



Agency Agreements – are yours compliant?

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Agency Agreements – are yours compliant?

One of the topics we here at ACOP love to discuss is the importance of having an agency agreement which is current and correctly completed, so that it is enforceable.

Not complying with Section 55 of the Property and Stock Agents Act 2002 may mean that an agent or strata agent is faced with the very real prospect of not getting paid their commission or management fees.

Section 55 of the Property and Stock Agents Act 2002 (NSW) dictates that a real estate agent is not entitled to any commission or expense reimbursement unless they have a valid, signed, and compliant written agency agreement in place. Furthermore, a copy of the agreement, (signed by both the client and the licensee) must be served to the client within **48 hours** of signing, or the agent could forfeit their payment.

To ensure an agency agreement satisfies Section 55 of the Property and Stock Agents Act 2002 (NSW), it must include prescribed terms such as the services to be performed, the fees and commissions payable, and expenses or outgoings the agent is authorised to incur.

Section 55A does provide a relief mechanism. Under this Section of the Act, if an agent fails to meet the strict technical requirements of an agreement, however, can demonstrate that the omission was minor, an unintentional administrative error, rather than deceptive behaviour and that the principal was not prejudiced, a court or tribunal has the discretion to order that the commission and expenses are still recoverable. That is:

- The failure to comply with the rules was inadvertent
- No person has suffered any financial loss or disadvantage because of the failure
- The failure is of a minor nature
- Failure to make the order for the payment of the commission would be unjust

Despite having the protections in section 55A, we strongly recommend that all agency agreements comply with the obligations imposed by the provisions of the Act and Regulations.

An agency agreement is in place for your protection as an agent. There is

no other document that secures your payment and it must be remembered that the laws are in force to protect the consumer, not the agent or agency. The only way you can protect your fees is by ensuring that you have an agency agreement in writing, signed and compliant. Always pay attention to the details when completing your agency agreements.

Here are some of the key errors, we still see on agency agreements:

- Leaving sections or boxes of agency agreement blank. Ensure every box and section is completed
- “NIL” is the correct term to use **not** N/A or TBA
- “Not known to agent at time” is the correct term to use **not** as per contract. In *most* cases you will **not** have the Contract for Sale in your office at the time of signing an agency agreement.
- Ensure your commission reflects the agent’s opinion of price. Include an incentive or sliding scale arrangement for exceeding price expectations (if agreed with your vendor), however, ensure you include the opinion of price in the commission section of the agency agreement. This will help safeguard you against any potential underquoting claims, if audited by NSW Fair Trading.

If the agent’s opinion of price is \$1,000,000 to \$1,100,000 at a Commission Rate of 1.65% (Including GST) and you agree with your Vendor to an incentive for any amount achieved over \$1,100,000. Then show the incentive separately on the agency agreement.

For example: If the sale price on the contract (Sale Price) is between \$1,100,000 and \$1,100,000 the commission will be 1.65% (Including GST) of the Sale Price and 1.75% (Including GST) if sold for \$1,100,000.01 and above.

However, Expressing the commission outside the range of the agent’s opinion of price, suggests that conversations have been had at a higher price.

For example: If the sale price on the contract (Sale Price) is between \$1,100,000 and \$1,200,000 the commission will be 1.65% (Including GST) of the Sale Price. This suggests that conversations have been had at \$1,200,000. This will leave you open to underquoting issues, should you be asked to produce sales documentation evidence to NSW Fair Trading.

Although, not mandated by legislation, it is best practice for all agencies have the Licensee-In-Charge, review and co-sign all agency agreements to ensure their accuracy, allowing for the identification of any errors or omissions before they lead to any potential issues. Implementing this additional review could ultimately save both time and fees in the future.

Should your Agency be interested in undergoing a Compliance Check, please contact the college on 1300 88 48 10 or enquiries@acop.edu.au for further details.

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