



Topic 2A- 2021/22
Material Fact
Compulsory

Continuing Professional Development (CPD)
1 hour

- Learner Guide -

Real Estate Training Solutions

PO Box 682, Richmond, NSW, 2753

Phone: 1300 850 980 | Email: enquiries@rets.com.au | www.rets.com.au

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Welcome

Welcome to *Compulsory CPD Topic 2A 2021/22 Disclosing Material Fact*; a short course equivalent to one CPD hour.

When RETS is satisfied that you are competent in this course, we will issue you with a Certificate of Completion stating that this hour of CPD has been achieved.

RETS gives you 12 months to complete this course.

In NSW all Class 1 and Class 2 licensed agents are required to complete 3 hours of compulsory topic CPD training each year, plus 3 hours of elective topics. Class 1 agents must also complete 3 hours of business skills training.

NOTE: Satisfactory completion of this topic will count as **1 hour** of CPD towards the compulsory learning topics required for the current CPD year. This is only part of your CPD requirements. If you need assistance to understand your CPD responsibilities, you can speak with RETS on 1300 850 980.

HELP!!

If at any time you get stuck, or do not understand a concept please contact your tutor. You can reach them via email – tutor@rets.com.au.

Good Luck

Sasha Boe
Managing Director

Introduction

Topic Description

The objective of this topic is to provide an overview of the legally required disclosure requirements for licensed agents under the Property and Stock Agents Act 2002 (the Act), with a particular focus on material facts. On completion of this topic a person will be able to demonstrate competency of the prescribed learning outcomes detailed below.

Learning Outcomes

A person who completes this compulsory CPD topic will be able to:

PART

1 Overview of disclosure requirements

2 Material Facts

LEARNING OUTCOME

1.1 **Identify** the disclosure obligations of a licensed agent under Division 5 of Part 3 of the Act and related provisions under the Property and Stock Agents Regulation 2014 (the Regulation).

2.1 **Identify** the material facts prescribed under clause 54 of the Regulation.

2.2 **Describe** an agent's obligations under the law to disclose material facts.

2.3 **Identify** examples of issues or matters that could be important to a reasonable person in deciding whether or not to proceed with a particular transaction.

2.4 **Identify** the steps an agent should take to determine whether any prescribed material facts apply to a particular property.

Overview

Whilst many consumers are very well educated these days due to the amount of information available on the internet as well as education by consumer bodies, many consumers turn to agents for expertise, knowledge and good advice. There are many unflattering stereotypes about unethical real estate agents and these have no doubt come about because of the unscrupulous actions of some agents.

The most effective and successful agents understand that the key to building solid relationships with clients and customers is trust. The real estate agent's reputation as a trusted 'go between' can be severely damaged, and there can be legal and other consequences, if agents carry out their day to day roles and functions without understanding their ethical and legal responsibilities.

A 'material fact' is defined by NSW Fair Trading as 'a fact that would be important to a reasonable person in deciding whether or not to proceed with a particular transaction. In a property services context, these are facts which:

- may be sufficiently significant or relevant to influence decisions on whether to buy, sell or rent, and/or
- could impact the market value of a property.

Agents' legal obligations for disclosure

Obligations to disclose material facts under the Property and Stock Agents Act 2002

It is vital to understand Section 52 of the Property and Stock Agents Act 2002 and its important role in understanding disclosure requirements for agents working in the property sector.

52 Misrepresentation by licensee or registered person

(1) A person (the agent) who is exercising or performing any function as a licensee or registered person must not induce any other person to enter into any contract or arrangement by—

(a) any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the agent or not), or

(b) any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know.

Maximum penalty—200 penalty units.

(2) Without limiting the generality of subsection (1), a statement, representation or promise is taken to be false, misleading or deceptive if it is of such a nature that it would reasonably tend to lead to a belief in the existence of a state of affairs that does not in fact exist, whether or not the statement, representation or promise indicates that the state of affairs does exist.

(3) It is a sufficient defence to a prosecution for an offence under this section if the defendant proves that the defendant did not know, and had no reasonable cause to suspect, that the statement, representation or promise was false, misleading or deceptive.

An offence under this section can attract up a penalty of up to \$22,000.

To summarise this excerpt, a licensee or certificate holder *must not* induce a person to enter into any contract or arrangement by:

- any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the agent or not), or

- any failure to disclose a material fact of a kind prescribed by the regulations (whether intended or not) that the agent knows or ought reasonably to know.

