Sales Relevant legislation

NSW specific legislation:

Property and Stock Agents Act 2002 (PSAA)
Property and Stock Agents Regulation 2014 (PSAR)
Conveyancing Act 2019
Swimming Pool Act 1992,
Swimming Pool Regulations 2018

Federal Legislation:

Australian Consumer Law 2010
Competition Consumer Act 2010
Do Not Call Register Act 2006
Spam Act 2003
Work Health and Safety Act 2011 and Regulation 2017
Fair Work Act 2009
Foreign Acquisitions and Takeovers Act 1975
Crimes Act 1900
Privacy Act 1988

Accessing Legislation

To access NSW based legislation:

https://www.legislation.nsw.gov.au/

Click on 'Search' and type in the name of the legislation. Or refer to 'Help using web site' (last link bottom of page)

To access Federal Legislation:

https://www.legislation.gov.au/Home

Click on 'Acts in Force' and then either type in the name of the Act you are searching for or search under the alphabetical boxes. Or Click on 'Information' then 'How to use the Legislation Register'.

Salesperson must have current Certificate of Registration

Property and Stock Agents Act 2002 No 66

Part 2 Licences and certificates of registration

Division 1 Requirement for licence or certificate of registration

10 Salespersons and managers require certificate of registration

(1) A person must not do any of the following things unless the person is the holder of a certificate of registration:

(a) be or remain as a n assistant agent in the employment of a person licensed (or required to be licensed) under this Act,

(b) represent, whether expressly or impliedly, that the person is an assistant agent,

(c) act as or exercise any of the functions of an assistant agent.

Maximum penalty: 100 penalty units.

A sales representative cannot use the words ‘sales agent’ in correspondence such as email, or on their business card, unless they hold a Class 1 or Class 2 real estate licence.

Agent General Rules of Conduct

The General Rules of Conduct apply to all agents and assistant agents. These are located in Schedule 1 of the Property and Stock Agents Regulation 2014. You can locate this Schedule here:

https://www.legislation.nsw.gov.au/#/view/regulation/2014/563/sch1

Property and Stock Agents Regulation 2014

Schedule 1 General rules of conduct applying to all agents and assistant agents

(Clause 7)

Note. Clause 7 provides that a reference in this Schedule to an agent includes a reference to a registered person to whom the Schedule applies.

1 Knowledge of Act and regulations

An agent must have a knowledge and understanding of the Act and the regulations under the Act, and such other laws relevant to the category of licence or certificate of registration held (including, laws relating to residential tenancy, fair trading, competition and consumer protection, anti-discrimination and privacy) as may be necessary to enable the agent to exercise his or her functions as agent lawfully.

2 Fiduciary obligations

An agent must comply with the fiduciary obligations arising as an agent.

3 Honesty, fairness and professionalism

(1) An agent must act honestly, fairly and professionally with all parties in a transaction.

(2) An agent must not mislead or deceive any parties in negotiations or a transaction.

4 Skill, care and diligence

An agent must exercise reasonable skill, care and diligence.

5 High pressure tactics, harassment or unconscionable conduct

An agent must not engage in high pressure tactics, harassment or harsh or unconscionable conduct.

6 To act in client's best interests

An agent must act in the client's best interests at all times unless it would be contrary to the Act or regulations under the Act or otherwise unlawful to do so.

7 Confidentiality

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An agent must not, at any time, use or disclose any confidential information obtained while acting on behalf of a client or dealing with a customer, unless:

(a) the client or customer authorises the disclosure, or

(b) the agent is permitted or compelled by law to disclose the information.

8 To act in accordance with client authority

(1) An agent must not act as an agent or represent himself or herself as acting as an agent on behalf of a person without written authority.

(2) This clause does not apply to a sale solely of livestock.

9 To act in accordance with client's instructions

An agent must act in accordance with a client's instructions unless it would be contrary to the Act or regulations under the Act or otherwise unlawful to do so.

10 Licensee must ensure employees comply with the Act and regulations

An agent who is the licensee-in-charge at a place of business of a licensee must take reasonable steps to ensure other licensees or registered persons employed in the business conducted there comply with the Act and regulations under the Act.

11 Conflicts of interest

An agent must not accept an appointment to act, or continue to act, as an agent if doing so would place the agent's interests in conflict with the client's interests.

12 Referral to service provider

(1) An agent who refers a person to a service provider must not falsely represent to the person that the service provider is independent of the agent.

(2) For the purposes of this clause, a service provider is considered to be independent of an agent if:

(a) the agent receives no rebate, discount, commission or benefit for referring a client or customer to the service provider, and

(b) the agent does not have a personal or commercial relationship with the service provider.

(3) The following are examples of a personal or commercial relationship:

(a) a family relationship,

(b) a business relationship,

(c) a fiduciary relationship,

(d) a relationship in which one person is accustomed, or obliged, to act in accordance with the directions, instructions or wishes of the other person.

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(4) If the service provider is not independent of the agent, the agent must disclose to the person:

(a) the nature of any relationship, whether personal or commercial, the agent has with the service provider, and

(b) the nature and value of any rebate, discount, commission or benefit the agent may receive, or expects to receive, by referring the client or customer to the service provider.

