TAFE College NZ Ltd

NZ Certificate in Real Estate (Salesperson) (Level 4)

MODULE 2 – UNIT STANDARD 23141 (V6)

Demonstrate knowledge of legislation as applied to real estate licensees.

(Level 5, Credits 4)

Learner Guide

TRANING AND FURTHER EDUCATION

TABLE OF CONTENTS

There are various issues and the associated legislation and requirements that impact on a licensee carrying out real estate agency work.

These issues are as follows:

- Health and safety.
- Protecting the rights of consumers.
- Transactions involving tenanted properties.
- Personal taxation.
- Building Act 2004
    - Fencing and residential swimming pool safety barriers.
- Anti-Money Laundering and Counter Financing of Terrorism Act

THE HEALTH AND SAFETY AT WORK ACT 2015

The primary health and safety legislation that has importance for real estate licensees when carrying out real estate work is the Health and Safety at Work Act 2015.

It is important for all licensees to understand their health and safety responsibilities and the implications of failure to adequately protect self, colleagues and consumers from harm.

Under the Health and Safety at Work Act 2015, various parties have a duty to ensure that no action or inaction by them, while in the workplace, causes harm to any other person.

Use this link to see the Health and Safety Act 2015 The Health and Safety at Work Act 2015.

The Health and Safety at Work Act 2015 classes duty holders as follows:

- PCBUs (persons conducting a business or undertaking, including employers and the self-employed).
- Officers (this includes directors, partners, and higher management such as a chief executive).
- Workers (persons carrying out work in any capacity for a PCBU including employees, contractors, subcontractors, trainees, people on work experience, volunteers).

PCBUs

Under the Health and Safety at Work Act 2015, all PCBU's must take reasonably practicable steps to ensure that the work they carry out does not put the health and safety of others at risk. This includes the health and safety of all potentially affected individuals, regardless of whether they are workers.

Managing risks

Every time a licensee lists a property, they must check for risks which could cause harm to people who visit that property on their invitation. These people are visiting the property for the licensee's work purposes, so the licensee has an obligation under the Act because the property is their place of work.

Any risks at the property must be eliminated if reasonably practicable. If it is not reasonably practicable to eliminate the risks, they should be minimised so far as it is 'reasonably practicable'.

Health and Safety at Work Act 2015

30 Management of risks

(1) A duty imposed on a person by or under the Act requires the person —

(a) to eliminate risks to health and safety, so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

A person must comply with subsection (1) to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter to which the risks relate

Reasonably practicable

Under section 22 of the Health and Safety Act at Work Act 2015, **reasonably practicable** means whatever can be reasonably done at a particular time 'when all relevant factors are weighed up', including:

- the likelihood of the hazard or the risk concerned occurring.
- the degree of harm that might result from the hazard or risk.
- what the person concerned knows, or ought reasonably to know, about the hazard or risk; and ways of eliminating or minimising it
- the availability and suitability of ways to eliminate or minimise the risk; and
- after assessing the extent of the risk and available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.'

Officers, there is also a positive duty on officers to carry out due diligence to make sure that PCBUs meet their health and safety obligations.

Workers are required to take **reasonable care** of their own health and safety and reasonable care that others are not harmed by their actions or inactions.

Workers **must** follow any reasonable instructions their PCBU gives them to comply with the Health and Safety at Work Act 2015 and **cooperate** with any reasonable health and safety policy or procedure.

Offences, fines, and other orders

Under the Health and Safety at Work Act 2015, three offence tiers apply.

Reckless conduct (section 47)

- For an individual who is not a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding $300,000, or both:
- For an individual who is a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding $600,000, or both:
- For any other person, to a fine not exceeding $3 million.

Failure to comply with a duty (with exposure to risk of death or serious injury/illness (section 48)

- For an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $150,000.
- For an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $300,000.
- For any other person, to a fine not exceeding $1.5 million.

Failure to comply with a duty (no exposure to death or serious injury/illness (section 49)

- For an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding $50,000.
- For an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding $100,000.
- For any other person, to a fine not exceeding $500,000.
- Other orders may also be imposed including adverse publicity orders, restoration orders, health, and safety project orders and/or court-ordered enforceable undertakings.

Considerations

The list that follows gives some examples of issues that licensees must be vigilant about.

- The agent must make sure that their real estate office premises are safe to enter, to work in and to carry out business from.
- Licensees must consider all aspects of safety relating to the vehicle used, and transport of consumers and colleagues in a vehicle, while carrying out real estate duties. This would include, for example, roadworthiness of the vehicle, safe and lawful driving techniques, ensuring passengers wear seatbelts because your vehicle would be considered your **place of work**.
- Open Homes and showing properties would also be a **place of work.**
- Licensees must be alert to all potential hazards at a property, business or space and make sure these hazards are appropriately controlled. This includes ensuring that people visiting the property who may be affected by the hazards are clearly informed and, if necessary, postponing access until the hazard is removed.

Identifying, managing, recording, and reporting workplace health and safety issues for Licensees.

Health and safety issues must be managed and reported in accordance with the real estate agency's health and safety procedures. It is important that all licensees are familiar with and follow the internal management processes and procedures to keep everyone safe.

The Benefits of Reporting Incidents

It is important to report to the incident to your Agency, as soon as practicable so everyone is aware of the incident and can address the hazard to minimise the risk of similar incidents taking place.

IDENTIFY – MINIMISE – ELIMINATE

For licensees, meeting health and safety requirements at work means that they need to understand and uphold their responsibilities for the well-being of themselves, consumers, and colleagues.

Your **place of work** is not just your Office, it includes people you have at your Open Homes, people that you take in your car and while driving them to a property, business, or space for a viewing.

When a licensee is completing an Agency Agreement, they have an obligation to **identify** any risks associated with a property. These should be discussed with the client and a plan for **minimising** or **eliminating** them. Where-ever possible they should be recorded on the Agency Agreement, so all other licensees in the agency are aware of them.

Managing risks

Every time a licensee lists a property, they must check for risks which could cause harm to people who visit that property on their invitation. These people are visiting the property for the licensee's work purposes, so the licensee has an obligation under the Act because the property is their place of work.
Any risks at the property must be eliminated if reasonably practicable. If it is not reasonably practicable to eliminate the risks, they should be minimised so far as it is 'reasonably practicable'.

Some examples of hazards that could be present at a property, business or space include the following:

- Interior and external pathways, decks, stairs, or flooring with surfaces that become slippery when wet.
- Mats or rugs that can slip on polished floors.
- Stairways that are steep, narrow, dark, or in an unusual location.
- Stairs with no handrails or unsafe handrails.
- Damaged carpet that could cause people to trip.
- Other trip hazards such as electrical extension cords or items lying on the floor or ground.
- Drains and waterways that have no protection.
- Dangerous machinery or tools in a garage or shed (which may be hazardous for children).

You cannot rely on the Client/Vendor to fix these hazards, sometimes you have to find a solution yourself. An example may be if there is a slippery entrance when it rains then you could put a warning sign up, lay a mat or big towel over the wet tiles.

If the hazard is dangerous, the client seller/lessor could need to be told that marketing needs to be suspended and that they need to resolve this situation before people can enter the property for viewings or open homes.
For example, in the case of actual or suspected methamphetamine contamination, used or manufactured on the property you must address the hazard.

Methamphetamine-contaminated properties

A property where methamphetamine ('meth' or 'P') has been used or manufactured is likely to be contaminated. If these chemicals are at high concentrations, they can cause serious health effects.

'Remedial levels' for methamphetamine contamination are set by NZS 8510:2017, published by Standards New Zealand. This means the levels at which decontamination must be carried out.
Under ***the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012)*** referred to as the Code of Conduct, the obligations on licensees in relation to methamphetamine-contaminated properties (as with other potential health hazards including asbestos) include disclosure and safety of the public who access the property or space.

The issue of allowing access to a (potentially) contaminated property/space is impacted by health and safety obligations under the Health and Safety at Work Act 2015.

- If contamination is suspected, the licensee should immediately discuss the matter with their supervising agent or branch manager.
- It may be necessary to suspend marketing and viewings until confirmation is received that the property is not contaminated.
- Under **Rule 10.7** of the Code of Conduct 2012, that methamphetamine contamination is considered a property defect. Rule 10.7 says where it appears likely that land may be subject to hidden or underlying defects, a licensee must either obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to a defect, or permission to disclose any significant potential risk to prospective buyers.
- Under **Rule 10.8,** if the client directs that the information is withheld from potential buyers, the licensee must stop acting for them.
- **Rule 5.1** - licensees are obliged to exercise skill, care, competence, and diligence always when carrying out real estate agency work.
- **Rule 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.

Note:

Under the Health and Safety at Work Act 2015, some profoundly serious events, incidents, injuries, and illnesses are classed as notifiable. This means that there is a responsibility to notify WorkSafe if something profoundly serious happens.

The meaning of a notifiable event is described as any of the following events that arise from work:

- the death of a person; or
- a notifiable injury or illness; or
- a notifiable incident.

Click here to see Section 24 – **meaning of a notifiable incident.**

Health and Safety – Section 56 - Duty to notify notifiable event

(1) A PCBU must, as soon as possible after becoming aware that a notifiable event arising out of the conduct of the business or undertaking has occurred, ensure that the regulator is notified of the event.
(2) A notification under subsection (1)—
  a) may be given by telephone or in writing (including by email, or other electronic means); and must be given by the fastest possible means in the circumstances.
(3) For the purposes of subsection (2), a person giving notice by telephone must—
  (a) give the details of the incident requested by the regulator; and
  (b) if required by the regulator, give a written notice of the incident within 48 hours of being informed of the requirement.
(4) Notice given in writing under subsection (2) or (3) must be in a form, or contain the details, approved by the regulator.
(5) If the regulator receives notice by telephone and a written notice is not required, the regulator must give the PCBU—
  (a) details of the information received; or
  (b) an acknowledgement of having received notice.
(6) A person who contravenes subsection (1) commits an offence and is liable on conviction,
  (a) for an individual, to a fine not exceeding $10,000:
  (b) for any other person, to a fine not exceeding $50,000.

The REINZ Information Sheet: Meth – Guidance for Sales Agents, provides important guidance for licensees. A copy of this document is available on the learning platform.

The following guidance is also provided on the Real Estate Authority website:
https://www.rea.govt.nz/real-estate-professionals/education-and- obligations/methamphetamine-disclosure/

PROTECTING THE RIGHTS OF CONSUMERS

The following pieces of legislation has implications for real estate licensees.

- The Human Rights Act 1993.
- The Privacy Act 1993.
- The Consumer Guarantees Act 1993.
- The Secret Commissions Act 1910.

The Human Rights Act 1993

The Human Rights Act 1993 makes it illegal to discriminate against any person because of the following:

- Race, ethnicity, or nationality (including citizenship)
- Sex (including sex or gender identity, pregnancy, and childbirth)
- Sexual orientation (including being heterosexual, homosexual, lesbian, or bisexual)
- Marital status (including being divorced, separated, or widowed)
- Political opinion (including the absence of political opinions)
- Religious belief (including the absence of religious beliefs)
- Ethical belief
- Employment status (having no job or living on ACC or a benefit)
- Disability
- Family status (including having no children or being related to an individual or family)
- Age (if over 16 years of age).

Section 53 of the Human Rights Act is of particular importance to real estate personnel. This section outlines what is unlawful in terms of discrimination in the acquisition, occupation, and disposal of land, housing, and other accommodation. It is important to be aware of your obligations not to discriminate when dealing with clients, customers, and other parties.

THE HUMAN RIGHTS ACT 1993

53 Land, housing, and other accommodation

(1) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal, –

(a) to refuse or fail to dispose of any estate or interest in land or any residential or business accommodation to any other person; or

(b) to dispose of such an estate or interest or such terms and conditions than are or would be offered to other persons; or

(c) to treat any person who is seeking to acquire or has acquired such an estate or interest or such accommodation differently from other persons in the same circumstances; or

(d) to deny any person, directly or indirectly, the right to occupy any land or any residential or business accommodation; or

(e) to terminate any estate or interest in land or the right of any person to occupy any land or any residential or business accommodation, —

(f) accommodation to any person on less favourable by reason of any of the prohibited grounds of discrimination.