Property owners or agents who have knowledge of material facts cannot rely on purchasers or tenants becoming aware of them through making 'usual inquiries' or doing their own 'due diligence'.

Past issues with understanding disclosure of material fact

The requirement to disclose material facts has always been part of the legal requirements for real estate agents, however, historically, the issue has been contentious and the legislation was not as clear as it currently is now.

There has been considerable debate over the years since the issue of stigmatised properties came to the fore in 2004 when a real estate agent in New South Wales was successfully prosecuted by the Commissioner of Fair Trading for marketing a home in North Ryde without revealing to prospective purchasers that a tragic triple murder had occurred in the house. The media had dubbed this property 'the Gonzales Murder House'¹.

Learning activity 1:

Review the ABC article below. Remember that it was published back in 2018, and reflects the past problematic issues that agents experienced when trying to navigate the issue of material fact. Many agents felt that material fact only applied to issues related to the physical condition of the property, such as termite damage or contaminated land.

<https://www.abc.net.au/news/2018-07-07/what-is-stigmatised-property-and-what-are-your-rights/9911608>

Test Your Learning:

What is a 'stigmatised' property?

¹ Source: <https://propertyupdate.com.au/stigmatised-properties-psychologically-stigmatised-property/>

Prescribed material facts under the Property and Stock Agents Regulation 2014

Commencing on 23rd March 2020, NSW Fair Trading prescribed certain material facts that it is an offence not to disclose. This was done via Section 54 of the Property and Stock Agents Regulation 2014. Section 54 is titled 'Misrepresentation by licensee or registered person by failing to disclose material facts'.

You can directly view Regulation 54 here:

<https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/sl-2014-0563#sec.54>

In summary, the following are prescribed material facts, and it is an offence for the agent to conceal:

- within the last 5 years, the property has been subject to flooding from a natural weather event or bush fire
- the property is subject to significant health or safety risks
- the property is listed on the register of residential premises that contain loose-fill asbestos insulation that is required to be maintained under Division 1A of Part 8 of the Home Building Act 1989
- within the last 5 years the property was the scene of a crime of murder or manslaughter
- within the last 2 years the property has been used for the purposes of the manufacture, cultivation or supply of any prohibited drug or prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985
- the property is, or is part of, a building that contains external combustible cladding to which:
- there is a notice of intention to issue a fire safety order or a fire safety order has been issued requiring rectification of the building regarding the external combustible cladding, or

- there is a notice of intention to issue a building product rectification order or a building product rectification order has been issued requiring rectification of the building regarding external combustible cladding
- the property is, or is part of, a building where a development application or complying development certificate application has been lodged under the Environmental Planning and Assessment Act 1979 for rectification of the building regarding external combustible cladding

Obligations under the Agent Rules of Conduct

The agent Rules of Conduct are contained in the Property and Stock Agents Regulation 2014. These Rules of Conduct (including general rules and those specific to the various sectors) apply to both licensees and assistant agents (certificate of registration holders).

General Rule of Conduct No. 3 is applicable to disclosure:

3 Honesty, fairness and professionalism

- (1) An agent must act honestly, fairly and professionally with all parties in a transaction.
- (2) An agent must not mislead or deceive any parties in negotiations or a transaction.

If a potential purchaser asks a seller's agent a question about a property, before that property is sold, the seller's agent must answer that question fully and frankly and to the best of their knowledge. If the agent has no knowledge of the matters raised by the potential purchaser, they can advise that potential purchaser that they do not know.

An example of a breach of this Rule of Conduct would be where an agent tells the seller to prepare the property for inspection by potential purchasers including taking steps to hide defects or any other important feature which would otherwise come to the attention of someone doing an inspection.

Failure to comply with the agent Rules of Conduct can attract substantial penalties, and can also impact negatively on the reputation of the agent, especially if the case is publicised in the media.

Obligations under the Australian Consumer Law

The Australian Consumer Law (ACL) is also applicable to the requirement for agents to disclose material facts. In particular, this relates to Section 18 of the ACL which prohibits misleading or deceptive conduct and Section 30 which prohibits false or misleading representations about the sale of land.