13 Licensee not to recommend engagement of services of solicitor or licensed conveyancer acting for other party

(1) An agent must not recommend that a person engage the services of a solicitor or licensed conveyancer, or firm of solicitors or licensed conveyancers, if the agent knows that the solicitor or licensed conveyancer, or the firm of solicitors or licensed conveyancers, acts or will be acting for the other party to the agreement concerned.

(2) Subclause (1) does not prevent an agent recommending that a person engage the services of a solicitor or licensed conveyancer if no other solicitor or licensed conveyancer is available (for example, in a remote location).

(3) If no other solicitor or licensed conveyancer is available, the agent must, in recommending the engagement of the solicitor or conveyancer, advise the person that the solicitor or licensed conveyancer is or will be acting for the other party.

14 Inducements

An agent must not offer to provide to any other person any gift, favour or benefit, whether monetary or otherwise, in order to induce a third person to engage the services of the agent as agent in respect of any matter.

15 (Repealed)

16 Insertion of material particulars in documents

An agent must not submit or tender to any person for signature a document, or cause or permit any document to be submitted or tendered to any person for signature, unless at the time of submission or tendering of the document all material particulars have been inserted in the document.

17 Duty to provide copy of signed documents

An agent who submits or tenders a document to any person for signature, or who causes or permits a document to be submitted or tendered to any person for signature, must immediately after the person has signed the document give a copy of the document to the person.

18 Representations about the Act or regulations

(1) An agent must not falsely represent to a person the nature or effect of a provision of the Act or any regulation under the Act.

(2) An agent must not, either expressly or impliedly, falsely represent, whether in writing or otherwise, to a person that a particular form of agency agreement or any term of such an agreement is required by the Act or a regulation under the Act.

19 Agency agreements must comply with regulations

An agent must not enter into an agency agreement unless the agreement complies with any applicable requirements of this Regulation, as required by section 55 of the Act.

20 Agent to pay rental income monthly to landlord

An agent must pay rental money for each calendar month (less any authorised expenses) owing to a landlord under a residential tenancy agreement at the end of each calendar month, unless instructed otherwise by the landlord.

21 Licensees and certificate holders not to receive certain gifts or benefits over a certain amount

The amount prescribed for the purposes of section 53F(2)(d) of the Act is $60.

22 Rental money and sales money to be in separate trust accounts

An agent who is the licensee in charge of a business must ensure that there are separate trust accounts for rental money and sales money and that money from rentals and sales are paid into the appropriate accounts.

Sales specific Agent Rules of Conduct

Besides the General Rules of conduct that are applicable to all agents, the below Rules of Conduct are applicable to agents working in a sales role.

Property and Stock Agents Regulation 2014

Schedule 2 Rules specific to real estate agents and assistant real estate agents

(Clause 7)

Note. Clause 7 provides that a reference in this Schedule to an agent includes a reference to a registered person to whom the Schedule applies.

Part 1 Real estate and business sales

1A Application of Part

This Part applies to real estate agents and assistant real estate agents who perform real estate sales or leasing functions in relation to the sale or purchase of land and business agent functions.

1 Preliminary physical inspection of property for sale to be conducted by agent

An agent must not act on behalf of a vendor of a property or business unless the agent has conducted a preliminary physical inspection of the property or business.

2 Sales inspection report required for property

On completion of the inspection required by clause 1, an agent must prepare and give to the vendor a sales inspection report for the property or business. The report must specify the following and be signed by the agent:

(a) the name and address of the vendor,

(b) the date of preparation of the report,

(c) the agent's name, business address and telephone number,

(d) a description of the property or business, including the address of the property or business and such other details as may be necessary to enable the property or business to be readily identified, including the business name and its Australian Business Number where relevant,

(e) a description of any fittings and fixtures that are to be included in the sale of the property, and, for business sales, a description of inclusions to be included in the sale such as goodwill, plant, fittings, stock in inventory and work in progress, together with details of any encumbrances affecting those inclusions,

(f) any terms and conditions of sale known to the agent (for example, whether or not vacant possession is to be given),

(g) the agent's recommendation as to the most suitable method of sale of the property or business,

(h) the agent's estimate of the selling price (or price range) for the property or business,

(i) details of any covenants, easements, defects, local government notices or orders affecting the property or business that are known to the agent,

(j) details of any special instructions about the marketing and showing of the property or business,

(k) the name, business address, telephone number and address for service of documents of the solicitor of the vendor.

3 Vendor to be informed of an offer

(1) The agent must, unless the vendor has instructed to the contrary in writing, inform the vendor of all offers of purchase as soon as practicable after receiving each offer up until exchange of contracts has taken place.

(2) If the agent is not going to inform the vendor of an offer, the agent must inform the person who made the offer that the offer will not be submitted to the vendor.

(3) The agent may inform the vendor of an offer orally or in writing and must identify the party by whom the offer is made. If the vendor is informed orally, the agent must confirm the information in writing.

(4) This clause does not apply to bids made in the course of an auction.

3A Confirmation of specific instructions—sale of business

(1) Before or at the time of entering into an agency agreement under which an agent will act for the vendor on the sale of the business, the agent must prepare for inclusion in the agency agreement written confirmation of any specific instructions given to the agent by the vendor before the agreement is entered into about any of the following—(a) inclusions to be included in the sale such as goodwill, plant, fittings, stock in inventory and work in progress, together with details of any encumbrances affecting those inclusions,

(b) arrangements for the transfer to the purchaser of any liability for the leasing or hire purchase of any of those inclusions,

(c) the marketing of the business,(d) the entitlement of prospective purchasers to inspect the premises of the business and the circumstances under which such an inspection can be made,

(e) the entitlement of prospective purchasers to inspect records, books of account and other documents concerning the business and the circumstances under which such an inspection can be made.