(2) It shall be unlawful for any person, on his or her own behalf or on behalf or purported behalf of any principal, to impose or seek to impose on any other person any term or condition which limits, by reference to any of the prohibited grounds of discrimination, the persons or class of persons who may be the licensees or invitees of the occupier of any land or any residential or business accommodation.

It is also illegal to instruct someone to discriminate. For example, it is a breach of the Human Rights Act for a client to instruct a licensee to discriminate as defined by the Act. Likewise, if the licensee follows through with their instruction, they are also breaking the law.

Note: **There are some exceptions under the Human Rights Act. Click on the link to see the Section of the Act.**

Section 54 relates to an exception in relation to shared residential accommodation situations. This means someone living in a flat can choose to live only with people of a particular sex or people of religious or ethical beliefs.

Another exception is stated in Section 55. This means that restrictions can be placed requiring that those living in an establishment (such as a religious institution or retirement village) can be restricted to persons of the same sex, marital status, religious or ethical belief, with a particular disability or for persons in a particular age group.

There is a further exception in terms of disability. In a situation where allowing a disabled person to reside in a particular property may cause them, or others living there, harm (including risk of infection), there is legal exception under Section 56.

Tenants are protected from discrimination under state and federal laws, which say that no one may be barred from a rental property based on race, sex, ability, marital status, age, sexual orientation, or sexual preference.

Smoking is one consideration a landlord or property manager has when renting out their properties and to avoid wasting everyone's time, the property should be advertised as suitable for a non-smoker.

THE PRIVACY ACT 1993

The purpose of this Act is to promote and protect individual privacy by—

(a) providing a framework for protecting an individual's right to privacy of personal information, including the right of an individual to access their personal information, while recognising that other rights and interests may at times also need to be considered; and

(b) giving effect to internationally recognised privacy obligations and standards in relation to the privacy of personal information, including the OECD Guidelines and the International Covenant on Civil and Political Rights.

The Privacy Act applies to people, businesses, and organisations within New Zealand. This includes real estate practitioners, and means that, during their business, licensees are required to comply with the Privacy Act. Section 3 sets out the criteria for information held by an agency.

The Privacy Commissioner is granted power under the Act to issue codes of practice that become part of the law. These codes apply to specific industries and sectors, such as the Telecommunications Information Privacy Code 2003, or relate to the handling of certain types of personal information, such as the Health Information Privacy Code 1994. They are designed to modify the principles of the Act (www.privacy.org.nz).

Personal information means information about any identifiable individual. Information can identify the individual by name but can also include information which has sufficient detail so that anyone receiving the information would be able to identify the individual concerned.

People who consider that their privacy has been breached may complain to the Privacy Commissioner, as outlined in Part 8 of the Act entitled 'Complaints' (sections 66-68).

The Privacy Commissioner is responsible for deciding if the complaint requires investigating (section 71), can refer it to other government agencies or the Ombudsman (section 72), or mediate a resolution between the parties.

Resolutions of this nature can vary and include voluntary payments to the party whose privacy has been breached, or apologies. If resolution is not possible, the matter may end up before the Human Rights Review Tribunal which has the same powers as a District Court.
This means that the Tribunal can award damages for any harm or loss suffered because of the breach of privacy. Substantial monetary awards have been made by the Tribunal.

Under section 80, the Commissioner is required to report any breach of duty or misconduct in this regard.

A-quick-tour-of-the-privacy-principles-Oct-2020.pdf

Privacy Principles

Section 6, which is in Part 2 of the Privacy Act 1993, outlines the information privacy principles.

Use the links below to explore the privacy principles individually.

Principle 1 - Purpose for collection

Principle 2 - Source of information

Principle 3 - What to tell an individual

Principle 4 - Manner of collection

Principle 5 - Storage and security

Principle 6 - Access

Principle 7 - Correction

Principle 8 - Accuracy

Principle 9 - Retention

Principle 10 - Use

Principle 11 - Disclosure

Principle 12 - Disclosure outside New Zealand

Principle 13 - Unique identifiers

These 13 principles set out criteria concerning the following:

- Collection (principles 1 - 4).
- Storage (principles 5 and 9).
- Access (principles 6 - 7).
- Use (principles 8 and 10).
- Disclosure of personal information (principle 11-12).
- The principles also include the use of unique identifiers (principle 13).

Collection of personal information

Principles 1 to 4 of the Privacy Act concern the collection of personal information - purpose, source, collection, and manner of collection. In summary, where an agency is collecting personal information (from a client, customer, or any other person while conducting business) the agency should only collect information which is necessary for their purpose.

The Privacy Act requires an agency to collect information about an individual from the individual concerned unless an exception to the Privacy Act applies. This means that if you are collecting information about a client, for example, you should obtain that information from the client directly, as opposed to through another person. However, it is often not practicable to obtain information directly from an individual because they may not hold the information you require. In that instance, in consultation with the client, you may approach another person or agency to obtain the information which is necessary. The client can also consent to your collecting information about them from another person or agency.

If you are collecting information from an individual, the Privacy Act requires that you tell the individual why the information is being collected and to whom you intend to give the information (for example, if the information is going to be used for advertising purposes, then the individual should be told that at the time the information is being collected). You should also advise individuals of which agency will be holding the personal information you have collected about them.

Principle 3

Principle 3 states that organisations should be open about why they are collecting personal information and what they will do with it.
When an organisation collects personal information, it must take reasonable steps to make sure that the person knows:

- the fact that the information is being collected; and
- the purpose for which the information is being collected; and
- the intended recipients of the information; and
- the name and address of –
    - the agency that is collecting the information; and
    - the agency that will hold the information; and
- if the collection of the information is authorised or required by or under law why it is being collected
- if the collection of the information is authorised or required by or under law, –
    - whether or not the supply of the information by that individual is voluntary or mandatory; and
- the consequences (if any) for that individual if all or any part of the requested information is not provided; and
- the rights of access to, and correction of, personal information provided by these principles.

Sometimes there may be good reasons for not letting a person know about the collection – for example, if it would undermine the purpose of the collection, or it is just not possible to tell the person.

You should not collect information by unlawful or unfair means or by unnecessarily intrusive means. If you are going to take a video of the interior of a house, for example, you should advise the homeowner of that and make sure that any items videoed do not intrude to an unreasonable extent on that person's personal affairs.

Storage of personal information

Principle 5 and principle 9 deal with storage of personal information.

Once you have collected information from individuals, you must make sure that the information is stored securely (principle 5). Information should only be held for the duration required (principle 9).

Access to personal information

Principle 6 and Principle 7 deal with access to personal information.

Individuals have a right to access information held about them by any agency (Principle 6) and if they consider information held about them to be inaccurate, they may request that you correct the information held (Principle 7). If an individual requests access to information you hold about them, you have 20 working days to respond to their request.

Principle 6

Principle 6 states that people have a right to ask for access to their own personal information. Generally, an organisation must provide access to the personal information it holds about someone if the person in question asks to see it. They can only ask to see information about themselves.
The Privacy Act does not allow you to request information about another person unless you are acting on that person's behalf and have written permission.
The provisions relating to access to personal information can be found in Part 4, Subpart 1 of the Privacy Act 2020 here.

Refusing access - In some situations, an organisation may have good reasons to refuse a request for access to personal information. For example, the information may involve an unwarranted breach of someone else's privacy or releasing it may pose a serious threat to someone's safety.

Principle 7 states that a person has a right to ask an organisation or business to correct information about them if they think it is wrong.
If an organisation does not agree that the information needs correcting, an individual can ask that an agency attach a statement of correction to its records, and, if reasonable, the agency should do so.
The provisions relating to correction of personal information can be found in Part 4, Subpart 2 of the Privacy Act 2020

Use and disclosure of personal information.

Principles 8, 10 and 11 relate to use and disclosure of personal information.

When using personal information about individuals it is important that the information is accurate, up-to-date, and not misleading. Principle 8 requires that it be checked prior to use.

Information should only be held for the duration required (principle 9) and used for the purpose it was collected (principle 10). Therefore, the information should be disposed of when there is no longer a lawful purpose for holding it.

Principles 10, 11 and 12 concern the use and disclosure of information and sets out limits on disclosure. In general terms, you should use and disclose personal information about individuals only if the use or disclosure is in connection with the purpose for which you collected the information, or the individual concerned authorises the use or disclosure.

Principle 10

Principle 10 states that organisations can generally only use personal information for the purpose it was collected.
Sometimes other uses will be allowed, such as if the new use is causally related to the original purpose, or if the person in question gives their permission for their information to be used in a different way.

Principle 11

Principle 11 states that an organisation may only disclose personal information in limited circumstances.
For instance, an organisation may disclose personal information when:

- disclosure is one of the purposes for which the organisation got the information.
- the person concerned authorises the disclosure.
- the information is to be used in a way that does not identify the person concerned.
- disclosure is necessary to avoid endangering someone's health or safety.
- disclosure is necessary to uphold or enforce the law.

For example, customers of various properties complained to the Privacy Commissioner that their names had been used by a particular real estate agency to publicise its success in achieving property sales. The customers' names were published in a daily newspaper. The Privacy Commissioner found that this action breached principle 11 and the case was resolved between the parties.

Principle 12 - Cross-border disclosure

Principle 12 sets rules around sending personal information to organisations or people outside New Zealand (cross-border disclosure).
A business or organisation may only disclose personal information to another organisation outside New Zealand if the receiving organisation:

- is subject to the Privacy Act because they do business in New Zealand.
- is subject to privacy laws that provide comparable safeguards to the Privacy Act.
- agrees to adequately protect the information, e.g. by using model contract clauses.
- is covered by a binding scheme or is subject to the privacy laws of a country prescribed by the New Zealand Government.

If none of the above criteria apply, a business or organisation may only make a cross-border disclosure with the permission of the person concerned. The person must be expressly informed that their information may not be given the same protection as provided by the New Zealand Privacy Act.

Principle 13 - Unique identifiers

Principle 13 states that an organisation can only use unique identifiers when it is necessary.

It outlines the requirements for giving a person a unique identifier number instead of using their name. Examples are a driver's licence number, a student ID number, or an IRD number.

An organisation cannot assign or use a unique identifier to a person if that unique identifier has already been given to that person by another organisation or agency.
Organisations including agencies must take reasonable steps to protect unique identifiers from misuse.
Unique identifiers are individual numbers, references, or other forms of identification allocated to people by organisations, such as driver's licence numbers, passport numbers, IRD numbers, REA, or bank.

People do not have to disclose their unique identifier unless this is one of the purposes for which the unique identifier was set up (or causally related to those purposes).

Note: In this context, ‘agency’ does not mean real estate agency.

All licensees conducting open homes are required to obtain the consent of all visitors inspecting the open home for the recording and use of personal information for other than security purposes.

Open home marketing – each Agency will vary but must include a consent clause for their register

Sample Real Estate Ltd

Register of persons inspecting ‘open home’ at (address)

on (day and date)

Privacy Act 1993 - Agreement to use information for other than security.

We, the undersigned, agree that the following information concerning ourselves may be used by your agency, or any other agency associated with you, for the purpose of marketing of real estate:

Name Address Telephone No. Signature Comments

The agreement to use information must appear on each page of the register and be drawn to the attention of the person supplying the information.

If the person objects to the use of their information for marketing, the appropriate note can be made in the comment column.

You should make it clear to persons with whom you are dealing that you are collecting information, what you will use it for, and ensure that you use that information only for that stated purpose.

Your office should have a documented privacy policy to follow which states how personal information collected may be used.

Examples of breaches

The following give some practical examples of how the Privacy Act has been applied by the Privacy Commissioner and the types of situations you should seek to avoid when using personal information about the people you deal with.

