

**Secretary's Guidelines for the Proper Supervision of
the Business of a Licensee under s32 of the
*Property and Stock Agents Act 2002***

NSW Fair Trading
Department of Customer Service
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These guidelines have been issued under section 32 of the
Property and Stock Agents Act 2002 and are in force from 23 March 2020.

[signed]
Rose Webb
Commissioner for Fair Trading
24 February 2020

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Part A Introduction

Section 32 of the *Property and Stock Agents Act 2002* ('the Act') sets out the requirements for a licensee to properly supervise the business carried on by that licensee.

Section 32(3) sets out non-exhaustive but specific requirements, applicable to section 32(1) and 32(2), concerning the licensee's duty to properly supervise the conduct of business. These requirements include the following:

- a. To properly supervise persons engaged in the business,
- b. To establish procedures designed to ensure that the provisions of the Act and any other laws relevant to the conduct of that business are complied with,
- c. To monitor the conduct of business in a manner that will ensure as far as practicable that those procedures are complied with.

In addition, section 32(4) provides that the Secretary may "from time to time issue and notify to licensees guidelines as to what constitutes the proper supervision of the business of a licensee".

A failure of a licensee to comply with any of the requirements of these guidelines in connection with a business constitutes a failure to properly supervise the business and carries a maximum penalty of 200 penalty units (\$22,000) in the case of a corporation, or 100 penalty units (\$11,000) in any other case.

Licensees must comply with all the requirements of these supervision guidelines as issued by the Secretary — but that is not the entirety of the licensee's duty to supervise a business. Other requirements include, at a minimum, the general requirements of section 32(3) and all other relevant provisions of the Act.

The supervision guidelines apply to all licence holders under the Act, unless otherwise specified. A licensee and person in charge of the business may be liable for any breach of the supervision guidelines.

Part B Definitions

- i. In these guidelines:

certificate holder means a person to whom a certificate of registration has been issued under the Act

certified copy means a copy of an original document that has on it an endorsement by a person who is authorised as a witness for statutory declarations under Statutory Declarations Regulations 2018 (Cth) – Schedule 2 that it is a true copy of the original document

licensee means a licensee under the Act

licensee in charge means:

- (a) an individual who carries on business under a class 1 licence
- (b) an individual who is employed to be in charge of a business under section 31 of the Act

operational procedures means the processes and procedures required to be prepared and documented under clauses 1, 2, 3, 4, 5, 6, 7 and 8 of these guidelines

price statement means a statement made, either orally or in writing, in the course of marketing a property to a buyer, potential buyer, seller or potential seller that the property is likely to be sold for a specified price or within a specified price range

principal licensee means:

- (a) a licensee (corporation or individual) who employs a licensee in charge under section 31 of the Act
- (b) an individual who carries on business under a class 1 licence and does not employ a licensee in charge

property means real property, business or livestock – whichever is applicable

the Act means the *Property and Stock Agents Act 2002*

the Regulation means the Property and Stock Agents Regulation 2014

owner means the person/s with both the legal ownership of the property and authority to sell the property.

- ii. Words and expressions used in these guidelines that are defined in the Act have the meanings set out in the Act.

Part C Supervision Guidelines

1. Licensee in charge

1.1. A principal licensee must:

- 1.1.1. ensure that no part of the business is left unsupervised by a licensee in charge
- 1.1.2. ensure that no more than one licensee in charge is in charge of any one particular part of the business at any time,
- 1.1.3. ensure that any licensee in charge who is permanently or temporarily unable to properly carry out their duties due to illness, leave or some other reason, is replaced by an appropriate class 1 licence holder such that there remains a licensee in charge appointed at all times,
- 1.1.4. prepare and maintain a document as part of the operational procedures that clearly identifies each licensee in charge relating to the business, the dates on which they were the licensee in charge and, if the licensee has appointed more than one licensee in charge, the part of the business that each person is in charge of, including which trust accounts the person is in charge of; and
- 1.1.5. ensure that details of every licensee in charge employed by the principal licensee, including the dates they commenced and finished being a licensee in charge, are notified to the Secretary in accordance with section 31(3) of the Act. This includes notifying the Secretary of address of each place of business at which the person discharges their duties as a licensee in charge of the business.