(2) The written confirmation may be prepared and be included as part of theagency agreement.

4 Setting aside minimum or reserve price at auction

When the bidding at an auction does not reach the minimum or reserve price fixed for the property or business by the vendor, the licensee conducting the auction must not set aside that price without the express permission of the vendor or a person given that permission by the vendor.

5 Information to be given when expression of interest deposit paid

(1) When an agent issues a receipt for an expression of interest deposit made prior to exchange of contracts, the agent must inform the person who paid the deposit that the vendor has no obligation to sell the property or business or the purchaser to buy the property or business and the deposit is refundable if a contract for the sale of the property or business is not entered into. The information must be provided in writing and may be provided on the receipt.

(2) The agent must promptly inform the vendor when an expression of interest deposit has been paid.

(3) The agent must promptly inform the person who paid the deposit when the agent becomes aware of any subsequent offer to purchase the property or business received from any other person. The agent must also advise the person who paid the deposit that they have the right to make further offers up until exchange of contracts has taken place.

6 Notifying managing agent of appointment to sell residential property or a business

If an agent accepts an appointment to sell residential property or a business that is tenanted, the agent must immediately give written notice of the appointment to any agent responsible for managing the property or business.

7 Licensee must not accept payment for a referral

An agent must not demand or accept a fee or other valuable consideration for referring the person on behalf of whom the agent is acting on the sale to a buyer's agent.

8 Bidding on behalf of telephone bidder

An agent must not bid at an auction on behalf of a person who is giving instructions to the agent by telephone unless:

(a) the written authority on the basis of which the agent bids on behalf of the person contains an acknowledgment that the person has been given a copy of the conditions that are applicable in respect of the sale, and

(b) the agent is satisfied that the person has been given a copy of those conditions.

9 Agent participating in exchange of contracts for residential property or a business

If an agent participates in the exchange or making of a contract for the sale of residential property or a business, the agent must serve a copy of the contract within 2 business days on:

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(a) each party to the contract, unless paragraph (b) requires the agent to serve a copy of the contract on a solicitor or conveyancer acting for the party, or

(b) the solicitor or conveyancer acting for a party to the contract if the party has notified the agent, or it is apparent from the contract, that a solicitor or conveyancer is acting for the party.

9A Statement of property details

At the time of entering into an agency agreement with a person on behalf of whom an agent is to act as buyer's agent, the agent must prepare and give the person a statement of property details that is signed by the agent and specifies the following—

(a) details known to the agent of the type of property to be purchased,

(b) details of any special instructions about the property to be purchased(for example, an instruction that vacant possession is required in the case of a rented property).

Note. These details can be changed by agreement between the parties or as providedby the agency agreement.

9B Person on behalf of whom agent is acting as buyer's agent to be informed of negotiations

(1) An agent acting as a buyer's agent for a person must keep the person informed of each stage of the negotiation of a purchase price as instructed by the person.

(2) This clause does not apply to bids made in the course of an auction.

9C Buyer's agent to obtain best possible purchase price

An agent acting as a buyer's agent must use the agent's best efforts to obtain the best possible purchase price, without breaching standards of ethical conduct or engaging in conduct that is contrary to good agency practice.

9D Buyer's agent not to exceed maximum purchase price fixed by client in negotiations or at auction

(1) In negotiations for the purchase of a property, an agent acting as a buyer's agent for a person (the client) must not exceed the maximum price fixed by the client without the express written authorisation of the client or a person authorised by the client.

(2) When the bidding at an auction exceeds the maximum price fixed by the client, the agent must not continue bidding without the express authorisation of the client or a person authorised by the client.

9E Information to be given when expression of interest deposit paid

(1) An agent acting as a buyer's agent for a person must inform the person of the following if the person pays an expression of interest deposit in respect of the proposed purchase of a property prior to the exchange of contracts—

(a) that the vendor has no obligation to sell the property,

(b) that the person has no obligation to buy the property,

(c) that the deposit is refundable if a contract for the sale of the property is not entered into.

(2) The information must be provided in writing and may be provided on the receipt issued by the vendor or the vendor's agent

(3) An agent acting as a buyer's agent for a person must promptly inform the person if the agent becomes aware of any subsequent offers to purchase the property on which the expression of interest deposit has been paid.

9F Agent must not accept payment for a referral

An agent acting as a buyer's agent for a person must not demand or accept a fee or other valuable consideration for referring the person to a selling agent.

Supervision Guidelines and Sales File documents

Section 32 Property and Stock Agents Act 2002 requires a licensee of an agency to properly supervise the business carried on by the agency.

NSW Fair Trading publish guidelines under Section 32 of the Property Stock and Business Agents Act.

You can access the NSW Fair Trading Supervision Guidelines here:

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/running-a-property-agency/supervision-guidelines

Refer to Part C Section 6 for the list of mandatory documents that must be contained in the Sales File.

