

Guidelines issued by the Commissioner for Fair Trading as to what constitutes proper supervision of the business of a licensee required by S.32 of the Property, Stock and Business Agents Act, 2002

Section 32 of the *Property, Stock and Business Agents Act, 2002* sets out the requirements in the Act with respect to the responsibilities of a licensee, as the person in charge of the business, to properly supervise the business carried on at that place.

A Synopsis of the Applicable Legislation

Section 32 (3) sets out three specific requirements, applicable to section 32(1) and 32(2), concerning the licensee's duty to properly supervise:

- (a) to supervise employees 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 the business are complied with,
- (c) to monitor the conduct of the business in a manner that will ensure as far as possible that those procedures are complied with.

Section 32 (4) provides that the Commissioner may *"from time to time issue and notify guidelines as to what constitutes the proper supervision of the business of a licensee."* A failure of a licensee to comply with the requirements of these guidelines constitutes a failure to properly supervise the business.

The Offence Provisions

The failure to comply with a requirement of these guidelines is a contravention of section 32 (1) or section 32 (2), an offence which carries a penalty not exceeding 200 penalty units (\$22,000) in the case of a corporation or 100 penalty units (\$11,000) in any other case.

Disciplinary Action

Contravention of section 32 can also trigger disciplinary action under section 191(a) of the Act. Section 191(a) provides that disciplinary action can be taken against a person who is or was the holder of a licence or certificate of registration on the ground that they had contravened a provision of the Act. Disciplinary action can be taken against the person whether or not they had been prosecuted or convicted of an offence in respect of the contravention.

Systemic failure to properly supervise the conduct of a business may also amount to a licensee not being a fit and proper person to be involved in the conduct of a business under section 191(e) of the Act. Section 191(e) allows for disciplinary action to be taken against a person on the ground that they are not a fit and proper person to be involved in the direction, management or conduct of the business of a licensee.

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

The Objective of the Requirements

The objective of section 32 is the protection of the public in connection with the conduct of a business under the Act. The nature of the business involves a range of different transactions, which require public trust and confidence in their supervision by the licensee.

That trust can only be realised if the internal systems of control, supervision and review are in place in the conduct of the business, and the licensee in charge maintains an active compliance role in the business.

The Guidelines are not exhaustive

The guidelines set out detailed requirements in relation to supervision of employees and establishment and monitoring of compliance procedures. Observance of these requirements is essential but does not constitute the totality of a licensee's duty to supervise a business. Licensees must also have regard to the general requirements of section 32(3) of the Act.

The Requirements

For the purposes of section 32 (4), these guidelines set out the following requirements as to what constitutes the proper supervision of the business of a licensee. Whilst a licensee who employs anyone at any place of business of the licensee is responsible for anything done or not done by the person, the Act also recognises that some functions of the licensee may be delegated to staff within an agency.

1. A licensee must have written procedures instructing employees of the agency as to their duties in regard to daily or next day banking practices of the agency with respect to the receipt of trust money. The licensee must be able to provide details of the process which the licensee uses to ensure employees comply with the procedures.
2. A licensee must have written procedures requiring the licensee to conduct a review of trust account cash flow on a monthly basis. The review must include a process which shows that the amounts banked to the trust account have been verified using the financial institution's records as source documents.
3. A licensee must have written procedures that set out the steps that all relevant staff must take to substantiate any selling price estimates which have been provided to a seller or prospective buyer. In framing such procedures, reference should be made to Estimated Price Guidelines which have been published by the Commissioner.
4. A licensee must maintain and be able to demonstrate that listing agents employed by the agency use a checklist in the property sales process for each matter to ensure that the following requirements are met:
 - All advertising material accurately describes the property concerned and that the information provided complies with the requirements of the relevant agency agreement and with the Act and Regulations;
 - Proper disclosures of conflicts of interest as required by Division 4 of the Act are made to clients, and where appropriate, any prospective buyer of land;

- The listing agent engaged to sell the property is aware of the restrictions on obtaining a beneficial interest in property.

The completed checklist must be certified in writing by the agent representing the principal and be retained in the Sales File as a record.

5. A licensee must maintain documented complaint handling procedures. These procedures shall include a process that ensures that all complaints about staff behaviour towards consumers, and the agency's response to those complaints, are recorded and retained. The procedure is to provide that complaints of a financial nature are directed to the attention of the licensee in charge or the Manager to be supervised directly by that person. A separate record of the handling of financial complaints must be kept.
6. Where any of the above requirements stipulate the preparation and use of a set of documented procedures a checklist, or a review system; the licensee must be able to produce this documentation to an authorised officer in accordance with the provisions of section 105 of the Act. The licensee must also be able to produce information demonstrating the regular use and maintenance of the required documentation within the agency.

These guidelines have been issued and notified to all licensees, and come into force from 1 March 2005.

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Commissioner for Fair Trading