2. Requirement to prepare operational procedures

- 2.1. A principal licensee must prepare and maintain operational procedures for the purposes of providing adequate supervision of business processes and employee conduct across the entirety of their business.
- 2.2. A principal licensee must ensure all operational procedures of the business are reviewed at least once each calendar year to ensure they are sufficiently robust and comply with the law.
- 2.3. A principal licensee must ensure all persons engaged in the business are familiar with and comply with all operational procedures.

2.4. A licensee must comply with all operational procedures of the business they are engaged in.

3. Trust account procedures

3.1. A principal licensee who employs a licensee in charge must:

3.1.1. ensure that each trust account maintained in accordance with Part 7 of the Act by the principal licensee, in connection with their business as a licensee, has only one licensee in charge who is responsible for and able to authorise withdrawal of money from that account, and

3.1.2. prepare and maintain a document that clearly identifies each licensee in charge and the trust account/s for which they are responsible.

3.2. A principal licensee must prepare and maintain written procedures for the review of trust accounts and daily or next day banking practices with respect to the receipt of trust money.

3.3. Without limiting clause 3.2, the written procedures must ensure:

3.3.1. that each trust account has only one licensee in charge who can authorise the withdrawal of trust money from that account, and details of the relevant licensee in charge and trust account have been recorded for each trust account,

3.3.2. a review of trust account transactions is conducted at least once per calendar month,

3.3.3. the amounts deposited into and withdrawn from the trust account have been verified using the relevant financial institution's records as source documents,

3.3.4. all persons who have access to the trust account system have separate logins, and their passwords are not shared with anyone,

3.3.5. any adjustments shown in an end of month reconciliation can be explained with evidence,

3.3.6. there are processes for obtaining and documenting the express authorisation of a licensee in charge to withdraw trust funds in accordance with the Regulation,

3.3.7. rental and sales money is paid into the appropriate trust accounts, and

3.3.8. rental money owing to a landlord under a residential tenancy agreement (less any authorised expenses) is paid to the landlord at the end of each calendar month, unless instructed otherwise by the landlord.

3.4. A licensee in charge must maintain a record of all cash transactions which includes, at a minimum:

3.4.1. the cash amount received,

3.4.2. the name of the person who received the cash from the payer,

3.4.3. the name of the person who prepared the daily banking of those funds,

- 3.4.4. the name of the person who deposited the funds in trust at the financial institution, and
- 3.4.5. the trust account details.

4. Identification check for the purposes of fraud prevention

- 4.1. A principal licensee must prepare and maintain written procedures for the verification of the identity of a party with whom it is proposed to enter an agency agreement.
- 4.2. Without limiting clause 4.1, the written procedures must provide for the following:
 - 4.2.1. a process to verify that the identity of a person entering an agency agreement is the owner of the property that is subject to the agreement or, the person has the legal right to act on behalf of the owner,
 - 4.2.2. if applicable, in the case of a person who has the legal right to act on behalf of the owner — where that person is not listed on the certificate of title, the original or a certified copy of the document which confers the power of sale or management on that person must be sighted, and a copy of the document must be retained,
 - 4.2.3. if applicable, where there is no mortgagee listed on the certificate of title, written confirmation of the power of sale or management is sought from all registered owners listed on the title,
 - 4.2.4. where it is not possible to comply with clause 4.2.3, a reasonable attempt must be made to verify the power of sale or management with the registered owner of the property and a record retained of each attempt,
 - 4.2.5. a record must be kept of all documentation relied upon to verify an individual's identity,
 - 4.2.6. the confirmation of identity check must meet all provisions of clause 4.3 of the supervision guidelines.
- 4.3. In verifying the identity of a person, a licensee must sight an original or certified copy of:
 - 4.3.1. a primary proof of identity document,
 - 4.3.2. two secondary proof of identity documents, and
 - 4.3.3. a document providing proof of legal ownership of the property.
 - 4.3.4. in the case of the sale of a business, only 4.3.1 and 4.3.2 apply.
- 4.4. For the purposes of clause 4.3, a primary proof of identity document is:
 - 4.4.1. a current Australian driver's licence, or
 - 4.4.2. a current photo card issued by a State or Territory Government agency, or
 - 4.4.3. a current Australian passport, or
 - 4.4.4. a current non-Australian passport.