Complaints

Complaint handling procedures that agents must follow are contained in Section 7 of the Supervision Guidelines:

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/running-a-property-agency/supervision-guidelines

NSW Fair Trading Fraud Prevention Guidelines

When selling a property, the agent must confirm that they are dealing with the true owner(s) of the property [i.e. the registered proprietors or their properly appointed representative].

NSW Fair Trading provides a Proof of Identity Checklist which the agent uses to confirm the identity of the property owner.

The guidelines list which proof of identity documents that agent should request to view, as well as documents to prove that the person is the owner of the property.

https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0008/371888/Real_estate_fraud_prevention_guidelines.pdf

NSW FAIR TRADING

Real Estate Fraud
Prevention Guidelines

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There is a prescribed format for Contract for Sale and Purchase of Land in NSW.

Property and Stock Agents Act 2002

Part 5 Residential property and rural land sales

Division 1 Contract for sale of residential property

63 Proposed contract for sale of residential property

(1) In this section:

purchaser includes a grantee of an option.

(2) A real estate agent must not offer residential property for sale unless the required documents are all available for inspection at the real estate agent's registered office by a prospective purchaser or agent for a prospective purchaser at all times at which an offer to purchase the property may be made (or at such other place or at such other times as may be prescribed by the regulations).

(3) A real estate agent is considered to offer residential property for sale when the agent, expressly or by implication:

(a) indicates that residential property is for sale or is to be auctioned at any future time, or

(b) offers to sell residential property, or

(c) invites an offer to purchase residential property, or

(d) indicates that a person may be willing to grant an option to purchase residential property.

(4) The required documents for the purposes of this section are:

(a) a copy of the proposed contract for the sale of the property (excluding particulars of the purchaser and purchase price), and

(b) the documents required by section 52A of the Conveyancing Act 1919 to be attached to the contract before signature by the purchaser, and

(c) in the case of an option to purchase residential property—a copy of the proposed option document (excluding particulars of the purchaser and consideration for the option).

(5) Without limiting this section, a real estate agent is taken to indicate that residential property is for sale if the real estate agent does any of the following or causes or permits any of the following to be done:

(a) advertises or promotes the property in any way that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale,

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(b) places a sign on or near the property that, in the circumstances, may reasonably be taken to indicate that the property is or may be for sale,

(c) advertises or in any way gives notice that the property is to be auctioned at any future time,

(d) places on display particulars or a description of, or a photograph, drawing or other representation of, the property in or on any premises, vehicle or place where the real estate agent conducts business as a real estate agent,

(e) shows the property to a prospective purchaser or gives the address of the property to a prospective purchaser.

(6) This section does not apply to anything done by a real estate agent when acting on behalf of a prospective purchaser of residential property.

(7) The regulations may create exceptions to this section.

Maximum penalty: 100 penalty units.

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Sales agency agreements

A written agency agreement must be prepared for all services to be performed by an agent for a client, unless the services relate only to livestock.

It is important to ensure the agreement is prepared, signed and served correctly – or you may lose your entitlement to be paid commission and recoup expenses.

An agent is not entitled to any commission or expenses for services performed for a client unless:

- a written agency agreement has been entered into for the services
- the agreement was signed by the licensee and the client
- the agreement contains the terms required by the regulations and
- within 48 hours after the client signs the agreement, a copy of the agreement signed by the licensee is served on the client (in limited circumstances, a court or tribunal can wholly or partly award commission to the agent if the signed copy of the agreement was not correctly served (see section 55 of the Act)).

If the agency agreement relates to residential property or rural land, it must contain a statement identifying the source and estimated amount of all rebates, discounts and commissions that the licensee will or may receive in respect of the expenses payable by the client under the agreement (see section 57 of the Act). An agent is not entitled to any expenses from the client if these disclosures are not made.

If the agreement is for the sale of residential property, the client must be given a copy of the consumer fact sheet 'Agency agreements for the sale of residential property'.

The fact sheet can be given to the client up to one month before the agreement is signed (see section 56 of the PSAA 2002).

If the agreement is for the sale of residential property or rural land, the client has a cooling-off period of one business day or Saturday. During the cooling-off period, the client can cancel the agreement by giving you written notice.

Note: this cooling off period may be waivered. To do so the seller must also sign a 'waiver' form.

You can read more about agency agreements here:

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/agency-agreements

Terms within the agency agreement

Some terms within a sales agency authority are prescribed (i.e. MUST be in the agreement) under the Property and Stock Agents Regulation 2014.

Schedule 7 covers terms that apply to all agency agreements:

https://www.legislation.nsw.gov.au/#/view/regulation/2014/563/sch7

Schedule 8 covers terms that are specific to an agency agreement for the sale of residential property:

https://www.legislation.nsw.gov.au/#/view/regulation/2014/563/sch8

You can read these terms within the whole Regulation here:

https://www.legislation.nsw.gov.au/#/view/regulation/2014/563

Agency agreement must disclose any rebates, discounts or commissions the agent is to receive

Property and Stock Agents Act 2002

Part 4 Agency agreements

Division 1 Requirements for agency agreements

57 Agency agreement must disclose rebates, discounts and commissions

(1) A licensee is not entitled to any expenses from a person for or in connection with services performed by the licensee in the capacity of licensee for or on behalf of the person in connection with a real estate transaction unless the agency agreement pursuant to which the licensee performs those services contains a statement:

(a) identifying the source of all rebates, discounts or commissions that the licensee will or may receive in respect of those expenses, and

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(b) specifying the estimated amount of those rebates, discounts or commissions (to the extent that the amount can reasonably be estimated).

