts to an offer at all.
- 7.8 **Rule 7.19:** It is suggested that this Rule would be better expressed more directly as follows:

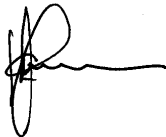
*“A licensee must not seek or accept a commission from both a client and customer in respect of the same transaction.”*

## **8 General**

- 8.1 Has consideration been given to whether the proposed Rules, insofar as they create obligations in favour of customers, may result in civil liability in tort by agents to customers?

If you would like to discuss any of the issues raised in this letter, please feel free to contact me via the Section Manager, Kim Oelofse, in the first instance on DDI 04 463 2991 or [kim.oelofse@lawsociety.org.nz](mailto:kim.oelofse@lawsociety.org.nz).

Yours sincerely



Chris Moore  
**Chair**