The Privacy Commissioner has upheld several complaints about agents publishing names and addresses in leaflets or advertisements about successful house sales. Mr K advertised that he had sold a house for Mr and Mrs B in Rose Road. Mr and Mrs B. complained about a breach of their privacy: that Mr K had used their names and personal details to promote his business. The problem was not that Mr K promoted his success at selling a property - the problem was that personal details identifying Mr and Mrs B had been released without their consent.

This was found to be a breach of Principle 11 (Disclosure of personal information must be authorised by the individual involved)

Mrs S contacted an agent because she wanted to buy a house in a particular area. She told the agent the price she was willing to pay. The agent circulated a leaflet in the area giving Mrs S's name and the ceiling price. Under the law at the time, Mrs S could not seek damages for the breach of privacy even though it may have reduced her bargaining power.

This was found to be a breach of Principle 3 (The individual should be made aware that the personal information is being collected, the purpose for collecting it and the intended recipient – in this case the individual was not made aware of how the information would be used and who it would be provided to)

The Privacy Commissioner investigated a complaint by a client whose agent distributed leaflets around the location of the client's house. The leaflets contained details of the listing, including the name and address of the client. The client considered that this had breached her privacy because she understood when she provided the agent with personal information that her name and address would not be included in any leaflet and that it would not be circulated in her neighbourhood.

This was found to be a breach of Principle 3 (In this case, the individual was not made aware of how the information would be used and who it would be provided to)

In the 1990s the Privacy Commissioner upheld a complaint from the tenant about an agent, Mr H, taking photographs of the inside of a flat when he had no legal right to be there. Mr H had failed to give notice under the Residential Tenancies Act 1986 that he would be carrying out an inspection.

This was found to be a breach of Principle 4 (Personal information must not be collected by unlawful means)

If information is in the public domain, this is unlikely to breach the Privacy Act. Note for example the difference between publicising a sold price at the time the sale is unconditional (=potential breach) compared to the same information being used after the sale has settled and the record updated on LINZ (= unlikely to be a breach)

THE CONSUMER GUARANTEES ACT 1993

The Consumer Guarantees Act 1993 (CGA) is a piece of consumer protection legislation.

It applies statutory guarantees to the consumer who is a person who 'acquires from a supplier goods or services of a kind ordinarily acquired for personal, domestic, or household use or consumption' (section 2(1)).

These statutory rights for the supply of goods and services to the consumer are independent of any other rights, including any contractual rights there may be between the parties.
Suppliers cannot contract out of the guarantees for consumers who acquire goods or services for domestic purposes (Section 43).

As the agent licensee is a supplier of a service to a consumer, the statutory guarantees of the Act apply to real estate agency work.

Failure to meet the requirements of the Consumer Guarantees Act is also likely to result in consequences through the disciplinary processes of the Real Estate Agents Act 2008 and the parallel requirements of the Code of Conduct.

The Consumer Guarantees Act 1993 provides guarantees to consumers about the services supplied. The guarantees given in relation to services are set out in Part 4 - Supply of services:

- **Section 28 -** Guarantee as to reasonable care and skill.
- **Section 29** - Guarantee as to fitness for a particular purpose.
- **Section 30** - Guarantee as to time of completion.
- **Section 31** - Guarantee as to price.

Section 28 is especially important for licensees to bear in mind; the guarantee that the services supplied will be carried out with reasonable care and skill. Essentially this guarantee codifies the common law tort of negligence. This requirement is also confirmed in the Code of Conduct under rule 5.1.

Reasonable care and skill are measured against the standard of competent practitioners. Therefore, licensees must be aware of their level of competence and seek advice when and where necessary from their supervising agent or branch manager. The agent must ensure that sufficient direction and control is provided in their supervision of salesperson licensees.

As the licensee is the professional 'caretaker' of the transaction, the customer also relies on the licensee to demonstrate skill and care in all matters, and to provide information that can be relied upon by the customer in their decision-making.

In relation to Section 30 and 31, issues of reasonable pricing and timeframes may impact on:

- marketing costs (where appropriate) and period, and
- the requirement for timely management when action is required, and appropriate costs for the client.

In relation to costs, a client seller/lessor is entitled to be sure the costs of any marketing passed to the client, accurately reflect any economies of scale enjoyed by the agency.

In relation to timing, the client seller/lessor should be guided as to the most appropriate marketing method and time frame in which to achieve optimal outcomes for successfully completing a transaction.

A breach of a guarantee under the Consumer Guarantees Act 1993 gives consumers several different remedies, including:

- giving the supplier an opportunity to remedy the failure to comply with the statutory guarantee.
- getting the matter rectified elsewhere at the original supplier's expense.
- cancelling the contract for services
- seeking damages for any substantial losses suffered to comply with a statutory guarantee.

However, the most likely remedy under the Consumer Guarantees Act, in the context of duties performed by a licensee, would be a consumer's entitlement to damages for any loss caused because of the breach of the guarantee. For example, if it were found that the licensee's breach of a guarantee resulted in the property selling for considerably less than it should have, the damages awarded would be the difference between the market value of the property and the price obtained.

Breaches of the guarantee as to reasonable care and skill have been judged previously, as in the Webb v Barfoot & Thompson case which involved the purchase of a property.

In this case, a salesperson advised her clients that the agreement to buy their property was 'cash unconditional' and that there was no way the customers could back out. On that basis, the clients entered into an agreement to buy another property and subsequently paid a deposit of $15,000.

However, the salesperson omitted to tell the clients that the sale and purchase agreement allowed the customers the right to requisition the clients' title (as deemed under Clause 6.2(1) which states that the customer has ten working days to give notice to the client that an objection or requisition of title is required).

This clause was duly actioned, which ultimately led to the customers cancelling the contract. This in turn caused the clients to forfeit the deposit paid on the other property they had agreed to buy.

The salesperson was found to have breached the guarantee under Section 28 that she would provide her services as a salesperson with reasonable skill and care by failing to bring to the clients' attention that the customers had rights under the requisition clause. The defendants were ordered to pay to the clients the amount of the forfeited deposit.

Webb v Barfoot & Thompson DC Auckland, 12 November 1999, NP5221/98, Kerr DCJ

THE SECRET COMMISSIONS ACT 1910

The Secret Commissions Act addresses offences relating to bribery and corruption.
It criminalises the bribery of an agent working on behalf of a principal to a contract (the client). Section 3 makes it an offence to offer to give, an agent a gift or other consideration to induce or reward them for taking actions in relation to their client's affairs or business. Section 4 makes it an offence to accept such a gift or reward.

Timing is important. Where a customer offers a gift after a transaction is completed, and that gift is inconsequential it is unlikely to be a bribe. For example, the successful purchaser buys the licensee a bottle of wine. This gift would not constitute a secret commission, but if this were an exceedingly rare and expensive bottle of wine, that was offered before the customer became the successful purchaser, it could be a bribe.
Section 3 and 4 also apply to gifts offered to family members and employees of the licensee. A more common example would include promising future real estate agency business. If a developer promises the licensee several listings in exchange for ensuring their offer is accepted for the land, this could constitute an inducement unless it was disclosed to the agent's principal.

Breaching the Secret Commissions Act carries a maximum penalty of up to 7 years imprisonment. In the context of real estate agency work, the Secret Commissions Act section 8 has relevance to both client and customer relationships. If you receive a referral fee or discount in the course of your work for a client or customer, say from a mortgage broker, lawyer, or advertising publisher, you are required to disclose and pass these payments on to that person unless you have their consent to keep them. This includes any discounts you receive on expenses you incur on behalf of your client, such as advertising.

Secret Commissions Act 1910

8 Receiving secret reward for procuring contracts an offence.

(1) Every person is guilty of an offence who advises any person to enter into a contract with a third person and receives or agrees to receive from that third person, without the knowledge and consent of the person so advised, any gift or consideration as an inducement or reward for the giving of that advice or the procuring of that contract, unless the person giving that advice himself acts as the agent of the third person in entering into the contract, or is to the knowledge of the person so advised the agent of that third person.
(2) For the purposes of this section a person to enter a contract if he makes to that other person any statement or suggestion with intent to induce him to enter the contract.

The Real Estate Agents Act 2008 also confirms these requirements in relation to the disclosure of discounts, rebates, and commission.

128 Agency agreement must disclose rebates, discounts, and commissions.

(1) An agent is not entitled to any expenses from a client for or in connection with any real estate agency work carried out by the agent for the client in connection with a transaction unless the agency agreement under which the agent performs that work contains a statement that—
(a) identifies the source of all rebates, discounts, or commissions that the agent will or is eligible to receive in respect of those expenses; and
(b) specifies the estimated amount of those rebates, discounts, or commissions (to the extent that the amount can reasonably be estimated).
(2) This section does not limit the liability of any person under the Secret Commissions Act 1910.

While a complaint of this nature is now more likely to be pursued under the Real Estate Agents Act, note that section 128(2) of the Real Estate Agents Act 2008 states that licensees can still also be liable under the Secret Commissions Act 1910.
In other words, the disclosure requirements under Section 128 of the Real Estate Agents Act do not prevent a licensee being prosecuted under the Secret Commissions Act.

NOTE: The Secret Commissions Act 1910 and The Real Estate Agents Act both state that you must disclose any benefit or reward that you may receive in relation to procuring a contract.

If there is any likelihood that you will benefit from a transaction, then you must:

- Inform the client of the relationship
- Obtain their written consent to proceed before presenting the offer

THE RESIDENTIAL TENANCIES ACT 1986

The Residential Tenancies Act 1986 sets out the rights and responsibilities of landlords and tenants in relation to residential properties.

The Residential Tenancies Act (RTA) states that tenancy 'in relation to any residential premises, means the right to occupy the premises (whether exclusively or otherwise) in consideration for rent…' (section 2), and outlines the law relating to residential tenancies, by:

- defining the rights and obligations of landlords and tenants of residential properties
- establishing a tribunal to determine expeditiously disputes arising between such landlords and tenants.
- establishing a fund in which bonds payable by such tenants are to be held.

It is important for real estate licensees working on a transaction that involves a tenanted property to understand the Residential Tenancies Act and the implications of the terms of different tenancy agreements.

The Residential Tenancies Act applies to most residential tenancies, that is, the letting of 'any premises used or intended for occupation by any person as a place of residence'.
There are exceptions such as:

- student hostels
- hotels and motels
- hospitals and prisons
- on-site accommodation for farm workers
- lodgers in the landlord's home
- cross leases and unit titles (this is a form of ownership)
- holiday homes.

The Residential Tenancies Act does not apply to commercial premises. However, there may be situations where its application may be ambiguous, such as when premises that will be used for business and as a place of residence are rented. The Residential Tenancies Act applies to this type of property unless it can be proved that the premises were let principally for non-residential purposes.

Tenancy agreements

Under the Residential Tenancies Act, all residential tenancy agreements must be in writing and signed by both tenant and landlord (section 13).

Standard residential tenancy agreements are available from the Ministry of Business, Innovation and Employment (MBIE) Tenancy Services website www.tenancy.govt.nz.

These forms outline the rights and obligations of both parties, including.

- a statement about insulation at the property from the landlord
- a property inspection report in which details of the condition of the property can be entered when the tenancy begins. This reduces the likelihood of disputes later.

The landlord must provide a copy of the signed agreement to the tenant before the tenancy starts.

Any variation or renewal of the tenancy agreement also must be in writing and signed by both landlord and tenant.

Every tenancy agreement (according to Section 13A) must state, amongst other things:

- the full name and contact address of both the landlord and the tenant
- the address of the rental property
- the date of the agreement and the date the tenancy will commence.
- the landlord's and tenant's addresses for service of any legal documents
- whether any tenant is under 18 years of age
- the amount of any bond
- the rent payable - how much, how often and the place where it is to be paid, or bank account number into which it is to be paid.
- a statement, if applicable, that the tenant will pay any lawyer's or agent's fees relating to the granting of the tenancy.
- a list of any chattels provided by the landlord.
- the fixed date (if any) when the tenancy ends.