(2) This section does not apply in respect of a real estate transaction relating to commercial land, being land used or intended to be used solely or principally for commercial, business or industrial purposes, but not including land used or intended to be used solely or principally for agricultural or pastoral purposes.

Sales Inspection Report to be part of Sales Agency Authority

When an agent lists a property for sale, they must carry out a physical inspection of the property and complete a Sales Inspection Report, which must be part of the sales agency authority.

Property and Stock Agents Regulation 2014

Schedule 2 Rules specific to real estate agents and assistant real estate agents

Part 1 Real estate and business sales

An agent must not act on behalf of a vendor of a property or business unless the agent has conducted a preliminary physical inspection of the property or business.

2 Sales inspection report required for property

On completion of the inspection required by clause 1, an agent must prepare and give to the vendor a sales inspection report for the property or business. The report must specify the following and be signed by the agent:

(a) the name and address of the vendor,

(b) the date of preparation of the report,

(c) the agent's name, business address and telephone number,

(d) a description of the property or business, including the address of the property or business and such other details as may be necessary to enable the property or business to be readily identified, including the business name and its Australian Business Number where relevant,

(e) a description of any fittings and fixtures that are to be included in the sale of the property, and, for business sales, a description of inclusions to be included in the sale such as goodwill, plant, fittings, stock in inventory and work in progress, together with details of any encumbrances affecting those inclusions,

(f) any terms and conditions of sale known to the agent (for example, whether or not vacant possession is to be given),

(g) the agent's recommendation as to the most suitable method of sale of the property or business,

(h) the agent's estimate of the selling price (or price range) for the property or business,

(i) details of any covenants, easements, defects, local government notices or orders affecting the property or business that are known to the agent,

(j) details of any special instructions about the marketing and showing of the property or business,

(k) the name, business address, telephone number and address for service of documents of the solicitor of the vendor.

Schedule 8 Terms specific to agency agreement for sale of residential property

8 A sales inspection report to form part of the agreement

The agreement must include a copy of any sales inspection report prepared by the agent and given to the person on behalf of whom the agent is acting under clause 2 of Schedule 2.

As an agent, you must:

- include your reasonable estimate of a property's likely selling price in the agency agreement
- provide evidence to the seller of how you estimated the selling price
- ensure the highest price in a price range does not exceed the lower price by more than 10 percent (for example, $500,000-$550,000)
- record in writing statements made about the price while a property is marketed
- ensure your estimated selling price remains reasonable by:
  - revising it as soon as you know (or should be aware) of evidence or circumstances that changes it
  - notifying the seller of the revised price
  - amending the agency agreement with the revised estimate
  - taking all reasonable steps as soon as is practical to update any marketing of the property with the revised estimated selling price.

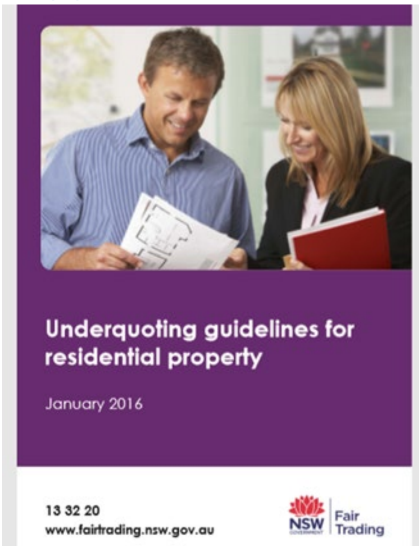
You must not:

- provide any price estimate less than what you have reasonably estimated that a property is worth (as recorded in the agency agreement with the seller). This applies to advertising the property or in any communication with prospective buyers about the property's likely selling price
- use any statements such as "offers above" or "offers over" an amount, or "plus" a particular price (for example, $500,000+), which could underquote or obscure a property's estimated value.

Underquoting is an offence under the PSAA 2002. Agents face fines of up to $22,000 for failing to comply with the law. Agents may also lose their commission and fees earned from the sale of an underquoted property.

NSW Fair Trading produce the document 'Underquoting guidelines for residential property' It is vital that you read and understand this document:

https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0010/367975/Underquoting_guidelines_for_residential_property.pdf



Consumer Protection legislation and real estate sales and marketing

The ACCC regulates the Competition and Consumer Act 2010, which is Federal legislation.

https://www.accc.gov.au/consumers/health-home-travel/real-estate

Agents need to be careful that they do not engage in:

1. **Misrepresentation:**

https://www.accc.gov.au/consumers/misleading-claims-advertising/false-or-misleading-claims

2. **Misleading and deceptive conduct:**

https://www.accc.gov.au/publications/advertising-selling/advertising-and-selling-guide/avoid-misleading-or-deceptive-claims-or-conduct/misleading-or-deceptive-conduct

3. Unconscionable Conduct:

https://www.accc.gov.au/business/anti-competitive-behaviour/unconscionable-conduct

Warning regarding financial and investment advice provided by a real estate agent

PROPERTY AND STOCK AGENTS ACT 2002 - SECT 46

Financial and investment advice by real estate agents

46 Financial and investment advice by real estate agents

(1) The regulations may make provision for or with respect to requiring a real estate agent who provides financial or investment advice to a person in connection with the sale or purchase of land to provide to the person specified information or warnings.