You can review further information about ACL in the ACL publication 'Avoiding unfair business practices- A GUIDE FOR BUSINESSES AND LEGAL PRACTITIONERS':
https://consumerlaw.gov.au/sites/consumer/files/2016/05/0553FT_ACL-guides_UnfairPractices_web.pdf

It is unlawful for a business to make statements in trade or commerce that:

- are misleading or deceptive; or
- are likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive. In most cases, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

It is also unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services. Whether a representation is considered false or misleading will depend on the circumstances of each case. A representation can be misleading even if it is true or partly true.

Learning activity 2:

Visit the NSW Fair Trading information regarding misleading representations and deceptive conduct:

<https://www.fairtrading.nsw.gov.au/buying-products-and-services/advertising-and-pricing/misleading-or-deceptive-conduct>

Test Your Learning:

When can silence be misleading or deceptive?

Handling disclosure of material fact

Agent must take reasonable steps to determine material facts

Agents are required to take reasonable steps to determine whether any of the material facts set out in the legislation apply to a particular property. This would include, at a minimum, making appropriate inquiries with the property owner.

An agent must make reasonable efforts to ascertain or verify the facts which are material to that transaction which a prudent agent would have ascertained and communicate those facts to any person affected by it. The agent should answer all inquiries by purchasers as fully and frankly as possible in the circumstances, including by referring those inquiries back to the seller or the seller's solicitor or conveyancer as necessary and diligently following up those responses.

Remember that a fact is not inuendo, gossip or mere speculation. However, an opinion may be a material fact, if it is an expert opinion that is honestly held on reasonable grounds, and the property owner or agent have knowledge of that expert opinion.

The following excerpt is from the NSW Fair Trading Misrepresentation Guidelines:

Agents should discuss with sellers any market sensitive matters that are likely to be the subject of statements or representations by the agent when marketing the property.

During this process, it is important for the agent to gather information on aspects of the property which are sensitive to the market which will assist him/her in accurately and honestly representing the property.

Following major reforms that commenced on 23 March 2020, an agent must not fail to disclose a material fact of a kind prescribed by the Regulation that the agent knows or ought reasonably to know.

This means that an agent could still be in breach of the law for failing to disclose a fact even though they didn't know about it.

To comply with this obligation, agents should take reasonable steps to determine whether any of the material facts set out in the above list apply to a particular property. This would include, at a minimum, making appropriate inquiries with the property owner. Material facts that an agent could be reasonably expected to know and could find out by doing their own discovery include, for example, whether the property has been affected by a flood or bush fire or whether the property is listed on the loose-fill asbestos insulation register. Other material facts, such as those relating to external combustible cladding, would be known by the property owner and revealed by prospective property purchasers doing their own due diligence in getting copies of the strata owners corporation's records. However, if an agent has those strata records and they contain information relevant to material facts, then the agent must disclose them.

It is unlikely that an agent would be held liable for not disclosing a material fact if the vendor intentionally concealed that information from the agent when they were questioned, and the agent could not otherwise be reasonably expected to know. Material facts that an agent could be reasonably expected to know and could find out by doing their own discovery include, for example, whether the property has been affected by a flood or bush fire or whether the property is listed on the loose-fill asbestos insulation register.

Other material facts, such as those relating to external combustible cladding, would be known by the property owner and revealed by prospective property purchasers doing their own due diligence in getting copies of the strata owners corporation's records. However, if an agent has those strata records and they contain information relevant to material facts, then the agent must disclose them. It is unlikely that an agent would be held liable for not disclosing a material fact if the vendor intentionally concealed that information from the agent when they were questioned, and the agent could not otherwise be reasonably expected to know.

Source: <https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/misrepresentation-guidelines>

Material fact clause in agency agreements

Form providers of agency authorities/agreements, such as ADL and REINSW have designed their authorities to include a section where the principal (seller or landlord) discloses to the agent the material facts. Below is an excerpt of the relevant section of the ADL Exclusive Selling Agency Agreement.

I. VENDOR'S DISCLOSURE (Note: Vendor must complete this Item) - section 52(1)(b) of the Act

Material Facts

For the purposes of section 52(1)(b) of the Act, the following kinds of material facts are prescribed-

(1) within the last 5 years the property has been subject to flooding from a natural weather event or bush fire: Yes No

(2) the property is subject to significant health or safety risks: Yes No

(3) the property is listed on the register of residential premises that contain loose-fill asbestos insulation that is required to be maintained under Division 1A of Part 8 of the *Home Building Act 1989*: Yes No

(4) within the last 5 years the property was the scene of a crime of murder or manslaughter: Yes No

(5) within the last 2 years the property has been used for the purposes of the manufacture, cultivation or supply of any prohibited drug or prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985*: Yes No