Bond

A bond is money that a landlord will usually ask tenants to pay as security when they move into a property.

- It can be up to the equivalent of 4 weeks' rent.
- If a bond is charged it must be lodged by the landlord with Tenancy Services within 23 working days of receiving it using a bond lodgement form.
- A bond is normally refunded at the end of a tenancy (using a completed bond refund form) unless there is a dispute between the landlord and tenant about any outstanding issue.

If the rent increases, the landlord can require the tenant to pay additional bond monies in proportion to the increased rent (for example, if the rent has gone up by 5%, and a bond of $1,000 has been paid, the landlord can ask for an additional $50 bond, since $50 is 5% of $1,000). It is illegal to ask for more than this. Likewise, if the rent decreases, the tenant can apply for a refund of a proportionate amount of the bond.

Landlord must permit and facilitate installation of fibre connection in certain circumstances

- there is no fibre connection in the premises; and the tenant requests a fibre connection
- it is possible to install a fibre connection in the premises; and the fibre connection can be installed at no cost to the landlord (for example, because the cost is covered by the UFB Initiative).

However, a landlord is not required to permit the installation of a fibre connection—

- if installation would materially compromise the weathertightness, structural integrity or the character of any building.
- if it was a breach of obligation to the premise, like a Body Corp Rule.

If a tenant makes a written request for the installation of a fibre connection, the landlord must respond within 21 days after receiving the request. It is unlawful for a landlord not to respond within 21 days of the request

Types of Tenancy

This section discusses some different types of tenancy and some of the rights and responsibilities that apply.

Fixed-term tenancy

Fixed-term tenancies are for a specific length of time. A fixed-term tenancy cannot be ended by notice during its term.

If the fixed term is for longer than 90 days, the tenancy will automatically become a periodic tenancy when the fixed term expires unless the landlord or the tenant gives notice to say they do not want the tenancy to continue, or they agree on a different arrangement.

That notice needs to be given no more than 90 days before and no less than 28 days before the expiry date.

Renewal of a fixed term tenancy agreement

While a landlord is not legally obliged to renew or extend a fixed term tenancy, if both the landlord and tenant agree, they can renew or extend the tenancy for a further fixed term and must record their agreement in writing.

Sometimes, though, a residential tenancy agreement allows the tenant the right to renew a fixed term tenancy. In this situation, if the tenant wants to renew the tenancy, they must tell the landlord in writing at least 28 days before the end of the fixed term. The tenancy is then renewed for the same length of time as the original fixed term.

Periodic tenancy

Periodic tenancies are ongoing tenancies of no fixed length that can be ended by giving notice.
A landlord or tenant must give a minimum period of notice when ending a periodic tenancy.
All notices to end a periodic tenancy must:

- be in writing.
- give the address of the tenancy.
- give the date when the tenancy is to end.
- be signed by the person giving the notice.

A tenant must give at least 28 days' written notice to end a periodic tenancy unless the landlord agrees to a shorter time.

In most circumstances, a landlord must give at least 90 days' written notice to end the tenancy.

A landlord can give at least 63 days' notice in the following situations:

- If the owner or a family member is going to live in the property.
- If the property is normally used as employee accommodation and is needed again as accommodation for an employee (this possibility must have been stated in the tenancy agreement).

If a tenant is given notice to end the periodic tenancy by the landlord and the tenant decides they want to move out sooner, the tenant must still give the landlord 28 days' written notice.

- When multiple tenants are named on the tenancy agreement, the tenancy end for all of them if at least one of them gives the landlord notice to end the tenancy.

Other types of tenancy

Other types of tenancy include a service tenancy which is related to a contract of service between the landlord as employer and the tenant as employee, and a boarding house tenancy which grants exclusive rights to sleeping quarters and rights to shared use of facilities in a boarding house for a period of 28 days or more.

Notice to terminate a tenancy.

Under section 51(3) of the Residential Tenancies Act every notice to terminate a tenancy shall

- be in writing, and
- identify the premises to which it relates, and
- specify the date by which the tenant is to vacate the premises, and
- in any case where the tenant is given less than 90 days' notice, set out the reasons for the termination, and
- be signed by the party giving the notice, or by that party's agent.

If the tenant is still there 90 days after the agreement has ended, and the landlord has taken no action to reclaim the premises, the law deems that a new periodic tenancy exists on the same terms and conditions as contained in the original tenancy agreement.

Tenancy Tribunal can end a tenancy.

The Tenancy Tribunal can end a tenancy if the tenant:

- is 21 days or more behind in rent.
- has caused or threatened to cause substantial damage to the premises.
- has assaulted or threatened to assault the landlord, a member of the landlord's family, an agent, or any other occupier of the building or a neighbouring building (Section 55)
- has breached the tenancy agreement and failed to fix the problem after being given notice to do so (Section 56), or
- has abandoned the premises. (Section 61).

Destruction of the property

If the property is destroyed or damaged so badly as to be uninhabitable, the tenant can stop paying rent and either party can give notice ending the tenancy. The landlord can give seven days' notice, and the tenant can give two days' notice.

Disputes and breaches of tenancy agreements

In the event of a problem between the landlord and tenant, disputes and breaches of tenancy agreements are usually dealt with initially through Tenancy Services. In most cases, the first approach is to try to mediate a settlement between the parties.
If mediation does not work, or one of the parties refuses mediation, or the case is serious enough to require the Tenancy Tribunal's attention, the case will be referred to the Tenancy Tribunal. The Tenancy Tribunal is a special court that is part of the justice system.

Cases are heard by tenancy adjudicators whose decision is a court order that both parties must comply with.

The type of orders made include: an order pay money to the other party, an order to do work to remedy damage, lack of repair or maintenance, possession (termination of tenancy).

The Tenancy Tribunal may award compensation up to $100,000 (or equivalent amount for remedial work). Claims more than this can be filed through the District Court.

Rent

A landlord cannot charge rent for more than two weeks in advance. Nor can a landlord require rent payments during any period for which rent has already been paid. An exception applies if the rent is a deduction from wages, paid monthly for example.

How much rent and how it will be paid will be detailed in the tenancy agreement.

Landlords are required to keep rent records and must make these available to the tenant if requested. They must provide receipts for rent payments unless they are made by automatic payment or direct payment into a dedicated rent account or deducted from wages.

If a tenant believes the rent exceeds a fair market rent by a substantial amount, they can apply to the Tenancy Tribunal for an order reducing it. The application must be made within three months of the tenancy starting, or within three months of the latest rent review.

Rent Reviews

Under a fixed-term tenancy, landlords can only increase rent if a provision in the fixed-term tenancy agreement allows it.

In the case of a periodic tenancy agreement, or if a fixed term tenancy agreement allows for it, the landlord can increase the rent by giving 60 days' notice in writing. The notice has to say what the new rent is and when it first falls due. There must be a gap of at least 12 months between rent increases.

If the tenancy is subject to an annual rent adjustment, the 60 days' notice requirement still applies. The tenant must also be told in writing (either as part of the tenancy agreement or in a separate letter) before the tenancy starts that there will be annual rent adjustments.

Landlord's responsibilities

The landlord's responsibilities are outlined in Section 45 of the Residential Tenancies Act. A summary of those responsibilities is as follows:

- To provide a written tenancy agreement in writing
- To provide a written break down of any fees charged on the agreement
- To provide the premises in a reasonable state of cleanliness and maintain the premises in a reasonable state of repair.
- To comply with all requirements in respect of insulation, smoke alarms regulations for landlords.
- To comply with all requirements in respect of buildings, health, and safety.
- To ensure that there is a sufficient supply of clean water to a rental property. If the premises do not have a reticulated water supply, the landlord must provide adequate means for the collection and storage of water.
- To compensate the tenant for any reasonable expenses incurred by the tenant for repairs where these repairs fall under the landlord's responsibility.
- To take all reasonable steps to ensure that the landlord, nor none of the landlord's other tenants causes or permits any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises.

The landlord is responsible for paying property costs such as rates and building insurance. The landlord is also responsible for water charges unless the water supply is metered for the tenant and the tenancy agreement says the tenant will pay.

Landlord's right of entry

As set out in **Section 48 of the Residential Tenancies Act,** the landlord has the right to enter their tenanted rental property under certain circumstances.

The landlord shall not enter the premises during the currency of the tenancy agreement, except— with the consent of the tenant freely given at, or immediately before, the time of entry; or in any of the circumstances described in subsections 48 (2) to (3).

The landlord may enter the premises.

- In the case of an emergency
- for the purpose of inspecting the premises, at any time between 8 o'clock in the morning and 7 o'clock in the evening on a day specified in a notice given to the tenant the landlord must give at least 48 hours' notice (but no more than 14 days)
- the landlord cannot carry out inspections more than once every four weeks.
- to carry out repairs and maintenance - this must be done between 8.00am and 7.00pm and the landlord must give at least 24 hours' notice.
- to provide services agreed in the tenancy agreement under conditions specified in the agreement.

With prior written consent of the tenant the landlord may enter the premises for the purpose of:

- showing the property to prospective tenants or prospective customers - this can be done at any reasonable time, subject to any reasonable conditions set down by the tenant.
- showing a registered valuer engaged in the preparation of a report on the premises
- showing a real estate agent engaged in appraising, evaluating, or selling or otherwise disposing of the premises.
- Showing it to an expert engaged in appraising or evaluating the premises

The tenant may not withhold his or her consent unreasonably; and may make the consent subject to any reasonable conditions.

Selling a Tenanted Property – The Landlord's Responsibility

A tenant must be informed if their rental property is put on the market.

Section 47 states a landlord must give notice to tenant of intention to sell.

(1) If, at any time after entering into a tenancy agreement, the landlord puts the premises on the market for the purposes of sale or other disposition, the landlord shall forthwith give written notice of that fact to the tenant.
(2) When a landlord is offering residential premises as available for letting, the landlord shall inform prospective tenants if the premises are on the market for the purposes of sale or other disposition.

Landlords must inform current tenants in writing if the property they are renting is being put on the market and if the property they are considering renting is for sale.

A tenant may not react well to a real estate agent arriving unexpectedly on their doorstep.
If a Licensee is acting for the Landlord, they should consider delivering the letter informing the tenant in person so they can introduce themselves and talk about it face to face. This will also give them an opportunity to talk about access to the property and get the tenants consent.

Some buyers, such as those buying investment properties, may prefer to purchase a property with a tenancy agreement in place. Other buyers may only be interested in the property if it can be sold with vacant possession so they themselves can move straight in.

Property being sold has a tenant with a fixed term tenancy.

A landlord or tenant cannot give notice to end a fixed-term tenancy early.

If a property is sold while it has a fixed-term tenancy in place, the tenancy and tenants must remain in place until the fixed term ends (unless the tenants provide written agreement to end the tenancy early). Therefore, licensees need to have a clear understanding of the terms of the tenancy agreement, so an appropriate settlement date can be agreed between buyer and seller.

If the buyer and seller agree to settle the sale before the fixed term tenancy ends, once the sale has completed, the buyer becomes the landlord for the rest of the fixed term tenancy.
However, if the buyer wants vacant possession, the buyer and seller would need to agree for settlement to fall at the end of the fixed term tenancy period.

Property being sold has a tenant with a periodic tenancy.

There are some limited circumstances when a landlord can give at least 63 days' notice to end a periodic tenancy (instead of at least 90 days).
One of these reasons is if it is for a family member or employee. If giving at least 63 days' notice to end a periodic tenancy, the landlord's notice must also state the applicable circumstances as the reason for giving the notice.

This reason must be genuine. If the reason given is found to not be genuine, a tenant has grounds to challenge the notice through the Tenancy Tribunal.

NOTE:
It is especially important to understand the type of tenancy agreement in place when working on a transaction involving a tenanted property.

The type of tenancy will determine whether a property can be sold with vacant possession or whether the purchaser will have obligations to uphold an existing tenancy agreement, and for how long.