(2) A real estate agent who fails to comply with a requirement of the regulations under this section is guilty of an offence.

Maximum penalty: 200 penalty units.

NSW Fair Trading Advertising Guidelines

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/running-a-property-agency/advertising-guidelines

NOTE: If your agency receives any rebates or discounts in advertising, these must be passed along to the client and must be disclosed on the appointment of agent. It is illegal for the agent to make a secret profit from advertising.

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Section 52 (1) of the PSAA 2002 states that it is an offence against the Act if in the course of performing functions as a licensee or registered person, another person is induced to enter into any contract or arrangement through:

- a statement, representation or promise which is false, misleading or deceptive (whether to the knowledge of the person or not) or by
- any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know.

Section 54 of the Property and Stock Agents Regulation 2014 provides the detailed list of what is considered to be material fact.

These include that the property:

- flooded from a natural weather event or was affected by bush fire in the last 5 years
- has significant health or safety risks
- is listed on the loose-fill asbestos insulation register
- has been the scene of a crime of murder or manslaughter in the last 5 years
- has been used for the production or supply of a prohibited drug or plant in the last 2 years
- is, or is a part of, a building that contains external combustible cladding to which:
- a fire safety order, or a notice of intention to issue a fire safety order, has been issued requiring the building to be rectified regarding the cladding
- a building product rectification order, or a notice of intention to issue a building product rectification order, has been issued requiring the building to be rectified regarding the cladding
- a development application or complying development certificate application has been lodged for rectification regarding the cladding.

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NSW Fair Trading produce Misrepresentation Guidelines which you should ensure you are familiar with. The Misrepresentation Guidelines cover:

- Publication of false, misleading or deceptive material
- Predictions
- Concealment and Silence
- Intention to mislead is not relevant
- What is a material fact?
- At what point should a material fact be disclosed?
- Difference between personal information and material facts
- Selling price, price range and method of sale
- Understanding selling price estimates
- Loose-fill asbestos insulation register

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/running-a-property-agency/misrepresentation-guidelines

ACCC Consumer Protection and real estate:

https://www.accc.gov.au/consumers/health-home-travel/real-estate

Disclosure of Beneficial Interest to sellers

If a real estate agent, a close relative or employee, intends to purchase a property that their agency has listed, this must be disclosed to the seller and the seller must consent in writing (prior to the sale) in a Section 49 Form approved by NSW Fair Trading.
Refer to Section 49 Property and Stock Agents Act 2002.

Maximum penalty: 200 penalty units or imprisonment for 2 years, or both.

The form on this link must be used:

https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0011/367868/psbasection49form.pdf

The form must be given to the seller/prospective buyer at the time you refer the person for the professional service

Disclosure of information to Buyers and Sellers about referrals

The agent is required to disclose to buyers and sellers any relationship that the agent may have with people to whom the buyer or seller is referred for professional services. The purpose of this form is to deal with concerns about conflicts of interest.

Refer to Section 47 Property and Stock Agents Act 2002.

The form on this link must be used:

https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0010/367867/psbasection47form.pdf

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The Spam Act

The Spam Act 2003 sets out Australia's spam rules. They include when commercial electronic messages can be sent and what information must be included in the message.

The key rule is that commercial electronic messages cannot be sent without permission (or consent). You must comply with these rules if you're planning to send any commercial electronic message to an electronic address, or have engaged someone to send them on your behalf. This includes messages sent by:

- email
- SMS
- MMS
- instant message.

The rules apply to messages sent to an electronic address, like a mobile number or email address, which contain a commercial element. This includes an offer to supply, provide, advertise or solicit:

- goods or services
- land, or an interest in land
- a or investment opportunity.

The rules also apply to a person who assists or enables a person to dishonestly obtain property or a financial advantage.

Messages that are factual in nature are only required to comply with a limited section of the Spam Act. Take a look at the information below on exemptions from spam rules.

Key rules

There are three key parts to the rules that you need to be aware of:

1. Permission (consent)—messages can only be sent with the permission of the person who owns the account for the address (usually the recipient).

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2. Identification—messages must contain the name and contact details of the person or business that authorised the message (sender identification).

3. Unsubscribe—messages must contain a low (or no cost) way for the recipient to stop getting messages (to 'opt out' or unsubscribe).

To find out more information about the Spam Act, visit:

https://www.acma.gov.au/theACMA/spam-industry-obligations

The Do Not Call Register

The provisions of the Do Not Call Register need to be considered when an agent is carrying out telemarketing. The Do Not Call Register Act 2006 established the Australian Communications & Media Authority (ACMA) Do Not Call Register, which provides Australians with the opportunity to opt out of receiving most telemarketing calls. It is prohibited under this legislation to make an unsolicited telemarketing call to a number listed on the register without consent, unless the call falls within an exempt category.

You can find out more about the Do Not Call Register here:

https://www.donotcall.gov.au/

Property and Stock Agents Regulation 2014

Schedule 2 Rules specific to real estate agents and assistant real estate agents

Part 1 Real estate and business sales

3 Vendor to be informed of an offer

(1) The agent must, unless the vendor has instructed to the contrary in writing, inform the vendor of all offers of purchase as soon as practicable after receiving each offer up until exchange of contracts has taken place.

