

COMMON GROUND PROPERTY LAW >>UPDATE

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The Real Estate Agents Act in practice

Following the recent implementation of the Real Estate Agents Act 2008 ('the Act'), some real estate agents are responding in a way that has the potential to create a number of issues for unwary vendors. Vendors should proceed cautiously before signing agency agreements.

The burden of new disclosure obligations has been placed on agents under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

Agents must:

- disclose known defects in the land to a customer (potential purchaser or tenant); and
- ensure that a customer is informed of any significant potential risk (where it appears likely, on the basis of the agent's knowledge and experience, that land may be subject to hidden or underlying defects).

An agent is not under any obligation to discover hidden or underlying defects.

These disclosure obligations were created to ensure that real estate agents act in a professional and transparent manner. Some agents are reacting to these additional obligations by trying to impose additional obligations on their vendor clients. Vendors who engage with real estate agents could be directly or indirectly vulnerable to legal proceedings.

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These are some of the examples we are already seeing, since the Act came into force, of attempts by real estate agents to protect themselves:

- indemnity clauses (requiring vendors to indemnify agents) are now being added to agency agreements; and
- widely drafted warranty clauses are also being used.

It is important for vendors to ensure that any information provided to the agent is correct, although in our view, vendors should not agree to an indemnity for the potential breach of professional duties that real estate agents are obliged, under the Act, to adhere to.

The Real Estate Institute of New Zealand has issued a standard form agency agreement that is designed to comply with the requirements of the Act and is used as guidance for agents in practice. This standard form promotes the addition of an indemnity clause:

The client certifies that the information contained in the Property Description Sheet is correct in all respects... The Client indemnifies the Agent and any of its employees, agents or contractors against losses, damages, claims or other liability arising from the proper use of that information or should that Property Description Sheet be incorrect or misleading by omission.

There is nothing in the Act requiring these types of indemnity clauses. They are unnecessary.

The Act is all about disclosure obligations; making sure agents inform customers of what they know. Real estate agents cannot be liable for things they are not reasonably expected to know. Transferring liability on to vendors through indemnity/warranty clauses may help protect an agent against liability, but it could mean that vendors themselves will be liable or at the least tied up in lengthy legal proceedings.

Imposing unnecessary clauses like these may be contrary to the Act. The regulations prohibit agents from imposing 'conditions on a client through an agency agreement that are not reasonably necessary to protect the interests of the agent'. It is questionable whether an indemnity clause is reasonably necessary for an agent's protection. In any event, arming yourself with knowledge of the Act may prevent you having to face the reality of these issues in court.

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If you would like further information about these articles or any other property law issue, contact any of Kensington Swan's specialist Property team.

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