Consent To Access to the Property

- Landlords must get the tenant's permission before entering the house to take photos. The tenant can refuse to allow any photographs of their personal possessions.
- Landlord's must also get the tenant's permission to show possible buyers through the house.
- The landlord (or Agent) needs to talk to the tenant and get the tenants permission on specific dates and times before planning open homes or an auction at the property.
- Communication and negotiation are important. Once everyone is agreed to a schedule of access, put it in writing and make sure it is signed by everyone involved.
- Ensure the tenants right to reasonable peace, comfort, or privacy in the use of the premises is respected by the landlord and their agent.

The following are unlawful acts under Section 48:

- entry upon the premises by the landlord other than as permitted by or under any of subsections.
- failure by the tenant, without reasonable excuse, to allow the landlord to enter upon the premises in any circumstances in which the landlord is entitled to enter under subsections (2) to failure by the landlord to notify, or to provide results to, the tenant as required
- the use of force or threats to get into the premises while the tenant is there can face charges, and this may result in them being fined or jailed. It is unlawful to enter the premises by the landlord other than as permitted

Tenant rights and Responsibilities

Residential Tenancies Act 1986 Section 38 allows for quiet enjoyment
(click to see the complete section)

(1) The tenant shall be entitled to have quiet enjoyment of the premises without interruption by the landlord or any person claiming by, through or under the landlord or having superior title to that of the landlord.
(2) The landlord shall not cause or permit any interference with the reasonable peace, comfort, or privacy of the tenant in the use of the premises by the tenant.
(3) Contravention of subsection (2) in circumstances that amount to harassment of the tenant is hereby declared to be an unlawful act.
(4) In this section premises includes facilities

Tenant responsibilities

The tenant's responsibilities are outlined in **Section 40 of the Residential Tenancies Act.** The tenant must do the following:

- Pay the rent.
- Use the premises principally for residential purposes.
- Keep the premises reasonably clean and tidy.
- Comply with all requirements in respect of smoke alarms imposed by tenant regulations.
- Tell the landlord about any repairs that are needed or any damage to the property.

The tenant may not intentionally or carelessly do any of the following:

- Damage the property or permit damage to the property.
- Cause or permit any interference with, or render inoperative, any means of escape from fire.
- Use the property for any unlawful purpose.
- Interfere with the peace, comfort, or privacy of the landlord's other tenants nearby.

The tenant is responsible for paying phone, electricity, gas and internet costs and any water costs that are charged by consumption, unless the landlord and the tenant agree otherwise in writing. The tenant should arrange their own contents insurance.

If there is damage to the property (other than reasonable wear and tear), it is up to the tenants to prove that it was not careless or intentional. The tenant is responsible for damage they cause or that is caused by anyone the tenant lets onto the property, other than the landlord or someone acting on the landlord's authority.

If the tenancy agreement provides for assignment of the tenancy, subletting or parting with possession, the tenant must get the written consent of the landlord if they assign the tenancy to another person (section 44(2)).

Under section 40(1)(e) of the Residential Tenancies Act on the termination of the tenancy, the tenant must:

- Quit the premises.
- Remove all his or her goods from the premises.
- Leave the premises in a reasonably clean and reasonably tidy condition and remove or arrange for the removal from the premises of all rubbish.
- Return to the landlord all keys, and security or pass cards or other such devices, provided by the landlord for the use of the tenant.
- Leave in or at the premises all other chattels provided by the landlord for the use of the tenant.
- If the tenant has added fixtures, these may be removed so long as any damage is made good. For example, if the tenant has fixed a bookshelf to the wall, they can remove it, but any holes or other damage will have to be repaired and repainted.
- If a tenant stays on in the property after the tenancy has been terminated, they must continue to meet all obligations in the tenancy agreement and the law.

PERSONAL TAXATION

Most licensees are engaged as contractors by real estate agents, and not as employees.

Contractors are responsible for ensuring they uphold their legal obligations in relation to personal taxation.

Key considerations are income tax, GST (goods and services tax), commission payments, business expenses, and filing a tax return in accordance with Inland Revenue requirements.

Income tax

Income tax is a compulsory tax on income. When engaged as contractors, licensees do not have PAYE tax deducted from their income, as an employee does. Instead, the agency will deduct tax from the scheduler payment for each commission earned and return it to IRD on behalf of the licensee. Licensees engaged as contractors need to make sure they pay income tax on their net profit for the year.

GST

GST applies to goods and services supplied in New Zealand by GST-registered individuals and entities.

Everyone with a sales turnover of over $60,000 for the last 12 months, or an expected turnover over $60,000 for the next **12 months must be registered for GST**. In most cases, real estate agents will require licensees to be GST-registered regardless of turnover.

How often GST returns are filed depends on the individual situation. There are three filing options: monthly, two-monthly, or six-monthly.
When completing a GST return, include total gross commission earned based on your invoice.

For more information on GST payments, visit: http://www.ird.govt.nz/gst/return-filing/

Commission

Tax invoices will show total commission, tax, and GST. Commissions paid to real estate licensees are schedular payments.
This means that while they are different to salary or wage payments, they are generally required to have tax deducted at source unless the individual has a valid certificate of exemption.

As mentioned above, commissions (scheduler payments) are taxed at a flat rate (usually 20%). Tax is worked out on the GST-exclusive amount. The deductions are made by the real estate agency.

As a licensee carrying out real estate work on behalf of a GST-registered agent, your commission will usually include GST. This is not always the case, so you should first clarify this with the real estate agent or your tax advisor to make sure you meet your GST obligations.

Expenses

Revenue expenses are day to day business expenses, for example, advertising or stationery for business use, uniforms, or branded clothing. Generally, revenue expenses are claimed in the year that they are purchased.

Capital expenses are assets purchased for business purposes; for example, a vehicle used for business purposes. Capital expenses are generally depreciated over time.

Many licensees also claim for a home office that is designated for use for business purposes.

Filing a tax return

You will need to file an IR3 individual tax return after the end of each tax year (usually 31 March).

On your IR3, you need to show your total business income and expenses, as well as any other income you received during the year.

If you are GST-registered, your income tax return will exclude GST on your income and expenses (GST is in your GST return).

If you are not GST-registered, your income tax return will include GST on your expenses only.

You can file an IR3 online through myIR Secure Online Services. You use your IRD number to register an account.

http://www.ird.govt.nz/online-services/myir-secure-online-services.html

Income and tax from your 'schedular' payments (commissions) and any salary or wages (if applicable) will automatically show in your account. This information comes from the monthly returns made by your agency when they pay to the tax deducted from your commission to IRD.

You need to add your expenses and any other income. The online tool can then carry out the required calculations for you.

For more information about personal taxation and to see an example invoice to a real estate licensee visit:

http://www.ird.govt.nz/resources/a/6/a6d63502-339f-4388-a147-c1563969db16/ir830.pdf

FENCING AND RESIDENTIAL SWIMMING POOL SAFETY BARRIERS

Real estate licensees must be aware of the implications of rights and responsibilities under fencing legislation, fencing covenants, fencing agreements, fencing encroachments and requirements in relation to residential swimming pool safety barriers.

At the point of listing, it is important for licensees to understand any issues relating to fencing of the property being listed, and the safety barriers of a swimming pool if one is present on the property.

Licensees will often be asked questions by prospective buyers, such as whether existing fences are on the boundary line or not, or if a swimming pool's safety barriers meet requirements.

Prospective buyers need to be informed of any potential issues, so that they can seek any necessary legal/technical advice before they enter a transaction (before they make a written offer and sign a sale and purchase agreement).

Fencing requirements under the Fencing Act 1978

The Fencing Act sets out the rights and responsibilities of property owners who want to build or upgrade the fence on any boundary they share with their neighbours. It also addresses situations where fencing encroaches onto a neighbouring property. An occupier is required to contribute equally to the cost of work to create an **"adequate" fence** between the properties.

Rights and responsibilities under the Fencing Act 1978

Under the Fencing Act 1978, the occupiers of adjoining properties must share the cost of work on boundary fences equally, unless:

- there is a fencing covenant, contract or agreement that states otherwise.
- the parties agree that their contributions will not be equal, or
- one of the property occupiers' damages or destroys a fence, then that person must pay the whole cost of repairs – **(Section 17)**

An occupier is required to contribute equally to the cost of work to create an **"adequate" fence** between the properties. An adequate fence means a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve. An occupier is defined as the owner of the property, or someone occupying the property who is not the owner but who has a tenancy of at least 10 years (leaseholder).

Under section 10 of the Fencing Act, and when no exclusions apply, if the two parties cannot reach agreement about fencing between properties, the property owner who wants to build the fence will have to serve a notice on the other describing the fence to be built, its location and the costs involved, and giving the other neighbour 21 days to respond.

The notice has to say that if the neighbour does not respond they will be deemed to have accepted the proposal and will be liable for their proportion of the costs. The neighbour can either agree or reply in writing setting out any reasons for objecting.

If there are still no agreement, mediation or arbitration routes are available, disputes can be taken to the Disputes Tribunal or a District Court.

Boundary fences may or may not be on the correct boundary line. Licensees should exercise extreme caution when asked about the location of a property's boundary. Measurements taken from Titles and Flats Plans may assist where original survey pegs remain in situ, however, in the absence of that evidence a new survey should be recommended.

FENCING ACT 1978

A fencing covenant is defined by the Fencing Act 1978.

A fencing covenant means a covenant, agreement, or proviso—

- that one party to the covenant, agreement, or proviso may not be required by the other party, being the occupier of adjoining land, to contribute towards the cost of work on a fence between the land occupied by the first party and that adjoining land: and
- that does not ensure for the benefit of any subsequent purchaser for value of the land occupied by the first party.

A fencing covenant is a specific type of agreement. It relates to the contribution to the cost of work on a fence between parcels of land.
It allows a party to avoid their contribution to a fence between their property and adjoining land that would otherwise be required by the Fencing Act 1978.

Fencing covenants are often registered by sub dividers or developers to avoid them having to contribute to fencing costs. Fencing covenants are recorded on the certificate of title but expire when the adjoining land is sold by the first purchaser, or after 12 years. However, the covenant may remain on the certificate of title.

Fencing Agreements

Fencing agreements are different from fencing covenants. They are an agreement between adjoining neighbours and may, for example, limit the height of a fence between two neighbouring properties for visual appeal, or agree to not erect a fence at all.

A fencing agreement is defined by the Fencing Act 1978

A fencing agreement means a covenant, agreement, or proviso, not being a fencing covenant, that relates in any way whatever to work on a fence between adjoining lands; and includes an agreement not to erect a fence.
Fencing agreements do not need to be registered on the certificate of title, but if they are registered, they have the effect of binding future owners of the affected properties.

Fencing encroachment is a type of encumbrance which can occur in the following situations:

- When a structure built on a subject parcel of land occupies space on a neighbouring property.
- When a structure built on a neighbouring property occupies space on the subject parcel of land.

The Fencing Act 1978 applies when an encroachment situation involves a fencing issue.
This means a situation where a fence has been built beyond the legal boundary of one property and on the land of the property next door.

Section 8 of the Fencing Act 1978 covers fencing encroachments.

Under section 8(1), a property owner cannot erect a fence that encroaches in any way onto neighbouring land that they do not legally occupy, unless they have permission to build the fence from the occupier of that land or through a court order.

If fencing encroaches on neighbouring land as described by Section 8(1), a court order may require that the fence be removed at the expense of the person who erected it unless the degree of encroachment is minimal, or it does not have any negative impact on the use or enjoyment of the neighbouring land by the complainant.

BUILDING ACT 2004 AND RESIDENTIAL POOLS

Residential pools and safety requirements under the Building Act 2004
The piece of legislation that used to govern swimming pool fencing requirements was the Fencing of Swimming Pools Act 1987. The Building (Pools) Amendment Act 2016 repealed the Fencing of Swimming Pools Act 1987.