(2) If the agent is not going to inform the vendor of an offer, the agent must inform the person who made the offer that the offer will not be submitted to the vendor.

(3) The agent may inform the vendor of an offer orally or in writing and must identify the party by whom the offer is made. If the vendor is informed orally, the agent must confirm the information in writing.

(4) This clause does not apply to bids made in the course of an auction.

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Exchange of Contracts

Refer to Conveyancing Act 1919 PART 4 - SALES AND OTHER TRANSACTIONS Division 8

The contract exchange is a critical point in the sale process. The buyer or seller is not legally bound until signed copies of the contract are exchanged.

Buyers of residential property have a cooling off period of 5 working days following the exchange of contracts during which they can withdraw from the sale. This is the case unless the cooling off period has been waived by the buyer.

If the agent arranges exchange of contracts, the agent must give copies of the signed contract to each party or their solicitor or conveyancer within 2 business days.

The cooling-off period starts as soon as contracts are exchanged and ends at 5pm on the fifth business day after exchange. During this period, the buyer may get out of the contract as long as they give written notice. If the buyer uses their cooling-off rights and withdraws from the contract during the five business-day period, they will have to pay the seller 0.25 percent of the purchase price. This works out to be $250 for every $100,000.

The cooling-off period can be waived, reduced or extended by negotiation. A buyer can waive the cooling-off period by giving the seller a '66W certificate'. It is also possible to reduce or extend the cooling-off period by written agreement with the seller.

There is no cooling-off period for sellers. Once contracts have been exchanged, sellers are generally bound to complete the agreement. There is no cooling-off period when purchasing at auction or exchange contracts on the same day as the auction after it is passed in.

You can find out more about the contract for sale exchange process here:

https://www.lawsociety.com.au/for-the-public/know-your-rights/buying-a-home

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The conveyancing process

Conveyancing can involve these steps:

- examining the contract for sale
- arranging building and pest inspections
- examining a strata inspection report (if the property is in a strata scheme)
- arranging finance if necessary
- exchanging the contract of sale
- paying the deposit
- arranging payment of stamp duties
- preparing and examining the mortgage agreement
- checking if there are outstanding arrears or land tax obligations
- checking if swimming pool compliance documentation is needed
- finding out if any government authority (e.g. local council, Sydney Water, NSW Roads and Maritime Services) has a vested interest in the land or if any planned development could affect the property
- finding out any information that may not have been previously disclosed such as a fence dispute or illegal building work
- calculating adjustments for council and water rates for the property settlement
- overseeing the change of title with Land and Property Information NSW
- completing any final checks prior to settlement
- attending settlement.

Privacy legislation and sales

Agents need to consider the requirements of the Australian Privacy Principles when dealing with people's personal information. They cannot pass on people's personal information to another party without their permission. They also need to advise parties, when they are collecting personal information, what it will be used for.

You can locate information about the Privacy Act and a link to the Privacy Principles:

https://www.oaic.gov.au/privacy/the-privacy-act/

Selling a tenanted property

A tenanted property can still be sold, however there are some considerations.

If there is a current fixed term tenancy in place (i.e. the last date on the term of the tenancy agreement has not yet expired), the tenant cannot be made to vacate the property. The tenant is entitled to stay in the property until the end of their tenancy. The options for the sale of the property would thus be:

1. sell to an investor who wants to rent the property out
2. sell to a buyer who is prepared to wait until the end of the lease to move in

If the tenancy agreement is in the periodic part of the tenancy (after the fixed term has expired and no new fixed term has been entered into), then the property can be sold and the tenant can be given a 30 days termination notice if vacant possession is specified in contract for sale and contract has been exchanged.

Summary:

REASON	**NOTICE PERIOD**
ACCESS: To obtain a property valuation (once in a 12-month period)	At least seven days notice
ACCESS: To show the premises to prospective buyers	- Two weeks written notice before the first inspection. - After the first inspection, you can agree on a suitable time frame but no more than 2 inspections per week with 48 hours notice.
To terminate the tenancy once the property is sold	30 days – if the premises have been sold after the fixed term has ended and vacant possession is required by the buyer under the terms of the sale contract

There are very specific requirements regarding photographing the rental property, refer to the Property Management Related Legislation document in your Resources.

Selling a property with a pool or spa

The Swimming Pools Act and Swimming Pool Amendment Act 2012 impose specific legislation that you will need to be aware of if you are selling a property with a pool.

If a property with a swimming pool/spa is being sold, then the property must have either:

- A certificate of compliance; or
- A relevant occupation certificate and a certificate of registration; or
- A certificate of non-compliance.

When a purchaser buys a property with a non-compliant pool, they have 90 days from settlement to fix any areas of non-compliance.

This requirement does not apply to a lot in a strata scheme or in a community scheme if that strata or community scheme has more than two lots, or if the sales contract is for an off-the-plan property.

This is something that should be discussed with the seller when you list the property for sale.

NOTE: Not attaching the certificates when required may allow the purchaser to rescind the contract within 14 days of exchange, unless settlement has already occurred.
If a certificate of non-compliance is attached to the contract for sale, the seller is transferring the obligation to obtain a certificate of compliance to the purchaser. The purchaser will have 90 days from the date of settlement to rectify defects listed in the certificate of non-compliance and obtain a certificate of compliance.