- 4.5. For the purposes of clause 4.3, a secondary proof of identity document is:
- 4.5.1. a current Medicare card, or
 - 4.5.2. a current credit card, or
 - 4.5.3. a current passbook or an account statement from a bank, building society or credit union up to one year old, or
 - 4.5.4. an electoral enrolment card or evidence of enrolment not more than two years old, or
 - 4.5.5. a gas, electricity or council rates bill up to one year old, or
 - 4.5.6. a water rates notice up to one year old.
- 4.6. For the purposes of clause 4.3, a document that is proof of legal ownership of the property is:
- 4.6.1. the certificate of title for the property, or
 - 4.6.2. a current council rates notice up to one year old, or
 - 4.6.3. a land valuation notice up to one year old, or
 - 4.6.4. a National Vendor Declaration concerning the relevant livestock.
- 4.7. In verifying a proof of identity document, a licensee must ensure:
- 4.7.1. the documents are legible and appear not to have been altered in any way, and
 - 4.7.2. there is no discrepancy between the information collected by a licensee and the information contained in the documents, other than a discrepancy that can be explained and supported with evidence, and
 - 4.7.3. the photograph contained in photographic identification documents is a true likeness to the person whose identity is being verified.

5. Ongoing dealings with parties to an agency agreement

- 5.1. A principal licensee must prepare and maintain written procedures that ensure all communication during the provision of services under an agency agreement is with the owner of the property or the person with the legal right to act on the owner's behalf.
- 5.2. Without limiting clause 5.1, the written procedures for ongoing communication must ensure:
- 5.2.1. persons engaged in the business only use contact details held on the file which have been confirmed to belong to the person who is party to the agency agreement,
 - 5.2.2. if a party to the agency agreement requests to change their contact or bank details, the change of details is confirmed, via an alternative contact method to the way in which the request originated with all parties to the agency agreement.

6. Sale of residential property – selling price and other representations

- 6.1. Clause 6 is only applicable to the sale of residential property.

- 6.2. A principal licensee must prepare and maintain written procedures for substantiating any estimated selling price, as defined in section 72 of the Act, that has been provided to a seller or prospective buyer of residential property.
- 6.3. Without limiting clause 6.2, the written procedures must ensure that the following factors have been considered when determining the estimated selling price:
 - 6.3.1. any sales of comparable properties,
 - 6.3.2. feedback from potential purchasers,
 - 6.3.3. any current or relevant valuations provided in respect of the property,
 - 6.3.4. the characteristics and features of the property,
 - 6.3.5. the methods used to market the property,
 - 6.3.6. any other available factor that may affect the estimated selling price.
- 6.4. A licensee must retain a record of information that demonstrates how the estimated selling price was determined to be reasonable.
- 6.5. A licensee must ensure that the estimated selling price is reviewed at least weekly to confirm it remains a reasonable estimated selling price.
- 6.6. When changes are made to an estimated selling price, a licensee must ensure:
 - 6.6.1. the change is communicated in writing to the vendor with evidence of how they estimated the revised estimated selling price as soon as practicable, and
 - 6.6.2. the relevant agency agreement is amended to reflect the revised estimated selling price.
- 6.7. Where there is a difference between the estimated selling price and the actual selling price, a licensee must be able to demonstrate that the difference was reasonable in the circumstances.
- 6.8. A licensee must ensure that any price statement made by a person engaged in the business is consistent with:
 - 6.8.1. the vendor's instructions, and
 - 6.8.2. is not lower than the estimated selling price.
- 6.9. Where a vendor instructs a person engaged in a licensee's business not to disclose a selling price, a licensee must ensure that the estimated selling price or any other selling price is not disclosed to potential buyers in writing or verbally by any person engaged in the business.
- 6.10. Where a licensee is responsible for managing the sale of a multi-unit or multi-lot property under an agency agreement, they must comply with the following:

- 6.10.1. If any price indication is given, it must include the estimated selling prices for the lowest and highest priced properties in each property category expressed by:
 - a. providing the price ranges for each category, with the low end of the range being the estimated selling price of the lowest priced property in the category and the higher end of the range being the most expensive property in that category; or
 - b. stating the estimated selling price in the agency agreement of the lowest and highest priced properties for each property category
 - 6.10.2. Any collective marketing of residential units or lots that include a price indication must also advise prospective buyers that there are multiple properties within each category of varying prices
 - 6.10.3. All advertising and marketing must be updated to reflect the value of the current lowest priced lot or unit available.
- 6.11. A principal licensee must prepare and maintain written procedures that ensure all persons engaged in the business who are involved in the sales process are aware of, and meet, the following requirements:
- 6.11.1. All advertising material must accurately describe the property concerned and the information provided complies with the relevant agency agreement and legislative requirements in the Act, the Australian Consumer Law under the *Competition and Consumer Act 2010* (Cth),
 - 6.11.2. All conflicts of interest must be properly disclosed, as required by Division 4 of Part 3 of the Act, to the clients, and where appropriate, any prospective buyers,
 - 6.11.3. The listing agent engaged to sell the property must be aware of the restrictions on obtaining a beneficial interest in the property.

7. Complaint handling procedures

- 7.1. A principal licensee must prepare and maintain written complaint handling procedures.
- 7.2. Without limiting clause 7.1, the written procedures must provide that:
 - 7.2.1. all complaints and the actions taken by the business in response to the complaint are recorded in a register and retained for at least 3 years from the date of receipt or resolution of the complaint, whichever is later, and
 - 7.2.2. complaints relating to financial transactions are reported to a licensee in charge as soon as practicable and are to be supervised directly by that licensee in charge.

8. Employee supervision

- 8.1. A principal licensee must prepare and maintain written procedures outlining the respective roles and responsibilities of licensees and certificate holders in relation to the preparation and signing of agency agreements, franchising agreements and agency agreements under which two or more licensed agents act in conjunction.
- 8.2. A licensee in charge is responsible for verifying:
 - 8.2.1. all persons engaged in the business have completed all continuing professional development they are required to undertake according to the Secretary's requirements issued and notified to licensees and certificate holders under section 20 of the Act,
 - 8.2.2. the applicable work experience requirements in accordance with the *Property and Stock Agents (Qualifications) Order 2019* have been met, and
 - 8.2.3. the length of time an individual has been engaged by the agency.

9. Gifts and benefits register

- 9.1. A principal licensee must prepare and maintain a register of all gifts and benefits received by persons engaged in the business in accordance with section 53F of the Act.

10. Record keeping

- 10.1. A licensee in charge must maintain records showing evidence of:
 - 10.1.1. regular reviews of operational procedures, and
 - 10.1.2. any non-compliance with the operational procedures by persons engaged in the business
- 10.2. A licensee in charge must be able to produce all documentation relevant to clauses 1-10 of these supervision guidelines to an authorised officer in accordance with section 105 of the Act.
- 10.3. All records relevant to clauses 1-10 must be kept for at least 3 years.

Part D Offence Provisions

The failure to comply with a clause of these guidelines is a contravention of section 32 of the Act, an offence which carries a maximum penalty of 200 penalty units (\$22,000) in the case of a corporation, or 100 penalty units (\$11,000) in any other case.

Contravention of section 32 can trigger disciplinary action under section 191(a) of the Act. This section allows the Secretary to undertake disciplinary action against a

person for contravening a provision of the Act, whether or not the person has been prosecuted or convicted of an offence in respect of the contravention.

Systemic failure to properly supervise the conduct of a business may also be relevant to any consideration as to whether a licensee is a fit and proper person to be involved in the conduct of a business under section 191(e) of the Act.

The Secretary may serve a notice to show cause on a person if the Secretary is of the opinion that there is reasonable cause to believe that there are grounds for taking disciplinary action against the person. Disciplinary action may range from a caution or reprimand to a disqualification from being involved in the direction, management or conduct of the business of a licensee.