Under the amendment, residential pool safety provisions are now included in the Building Act 2004.
162(A) The Purpose The purpose of this subpart is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.
The amendment also created *Clause F9—Means of restricting access to residential pools.*
This clause is part of the Building Code and is found in the Building Regulations 1992. It outlines how access to residential pools constructed, erected, or installed on 1 January 2017 or since needs to be restricted.

These safety provisions relate to barriers to restrict access to residential pools (i.e., fences, gates, and doors) and barriers for small, heated pools, such as a spa pool or a hot tub (i.e., a secure cover).

Acceptable solution F9/AS1 (2017) provides specific construction requirements that swimming pool barriers must meet to comply with the Clause F9 of the Building Code.

Acceptable Solution F9/AS2 (2017) provides specific requirements for covers which may be used on above ground small, heated pools to comply with the Building Code.

Residential pools constructed, erected, or installed before 1 January 2017 are considered to comply with the current requirements if they still meet the previous requirements of the Fencing of Swimming Pools Act 1987 which was in force before the amendments were made.

A Residential pool is defined in section 7 of the Building Act as a

(a) in a place of abode; or
(b) in or on land that also contains an abode; or
(c) in or on land that is adjacent to other land that contains an abode if the pool is used in conjunction with that other land or abode.

An Abode or **place of abode is** defined in section 7 of the Building Act as —
(a) means any place used predominantly as a place of residence or abode, including any appurtenances [other parts] belonging to or enjoyed with the place; and
(b) includes—
  (i) a hotel, motel, inn, hostel, or boarding house:
  (ii) a convalescent home, nursing home, or hospice:
  (iii) a rest home or retirement village:
  (iv) a camping ground:
  (v) any similar place.

A **small, heated pool is** defined in section 7 of the Building Act as a heated pool (such as a spa pool or a hot tub) that—

(a) has a water surface area of $5m^2$ or less; and
(b) is designed for therapeutic or recreational use.

Immediate pool area (as defined in section 7 of the Building Act) means the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool.

Special provisions for residential pools

The Building Act 2004, Subpart 7A —
Special provisions for residential pools (sections 162A- 162E), covers requirements in relation to residential pools.

The purpose of these requirements is to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age.

Section 162B goes on to confirm that the requirements relate to pools with a maximum depth of 400 mm or more.

Residential pools must have physical barriers.

Subpart 7A—Special provisions for residential pools - 162C Residential pools must have means of restricting access

Section 162C confirms that all residential pools filled or partly filled with water (regardless of construction date) must have physical barriers (fencing, gates, and doors) that will successfully restrict access to the pool by unsupervised children under 5 years of age.

Building Act 2004

162C Residential pools must have means of restricting access

(1) Every residential pool that is **filled or partly filled** with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
(2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
  (a) that are in force; or
  (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, Code Compliance Certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
(3) In the case of a small, heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
(4) The following persons must ensure compliance with this section:
  (a) the owner of the pool:
  (b) the pool operator:
  (c) the owner of the land on which the pool is situated:
(d) the occupier of the property in or on which the pool is situated:

Section 162(2) confirms that pools of different ages may meet different compliance criteria.

NOTE:
Residential pools constructed on 1 January 2017 or since must meet Clause F9 of the Building Code.

Pools constructed before 1 January 2017 are compliant if they still meet the previous requirements of the Fencing of Swimming Pools Act 1987 which was in force before the amendments were made.

Means of restricting access to residential pools erected or installed on 1 January 2017 or later.

As noted earlier, *Clause F9—Means of restricting access to residential pools* is part of the Building Code and is found in the Building Regulations. It outlines information about how access to residential pools erected or installed on 1 January 2017 or later needs to be restricted.

F9.1 The objective of this provision is to prevent injury or death to young children involving residential pools.

F9.2 Residential pools with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

F9.3.1 Residential pools must have or be provided with physical barriers that restrict access to the pool or the immediate pool area by unsupervised young children (i.e., under 5 years of age).

F9.3.2 Barriers must either—

(a) surround the pool (and may enclose the whole or part of the immediate pool area); or
(b) in the case of a small, heated pool, cover the pool itself.

F9.3.3 A barrier surrounding a pool must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

Any gates must—

(a) open away from the pool; and
(b) not be able to be readily opened by children; and
(c) automatically return to the closed position after use.

F9.3.4 Where a building forms all or part of an immediate pool area barrier, —

(a) doors between the building and the immediate pool area must not be able to be readily opened by children, and must either—
  (i) emit an audible warning when the door is open; or
  (ii) close automatically after use:
(b) windows opening from a building into the immediate pool area must be constructed or positioned to restrict the passage of children.

F9.3.5 Where a cover is provided as a barrier to a small, heated pool, it must—

(a) restrict the entry of children when closed; and
(b) be able to withstand a reasonably foreseeable load; and
(c) be able to be readily returned to the closed position; and
(d) have signage indicating its child safety features.

Acceptable solutions for compliance with clause F9

As noted earlier, the document called *Acceptable solution F9/AS1* and *F9/AS2* provides specific requirements that swimming pool barriers (i.e., pool fences, doors, and gates) must meet, and requirements for covers which may be used on above ground small, heated pools to comply with the Building Code.

This document is published by the Ministry of Business, Innovation and Employment (MBIE) and is available on their website.

The full *Acceptable solution* *F9/AS1* and *F9/AS2* document can be found using this link.

Swimming pool barriers

A reasonably competent licensee should be familiar with the key points from *Acceptable solution F9/AS1 (2017)* relating to **swimming pool barriers** which are summarised below:

Height

Pool barriers not on a property boundary must be at least 1200 mm in height from the floor/ground level outside the pool barrier.

Materials

Steel wire mesh with square openings may be used instead of solid panelling if the openings do not have a side dimension greater than 13 mm.

Gates and doors

A gate in a pool barrier must be hinged, at least 1200 mm high, open away from the pool, swing clear of any obstruction that might hold it open, be self-closing device and have a latching device that will not release if the gate is lifted or pulled down.

The latching device must be positioned so that it cannot be reached by a child from outside the pool area.

Other objects nearby

Ground features or objects outside a pool barrier within 1200 mm of the top of the barrier that would mean a child could climb over are not permitted.

Barriers for above ground small, heated pools

Under section 162(3)(c) of the Building Act, safety covers can be used as barriers for spa pools and hot tubs that are not in use (they do not need to be fenced).

Some key points from the *Acceptable solution F9/AS2* relating to **above ground small, heated pools** (such as a spa pool or a hot tub) can be summarised as follows:

- The water surface must be 5 square metres or less.
- The pool must have walls at least 760mm high, which cannot be climbed.
- Hold-down straps and fasteners must be able to keep the cover firmly in place if a 10kg force is applied in any direction.
- Covers must be held in place with straps that are fitted with lockable snap fasteners with a minimum width of 33mm.
- Metal padlocks can be used instead of lockable snap fasteners.
- The top surface of the pool cover must be constructed with a slope from the centre to the outside edges to prevent water ‘ponding’ on the cover.

Residential pools constructed, erected, or installed before 1 January 2017.

Section 450B of the Building Act contains provisions that apply to residential pools constructed, erected, or installed before 1 January 2017.

Section 450B (3) outlines the requirements for barriers for pools constructed, erected, or installed before 1 January 2017.

These conditions reflect the previous requirements of the Fencing of Swimming Pools Act 1987 which was in force before the amendments were made.

BUILDING ACT 2004

Subpart 7A—Special provisions for residential pools 450B Savings provision for existing residential pools (extract)

This section applies to a residential pool that was constructed, erected, or installed before 1st January 2017 (an existing pool).

An existing pool is deemed to have barriers that comply with section 162C if the barriers complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and they continue to comply with those requirements subject to any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and the conditions of any such exemption.

Alternatively, an existing pool is deemed to comply with section 162C if all the following apply:

- the outside surface of the side walls of the pool is constructed to inhibit climbing; and
- no part of the top of any side wall of the pool is less than 1.2 m above the adjacent ground level
- any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and
- any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool
- any ladder or other means of access to the interior of the swimming pool can be readily removed or made inoperable and is removed or made inoperable whenever the pool is not intended to be in use.

Inspections of residential pools

Under section 162D of the Building Act, residential swimming pool barriers must be inspected at least every three years to check that its barriers comply with the requirements of section 162C. This requirement does not apply to small, heated pools where the barrier is a safety cover.

Territorial authority may grant a waiver.

Under section 67A of the Building Act, a territorial authority may grant a waiver or modification of section 162C(1) or (2) if the territorial authority is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.

Waivers are considered in relation to all the relevant circumstances, like the characteristics of the pool and the land on which it is located.

Notices to fix and infringement notices.

Territorial authorities can enforce pool barrier requirements. This includes the power to issue infringement notices and notices to fix pools that are not compliant.

- Under section 165(g) of the Building Act, a territorial authority may direct that the pool be drained of water and be kept empty until the requirements of section 162C are complied with.
- Under section 168 it is an offence not to comply with a notice to fix.
- Under section 168(1AB), a person who does not comply with a notice to fix a pool barrier requirement is liable on conviction to a fine not exceeding $5,000.

Resource consent

A resource consent may be required if the pool position in relation to the boundary or other buildings does not meet the requirements of the district plan.

Building consent

Most building work needs a building consent unless it is listed in Schedule 1 of the Building Act.

Construction of a residential pool barrier is classed as building work that needs a building consent.

- A building consent is not needed to install a safety cover to restrict access to a small, heated pool if the pool is residential.

Code Compliance Certificate (CCC)

A Code Compliance Certificate is issued after a final inspection of completed building work that required a building consent. It confirms that the building work complies with the building consent.

A Code Compliance Certificate can only be issued by the consent authority that granted the building consent.

- For residential swimming pools, the barriers must meet requirements for a code of compliance certificate to be issued.

The consent authority may refuse to consider an application for a Code Compliance Certificate if it is applied for more than two years after the building consent was granted.

Certificate of Acceptance

A Certificate of Acceptance can be applied for when work that required a building consent was done without a building consent, or where a building permit was in place, but no Code Compliance Certificate (CCC) was issued.

Building consents were introduced on 1 July 1992. Consent authorities can usually issue certificates of acceptance for work done after this date. A Certificate of Acceptance confirms that building work sufficiently complies with the current clauses of the Building Code.

For non-compliant work, a notice to fix will be issued. This will specify the remedial work required.

Building Act 2004 - Subpart 7A—Special provisions for residential pools 162D Periodic inspections of residential pools (extract)

(1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
  (a) residential pools other than small, heated pools:
  (b) small, heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.

(2) A territorial authority may accept a certificate of periodic inspection from an independently qualified pool inspector for the purpose of subsection (1) in lieu of carrying out an inspection under section 222.

(3) If a territorial authority decides not to accept a certificate of periodic inspection from an independently qualified pool inspector under subsection (2), the territorial authority must, within 7 working days of making that decision, give notice to the chief executive of the decision and the reasons for the decision.

(4) If an independently qualified pool inspector inspects a pool for the purpose of this section and decides that the pool does not have barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188), the inspector must, within 3 working days of the date of inspection, give written notice to the relevant territorial authority of the decision, attaching any information that the chief executive requires to accompany the notice.

(5) In this section, — **anniversary date**, in relation to a pool, means—
  (a) the date of issue of the Code Compliance Certificate or the certificate of acceptance in respect of the pool; or
  (b) in the case of a pool that did not require a building consent, —
    (i) the date on which notice was given under section 7 of the Fencing of Swimming Pools Act 1987; or
    (ii) if subparagraph (I) does not apply, the date on which the existence of the pool came to the knowledge of the territorial authority.
    (iii) **certificate of periodic inspection** means a certificate that—
  (a) is issued by an independently qualified pool inspector; and
  (b) is in the prescribed form (if any); and certifies that a pool has barriers that comply with the requirements of section 162C (subject to any waiver or modification

The inspection is carried out by the territorial authority for the area unless the pool owner chooses to have the inspection carried out by an independently qualified pool inspector.