You find out more information about selling a property with a pool or spa by visiting the NSW Fair Trading web site:

https://www.fairtrading.nsw.gov.au/housing-and-property/building-and-renovating/pools-and-pool-safety/swimming-pools-and-spas

Auctions

Bidders Guide

NSW Fair Trading produce a Fact Sheet Bidders Guide which must be given to all bidders prior to the auction:

You can read the Bidders Guide here:

https://www.fairtrading.nsw.gov.au/housing-and-property/buying-and-selling-property/buying-a-property/bidders-guide

Bidders Record

For each auction, a Bidders Record of everyone registered to bid, needs to be made. Each bidder must be given a bidder's number to display. The Bidders Record can be made by:

- the selling agent, or
- another agent engaged to act in respect of the sale or acting for or on behalf of the auctioneer.

Important: The selling agent must make sure that all potential bidders receive a copy of the Bidder's guide prior to auction.

Details to be included in the Bidders Record

The Bidders Record must be in English and must include:

- the date and place of the auction
- the address of the property or properties being auctioned
- the name of the owner of the property at the time of the auction
- the names and licence numbers of the selling agent and the auctioneer
- each bidder's name, address, the identifying number of their proof of identity and the bidder number allocated to the person for the auction
- if the person registering is a licensed agent acting for a buyer – their licence number
- if the bidder is bidding on behalf of someone else, the other person's name, address and the identifying number of their proof of identity. This requirement does not apply if the person registering has a power of attorney to act for the other person – they can simply register to bid in their own right
- the highest bid accepted and vendor bid (if any).

Reserve Price

Before the auction, the seller will set a minimum price with the auctioneer. If the reserve price does not reach that minimum price during bidding, the auctioneer will privately ask the seller if they will sell at a lower price.

Passed In

If bids do not meet the seller's reserve price, the auctioneer will seek more bids. If bids still do not meet the reserve, the property may be 'passed in' or withdrawn from auction. The highest bidder then gets first right to negotiate with the seller.

Fall of the hammer

Towards the end of the auction, the auctioneer will call for any final bids. Once there are no more bids, the auctioneer will count down the 'fall of the hammer', which will signal the end of the auction. No bids can be made after the fall of the hammer and the highest bidder is legally obliged to sign and exchange contracts.

You should read through the NSW Fair Trading web site information 'Auction Laws and Conditions':

https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/auction-laws-and-conditions

Also, the following sections of the legislation are relevant to the auction process.

Property and Stock Agents Act 2002:

- Division 2 Bidding at auction of residential property or rural land
- Part 6 Auctions — general

Property and Stock Agents Regulation 2014:

- Part 3 Auctions

Deposits taken on listed properties for sale are trust account funds, as are any marketing fees paid in advance to the agent. More detailed trust accounting specific information can be located in the trust accounting unit of competency. However, in general the main aspects to be aware of is the money is not for the use of paying agency bills, it is client money, and there is a requirement to bank the money promptly:

Property and Stock Agents Regulation 2014

Part 4 Trust money

18 Banking of trust money

A licensee who receives trust money must pay it into the licensee's trust account:

(a) before the end of the next banking day after the day of its receipt, if that is practicable, or

(b) if that is not practicable, as soon as practicable after that day.

Maximum penalty:

(a) 40 penalty units in the case of a corporation, or

(b) 20 penalty units in any other case.

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Record keeping

Records must be in English and kept for 3 years.

Property and Stock Agents Act 2002

Part 8 Records

Division 1 Keeping and inspection of records

104 Licensee to make and keep certain records

(1) A licensee must make the following records:

(a) a record containing full particulars of all transactions by or with the licensee in connection with his or her business as a licensee,

(b) such other records relating to the licensee's business as a licensee as may be required by the regulations.

(2) A record required by this section must be kept for at least 3 years after it is made.

(3) The record must be kept:

(a) by the licensee at the licensee's registered office (while the licensee remains a licensee), or

(b) if the licensee ceases to be a licensee, by the former licensee in his or her possession, custody or control unless the former licensee authorises some other person to have possession, custody or control of the record, or

(c) by any other person who obtains possession, custody or control of the record whether as a result of being the personal representative of a deceased licensee or by transfer of the business of the licensee or otherwise.

(4) The regulations may make provision for the manner and form in which a record required by this section is to be kept.

(5) An entry in a record made under this section and kept at the registered office of a licensee is presumed, unless the contrary is proved, to have been made by or with the authority of the licensee.

(6) A person who contravenes a provision of this section is guilty of an offence.

Maximum penalty: 50 penalty units.

105 Inspection of licensee's records

(1) A licensee's records are at all reasonable times open to inspection by an authorised officer.

(2) An authorised officer may require a person who has possession, custody or control of a licensee's records:

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(a) to produce the licensee’s records for inspection,

(b) to furnish all authorities and orders to financial institutions as may be reasonably required of the person.

(3) If a licensee is absent from an office or place of business of the licensee, any employee or agent of the licensee for the time being having the apparent control or charge of the office or place of business is taken to have possession, custody or control of the licensee’s records at that office or place of business.

(4) An authorised officer may take copies of or extracts from, or make notes from, any licensee’s records produced to the authorised officer under this section and for that purpose may take temporary possession of those records.

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