(6) the property is, or is part of, a building that contains external combustible cladding-

(i) to which there is a notice of intention to issue a fire safety order or a fire safety order has been issued requiring rectification of the building regarding the external combustible cladding: Yes No

(ii) to which there is a notice of intention to issue a building product rectification order or a building product rectification order has been issued requiring rectification of the building regarding external combustible cladding: Yes No

(7) the property is, or is part of, a building where a development application or complying development certificate application has been lodged under the *Environmental Planning and Assessment Act 1979* for rectification of the building regarding external combustible cladding: Yes No

Please provide additional information where you have answered 'yes' to any of the above statements:

Agents should ensure that they explain to the property owner the importance of disclosing this information, and the negative consequences that may occur if known information is not disclosed. It cannot be presumed that a property owner understands the meaning or importance of this process. The agent is the professional and must take control of ensuring this information is completed in the agreement.

Expert local knowledge

Agents are usually experts in their own geographic areas, so part of being a local expert is having your ear to the ground so to speak, and continually scanning your environment for relevant issues, such as contamination of land or local council announcements about road widening or new roads, media coverage of violent crimes that have been perpetrated.

When material facts should be disclosed

As to the question of when material facts should be disclosed, agents must apply their own judgement. NSW Fair Trading advise that in a sale, facts of a non-sensitive nature such as the area of the land on which the property stands, would likely be provided as part of the standard marketing campaign. Disclosure of more sensitive information may be more appropriately revealed when there are indications that a person is seriously considering purchasing the property.

Agents must also make continuing disclosure if further material facts become known until the property is sold.

Other common types of matters which could impact a person's decision to proceed with a transaction

The list of prescribed material facts in the Property and Stock Agents Regulation 2014 assists agents to 'tick off' the obvious material facts, however these may not be the only material facts involved. Other material facts may be involved depending on the circumstances. An agent should always consider whether there is anything else, relative to the individual that they are dealing with, that could impact on their decision. These may go beyond the material facts prescribed in the legislation, and the agent will need to consider the individual circumstances involved.

Some purchasers may decide that they would not purchase a property in the following cases:

- Deceased estate (natural causes)
- Death in the property- any other means than natural causes (e.g. suicide)
- Illegal activities (e.g. drugs, stolen goods, biker gang)
- Divorce
- Mortgagee in possession
- Current DA's, Adjoining developments
- Industrial smells or noise
- Difficult neighbours (noise, criminal activity)
- If an investment property- poor tenant history

- Building defects

These issues are not always clear.

For example:

Should information that there is a 'a very aggressive neighbour' be disclosed to a potential purchaser?

Is the neighbour's aggression only applicable to the property owner/seller?
What is the definition of 'aggressive'? etc

If there is something unique to the purchaser and their belief system that they wish to know about the property- such as not wanting to live in a property where there has been a divorce, the agent would be best to consult the property owner before disclosing this information. Disclosing that a property owner is selling due to a divorce (particularly an acrimonious situation) can provide leverage to the buyer in their negotiation on price. If an agent is asked this question, they would be best to seek the instructions of the owner. Generally it would be considered a breach of client confidentiality to pass on information about their personal circumstances, so the agent needs to tread carefully and seek the seller's advice or the advice of their solicitor. If there is something that is unique to the purchaser, they should be making their own enquiries for the issue.

Advertising Guidelines

Agents must ensure that all information in a publication is accurate and does not create a false impression for consumers.

Fair Trading has developed guidelines to assist agents when publishing photographic advertisements to further explain the prohibitions against publishing misleading and deceptive material.

Learning activity 3:

Review the NSW Fair Trading Advertising Guidelines here:

<https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/working-as-a-property-agent/advertising-guidelines>

Test Your Learning:

Advertising that includes photographs of real estate that give a consumer the wrong impression may potentially breach which legislation?

Conclusion

This CPD Topic has focused on the following learning outcomes:

- identifying the disclosure obligations of a licensed agent under Division 5 of Part 3 of the Act and related provisions under the Property and Stock Agents Regulation 2014
- identifying the material facts prescribed under clause 54 of the Regulation
- describing an agent's obligations under the law to disclose material facts.
- identifying examples of issues or matters that could be important to a reasonable person in deciding whether or not to proceed with a particular transaction
- identifying the steps an agent should take to determine whether any prescribed material facts apply to a particular property.