Under section 5 of the Act, an independently qualified pool inspector means a person—

- accepted by the chief executive as qualified to carry out inspections to determine whether a pool has barriers that comply with the requirements of section 162C; and
- whose acceptance has not been withdrawn.

If an independently qualified pool inspector carries out the inspection, they will need to confirm compliance by providing a certificate of periodic inspection. If the pool barriers do not comply, the inspector will need to inform the territorial authority in writing within three days of carrying out the inspection.

THE OVERSEAS INVESTMENT ACT

The Overseas Investment Act 2005 (OIA) requires an '**overseas person'**, or 'an **associate** of an overseas person' to apply for **consent** to buy certain types of land or business.

Under Section 7(2), an individual is classed as an 'overseas person' if they are **not** a New Zealand citizen or a New Zealand resident. A resident is someone who holds a **residence class visa** and is **residing in New Zealand** indefinitely under the terms of the OIA. An overseas person may also be a body corporate, a partnership or other body of persons, a trust, or a unit trust.

Note that owning business assets in New Zealand does not entitle an overseas investor to live in this country.

For a full definition of an overseas person under the Overseas Investment Act 2005, see the copy of Section 7 on the next page.

Which land the OIA applies to

The types of land and business affected by these requirements are:

- **Sensitive land** or an **interest** in sensitive land (an 'interest' refers to buying shares in a company that owns sensitive land) (Section 1)
- **Business assets** worth more than $100 million (Section 13)
- **Fishing quota** or an **interest** in fishing quota. (Section 10 of the OIA and Sections 56 to 58B of the Fisheries Act 1996.)

In 2018, the Overseas Investment Amendment Act changed to now classify **all residential** and **lifestyle** properties as sensitive land. **Restrictions** on the sale of sensitive land under the Overseas Investment Act 2005 now apply to residential and lifestyle properties throughout New Zealand. Land is a residential or lifestyle property if this is how it is categorised by the relevant district council.

The OIA also classifies several other types of land as **sensitive**. For example

- All Residential land and land in Marine & coastal areas
- Non-urban land over 5 ha
- Land adjacent to the foreshore
- Land on certain offshore islands, if over 4000 m²
- Land of more than 4000 m² that is being held for use as a park or reserve
- Land of more than 4000 m² that adjoins a recreation reserve on the edge of a lake or the sea

Special land has additional requirements attached to it. Any person selling sensitive land that includes special land (foreshore, seabed, riverbed, or lakebed) to an overseas person must offer the Crown the **right** to **acquire** the special land.

A full definition of sensitive land is given in Schedule 1 of the Overseas Investment Act. http://www.legislation.govt.nz/act/public/2005/0082/27.0/DLM358552.html . However, be aware that this site is not always fully up to date with very recent amendments.

Overseas Investment Act 2005

7 Who are overseas persons

(1) The purpose of this definition is to provide that persons are overseas persons if they themselves are overseas persons (for example, not a New Zealand citizen or resident or, for companies, incorporated overseas) or they are 25% (or more) owned or controlled by an overseas person or persons.

(2) In this Act, overseas person means—

(a) an individual who is neither a New Zealand citizen nor ordinarily resident in New Zealand;

or

(b) a body corporate that is incorporated outside New Zealand or is a 25% or more subsidiary of a body corporate incorporated outside New Zealand; or

(c) a body corporate (A) if an overseas person or persons have—

(i) 25% or more of any class of A's securities; or

(ii) the power to control the composition of 25% or more of A's governing body; or

(iii) the right to exercise or control the exercise of 25% or more of the voting power at a meeting of A; or

(d) a partnership, unincorporated joint venture, or other unincorporated body of persons (other than a trust or unit trust) (A) if—

i. 25% or more of A's partners or members are overseas persons; or

ii. an overseas person or persons have a beneficial interest in or entitlement to 25% or more of A's profits or assets (including on A's winding up); or

iii. an overseas person or persons have the right to exercise or control the exercise of 25% or more of the voting power at a meeting of A; or

(d) a trust (A) if—

(i) 25% or more of A's governing body are overseas persons; or

(ii) an overseas person or persons have a beneficial interest in or entitlement to 25% or more of A's trust property; or

(iii) 25% or more of the persons having the right to amend or control the amendment of A's trust deed are overseas persons; or

(iv) 25% or more of the persons having the right to control the composition of A's governing body are overseas persons; or

(e) a unit trust (A) if—

(i) the manager or trustee, or both, are overseas persons; or

an overseas person or persons have a beneficial interest in or entitlement to 25% or more of A's trust

Applications for OIA consent

In accordance with Overseas Investment Act requirements, a buyer who needs OIA consent must make a **written application** to request this from the Overseas Investment Office (OIO). The OIO is part of Land Information New Zealand (LINZ).

A buyer will usually need to get help from a **solicitor** to confirm whether consent is required and to deal with the process of applying for consent. Affected potential buyers must be advised to seek **legal advice** as early as possible in the transaction process.

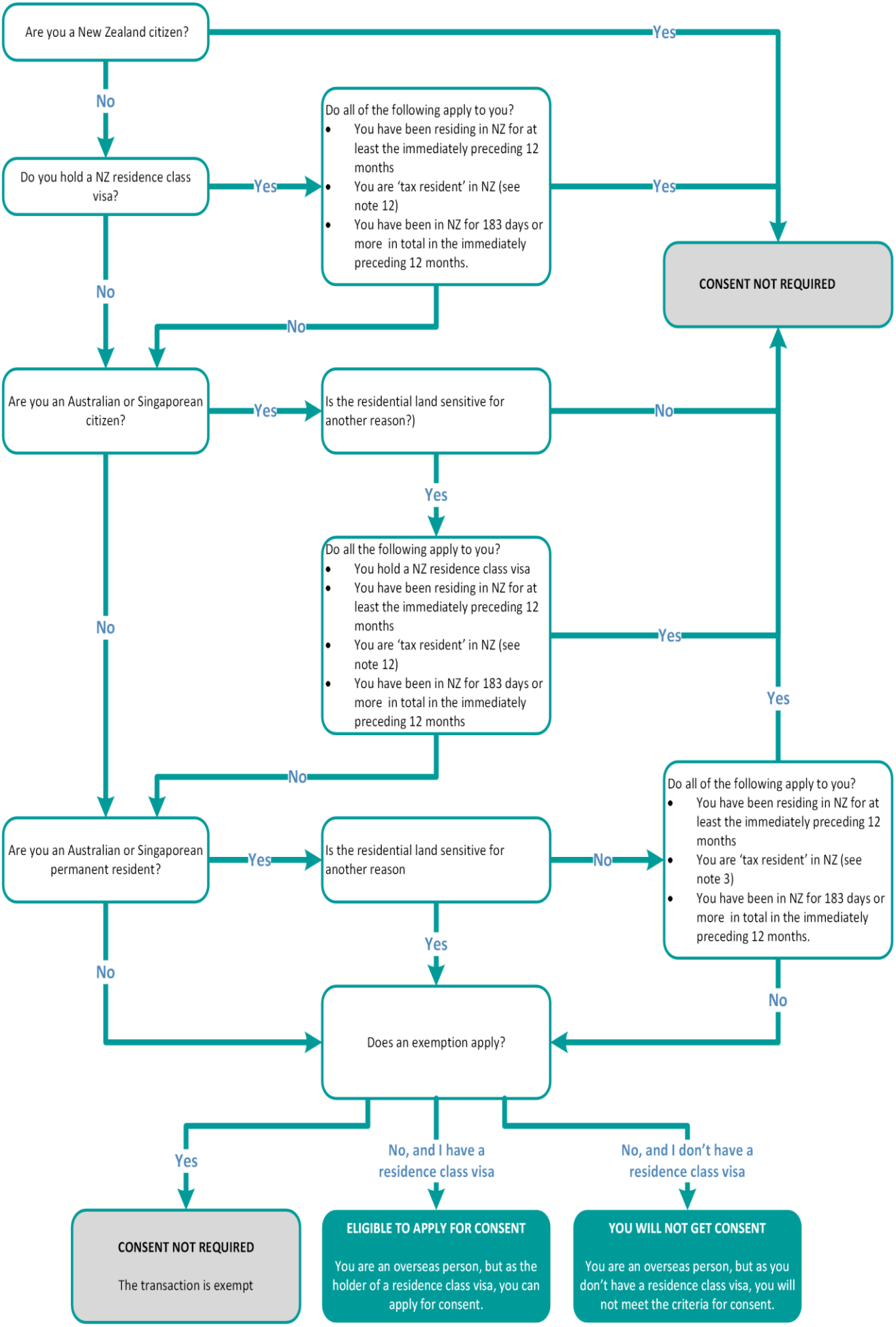
Criteria for receiving OIA consent

In simple terms, OIA consent depends on whether:

- The applicant satisfies the **investor test** (which means they have good character, business acumen, financial commitment, and are eligible for visas or entry permissions).
- The transaction is likely to **benefit** New Zealand.
- The individual overseas person is ordinarily **resident** in New Zealand or **intends** to reside in New Zealand indefinitely.
- In the case of a company, a partnership, a joint venture, or a trust, all the individuals with control of it are New Zealand **citizens**, ordinary New Zealand **residents** or are **intending** to live in New Zealand indefinitely.
- If the application is for farmland, the land has already been offered for sale on the **open market** to New Zealand citizens and residents. (Note: The farmland must be offered to the open market for a period of 20 working days before it can be sold to an overseas buyer.)

Remember:

- Under the Overseas Investment Act 2005 (OIA), overseas persons and their associates **must apply for consent** to buy some types of sensitive land or businesses.
- There are several types of land that **count as sensitive land**, including almost all **residential and lifestyle** properties.
- If an overseas buyer requires OIA consent, they **must indicate** this on the sale and purchase agreement.
- To receive OIA consent, buyers **must meet** a range of criteria, including that:
  - They satisfy the investor test.
  - The transaction they are proposing is likely to benefit New Zealand.
  - They are ordinarily resident in New Zealand (or intend to become resident.
- If an application relates to farmland, it **must** already have been offered for sale on the open market to New Zealand citizens and residents.


Are you a New Zealand citizen?
Yes
No
Do you hold a NZ residence class visa?
Yes
Do all of the following apply to you?
• You have been residing in NZ for at least the immediately preceding 12 months
• You are 'tax resident' in NZ (see note 12)
• You have been in NZ for 183 days or more in total in the immediately preceding 12 months.
Yes
CONSENT NOT REQUIRED
No
No
Are you an Australian or Singaporean citizen?
Yes
Is the residential land sensitive for another reason?)
No
Yes
Do all the following apply to you?
• You hold a NZ residence class visa
• You have been residing in NZ for at least the immediately preceding 12 months
• You are 'tax resident' in NZ (see note 12)
• You have been in NZ for 183 days or more in total in the immediately preceding 12 months
Yes
No
Yes
No
Are you an Australian or Singaporean permanent resident?
Yes
Is the residential land sensitive for another reason
No
Do all of the following apply to you?
• You have been residing in NZ for at least the immediately preceding 12 months
• You are 'tax resident' in NZ (see note 3)
• You have been in NZ for 183 days or more in total in the immediately preceding 12 months.
Yes
No
No
Does an exemption apply?
Yes
No, and I have a residence class visa
No, and I don't have a residence class visa
CONSENT NOT REQUIRED
The transaction is exempt
ELIGIBLE TO APPLY FOR CONSENT
You are an overseas person, but as the holder of a residence class visa, you can apply for consent.
YOU WILL NOT GET CONSENT
You are an overseas person, but as you don't have a residence class visa, you will not meet the criteria for consent.

OVERSEAS INVESTMENT OFFICE

Land Information New Zealand
Toitū te whenua

Can you buy a home in New Zealand to live in?

Most overseas people are not able to buy homes in New Zealand to live in, but some can apply to the Overseas Investment Office for consent.

You don't need consent if...

- You are a New Zealand, Australian or Singaporean citizen.
- You have a New Zealand, Australian or Singaporean Permanent Resident visa and live in New Zealand.*
- You have a New Zealand Resident visa and live in New Zealand.*

*You have been here for at least 12 months, and spent at least 183 days of the past 12 months here.

You must apply for consent to buy one home to live in if...

- You have a New Zealand Permanent Resident or Resident visa and do not live in New Zealand.*
- You have an Australian or Singaporean Permanent Resident visa and do not live in New Zealand.*

*To get consent you'll need to live in New Zealand, and if you stop living here, you'll have to sell.

You can't buy one home to live in if...

- You have a Temporary visa, such as a visitor, student, working holiday, or work visa (you don't have a Permanent Resident or Resident visa).

  There are other ways you may be able to invest in property.

Check if you can buy

Visit the Ministry of Business, Innovation & Employment website at https://www.newzealandnow.govt.nz/overseas

ANTI MONEY LAUNDERING

The Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) amendment bill introduced new obligations to the real estate industry from January 1, 2019.

The Anti-Money Laundering and Countering Financing of Terrorism Act (AML/CFT Act) classifies real estate agencies as 'reporting entities', which means they are obligated to detect and deter money laundering and terrorism financing.

The aim of the AML/CFT requirements on real estate agencies is to deter criminals from using real estate to change money gained from illegal activities into legitimate assets.

The Act has several key requirements that will apply to real estate agencies:

- Customer due diligence on new and existing customers (clients).
- Undertake a risk assessment of the money laundering and financing of terrorism risks you may come across in the ordinary course of your business.
- Develop a compliance programme to detect and deter money laundering and the financing of terrorism and manage or mitigate any risks identified.
- Appoint an AML-CFT compliance officer to manage your compliance programme.
- Report any suspicious activity or certain prescribed transactions to the Police Financial Intelligence Unit.
- Report to DIA's AML-CFT supervisor annually on matters such as the number of customer due diligence verifications undertaken in the year (from 1 July to 30 June).
- The agency's compliance programme must be independently audited every 2 years.

All licensees who work for a real estate agent, carry out real estate agency work and manage client funds in relation to that work, are required to fully comply with the AML/CFT Act. 'Managing client funds' includes receiving deposit funds from a buyer, holding them in the agency's trust account and then releasing them to the person entitled to them.

What's money laundering and terrorism funding?

Money laundering (ML) is the process that criminals use to "clean" the money they make through their criminal activity, by turning it into seemingly legitimate funds.

Terrorism financing (TF) is used to describe the process terrorists and their sympathisers use to raise and move funds.

Examples of how money could be laundered through real estate transactions are:

- A criminal organisation investing in a development property, paying construction bills in cash, or even loaning themselves a mortgage through a shell corporation.
- A person having a relative or an acquaintance purchase a property when they are the financial beneficiary themselves.
- A person making a low offer in a tender purchase and paying a deposit in cash from one account. Then, when the tender is rejected, getting the refund of the deposit paid into a different account (e.g., a trust account).

Conducting Due Diligence

The AML/CFT Act requires reporting entities to conduct Customer Due Diligence (CDD).

The 'customer' in the Act is referred to as the 'client' in real estate. In other words, it is normally the person you are entering into the Agency Agreement with.

Customer due diligence will require reporting entities, including real estate agencies, **to obtain the following information about a customer and then verify that information**. In most cases, this will include sighting documents that include details about your customer such as:

- full name
- date of birth
- the person's relationship to the customer if the person is not the customer
- address or registered office
- company identifier or registration number
- as well as any information prescribed by regulations.

Verifying the information involves taking reasonable steps to show the information provided to you is correct.

- ***CDD needs to be carried out before the agency enters into an agency agreement with the client.***
- **You do not need to complete Due Diligence on a repeat client if nothing has changed**

You are required to conduct Customer Due Diligence on:

Your client

This is the person entering into an agency agreement with the real estate agent (usually the vendor unless you been engaged by a buyer as a 'buyer's agent').

A beneficial owner of your client

- an individual who has effective control of a client on whose behalf the transaction is conducted

or

- an individual who has **more than a 25% shareholding** in a company on whose behalf the transaction is conducted.

A person acting on behalf of your client

For example, this may be a person exercising a power of attorney for your client, or the legal guardian acting on behalf of a minor who is your client. If the client does not speak English and they have a person acting on their behalf, you are required to identify that person.
You will need to be satisfied that you know who the person acting on your client's behalf is and that they have the authority to act for your client. You would need to undertake CDD on the person acting on your client's behalf as well as the client.

There are occasions when Customer Due Diligence will be required to be carried out on people other than your Client.

- If a real estate sale falls through, and a deposit is refunded you will be required to carry out CDD on the buyer.
- If a buyer **pays you $10,000 or more in cash**, you have CDD responsibilities regarding them. This needs to be referred to your Compliance Officer.

- If the deposit is paid by a **wire transfer of NZ$1,000 or more**, the agency is required to obtain and verify identity information on the originator of the wire transfer. This needs to be referred to your Compliance Officer.
- If a sale is not finalised and the person who paid the deposit **requests the refund of the deposit to be paid to a different bank account from the one the deposit was originally paid into**, refer this to your Compliance Officer.

Conducting due diligence on people other than the client

What is Customer Due Diligence?

Customer due diligence is the processes used to collect and evaluate relevant information about a customer or potential customer.
This means you must **obtain** the necessary information to determine the level of CDD and then you must **verify** this information using acceptable documents.

Conducting due diligence on trusts

You need to conduct EDD on a trust.
This means you would need:

- the full name of the trust and the address of the trust
- identification of individuals who are the settlor(s)
- confirmation of the source of funds or source of wealth of the trust (usually by verifying the origin of settlor's wealth)
- name and date of birth of the individuals who are the trust's beneficiaries.

Professional trust named as the registered owner

Where a professional trust is named as the registered owner of a property (e.g., ABC Trustees Limited) rather than a standard family trust, the real estate agency needs to identify the individual(s) representing the corporate trustee or agent.
Identification and verification of all individuals must be to the standard required by the Act.

Verification –verifying a client's identity

Verification involves confirming some of the obtained information against documents, data or information obtained from a reliable and independent source.

Under the AML/CFT Act you must take 'reasonable steps' to satisfy yourself that the identity information you have obtained is correct.

The agency may verify the identity documents of the client by verifying documentary evidence (either face to face or by obtaining copies of documents that have been certified by a 'trusted referee')
or

- through electronic verification

More details on information required is in the Amended Identity Verification Code of Practice (IVCOP 2013), published on the Department of Internal Affairs (DIA) website. This document can be found on the webpage https://www.dia.govt.nz/AML-CFT-Information-for-Real-Estate-Agents

Three Levels of Customer Due Diligence

Simplified CDD (SDD)

Applies for low-risk clients (e.g., local authorities or publicly listed companies).
For SDD, you need to record the full name of the entity and a brief reason why this is a circumstance where Simplified Due Diligence applies.
You need to collect the following for the person acting on behalf of the entity:

- their full name and date of birth
- their relationship to the client.

Standard CDD

Applies to most residential and commercial property transactions.
For Standard CDD, you must gather information that details:

- Client full name
- date of birth
- the person's relationship to the customer if the person is not the customer
- address or registered office
- company identifier or registration number
- as well as any information prescribed by regulations.
- The information needs to be verified.

Enhanced CDD (EDD)

Applies when there is a higher level of risk (e.g., trust ownership or a politically exposed person or non-residents from countries with insufficient AML/CFT regimes.)

For EDD, as well as all the information required for Standard CDD, the client needs to be asked about the source of funds or wealth.

The information supplied needs to be verified.

Enhanced Customer Due Diligence Guideline

AMLCFT Risk Assessment and Programme - Prompts and Notes.pdf (dia.govt.nz)

COMPLYING WITH AML REQUIREMENTS.

The Compliance Programme

Appoint a Compliance Officer – Section 56 You must appoint a compliance officer who will have responsibility for administering and maintaining the AML/CFT Programme. An employee must be appointed to this role who reports to a senior manager. In the case of a sole practitioner, we would expect you to be the compliance officer.
If that is not possible, an external person must be appointed as a compliance officer. Compliance officers can be shared within a designated business group.
Conduct a Risk Assessment – Section 58 You are required to undertake an assessment of the risks posed to your business by money laundering and financing of terrorism. The risk assessment should be in writing and be informed by AML/CFT supervisory guidelines, which are available on the DIA website.
Develop an AML/CFT Programme – Section 57 Your AML/CFT programme must be based on your risk assessment and be in writing. It should include policies, procedures, and controls for ensuring all compliance obligations are adequately and effectively met.

Maintaining Compliance

Conduct Customer Due Diligence (CDD) – Part 2, Subpart 1 You must conduct CDD when conducting an occasional transaction or when establishing a business relationship with a client. You must also conduct CDD on an existing customer under certain circumstances. There are three levels of CDD depending on context and according to the level of risk involved; simplified, standard and enhanced. **CDD only needs to be conducted on your client and must occur before you enter into an agency agreement with the client.**
Keep records – Sections 49 – 55 You must keep records of transactions, suspicious activities, the documents verifying the identities of clients and other parties or beneficiaries, and any other related records are required by the supervisor. Records must be kept at least five years.
Ongoing Customer Due Diligence and ongoing account monitoring - Section 31 You are required to undertake ongoing CDD and account monitoring. This is to ensure that you have continued confidence that the business relationship and the transactions within the relationship are consistent with the client's business and risk profile. It also assists in spotting suspicious activity.
Review your risk assessment and compliance programme - Section 59 Your AML/CFT supervisor expects you to conduct a regular review of your risk assessment and compliance programme. This is to ensure that any business changes or new risks in the operating environment are covered and your AML/CFT documents remains fit for purpose.

Reporting and Auditing

Submit an annual report - Section 60 You must submit an annual report. This report must be in the prescribed form and be submitted to your AML/CFT supervisor at the time set by the supervisor. The report must consider the results and implications of the audit (see below) and any information prescribed in the regulations.
Audit your risk assessment and compliance programme every two years – Section 59A At least every two years you must review your risk assessment and compliance programme, and have it audited by an independent person who is suitably qualified to conduct the audit. Your AML/CFT supervisor may also require an audit of your risk assessment and compliance programme to be undertaken on request.

Reporting to the Financial Intelligence Unit

Report to the Financial Intelligence Unit – Subparts 2 and 2A When you identify suspicious activity, you must report it to the FIU. Suspicion is objective not subjective. You must also submit prescribed transaction reports to the FIU, as necessary.

RESOURCES

Inland Revenue. (2016). *Working in the real estate industry*. https://www.ird.govt.nz/resources/a/6/a6d63502-339f-4388-a147-c1563969db16/ir830.pdf

Ministry of Business, Innovation and Employment (MBIE). (2017). *Acceptable solutions F9/AS1 and F9/AS2: For New Zealand Building Code clause F9 means of restricting access to residential pools*. https://www.building.govt.nz/assets/Uploads/building-code-compliance/f-safety- of-users/f9-restricting-access-residential-pools/asvm/f9-restricting-access-to- residential-pools.pdf

Ministry of Business, Innovation and Employment (MBIE). (2018). *Sale of a house*. https://www.tenancy.govt.nz/ending-a-tenancy/change-of-landlord-or- tenant/sale-of-a-house/

Ministry of Justice. (n.d.). *Saying no to bribery and corruption – A guide for New Zealand businesses*. https://justice.govt.nz/assets/Documents/Publications/Ministry-of- Justice-Anti-Corruption-Guide.pdf

Real Estate Authority (REA). (2012). *Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012*. https://www.rea.govt.nz/assets/Uploads/Resources/Guides/Code-of-conduct.pdf

Guideline: Real Estate Agents Complying with the Anti-Money Laundering and Countering Financing of Terrorism Act 2009

https://www.dia.govt.nz/diawebsite.nsf/Files/AML-CFT-Real-Estate-Guideline/$file/AML-CFT-Real-Estate-Guideline-Dec-2018.pdf