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Dear Josh

#### **INDEPENDENT REVIEW OF RECENT COMPLAINTS ASSESSMENT COMMITTEE DECISIONS**

1. Thank you for your instructions to review five recent decisions by Complaints Assessment Committees (**CACs**) and provide comment on their reasoning, consistency, and accuracy.
2. We have reviewed each of the provided decisions against the following criteria:
  - 2.1 **Are the reasons given by each CAC logical and easy to follow?** This informs the “reasoning” measure given above. A well-reasoned decision is one which is easy to follow and where the discussion logically supports the outcome. As discussed in paragraphs 4–17, we think that:
    - (a) The five CAC decisions are generally well-reasoned, and readers should be able to understand their conclusions.
    - (b) However, we think that one decision potentially falls short in explaining why the CAC prefers the evidence of the complainant over that of the licensees, which we discuss more under the “accuracy” criterion.
    - (c) We also suggest that some improvements could be made in how the CAC decisions incorporate discussion of the applicable provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (**Rules**) and Real Estate Agents Act 2008 (**Act**). In some decisions, the discussion of the relevant Rules was quite brief. While we think readers likely could still understand the decision, we think that it is worth providing more explanation—particularly for a lay audience. We have highlighted some examples of good practice from the decisions which we think could be replicated more widely in future.
  - 2.2 **Are the five CAC decisions consistent with each other?** You selected five decisions dealing with the theme of misrepresentation—relevant to rr 6.1–6.4 and 9.4 of the Rules. We assessed whether these decisions treated like situations alike, and whether differences in outcome were explicable based on the different facts of each

case. In our view, the five decisions are consistent. We discuss this issue in paragraphs 18–22.

2.3 **Does each decision clearly identify the evidence supporting the CAC’s factual findings?** You have not asked us to advise on the merits of each decision, and we have not been provided with the evidential record before the CAC. Therefore, we have tested the “accuracy” of each decision by assessing whether the CAC have justified their factual conclusions by reference to the evidence before them. Our review suggests that CACs generally do this well. However, one of the decisions does not—we think—adequately justify a crucial credibility finding: in circumstances where either the licensees or complainant were lying, it does not explain why it has preferred the complainant’s evidence. We explain this concern below in paragraphs 23–31.

3. We have also summarised all five decisions in the **Appendix**, for ease of reference.

**Are the reasons given by each CAC logical and easy to follow?**

4. We consider that the reasons given in each of the five decisions are generally logical and easy to follow. With one caveat, we consider that readers are likely to understand why and how each CAC came to their determination.

5. The caveat relates to our below discussion about how the CAC addresses direct conflicts between the evidence of the licensee(s) and of the complainant (see paragraphs 23–31). As discussed there, we think that reasoning in this area could be improved.

6. We have one other suggestion for future CACs to consider in drafting their decisions. We think it would be useful for CACs to expand their discussion of the applicable Rules. The general pattern is that decisions focus on the factual allegations made in the complaint, and refer to the Rules only briefly. The result is that the decisions do not always clearly explain what the Rules require, and how the licensee met (or did not meet) those obligations.

7. For example, ■ begins with the statement that:

2.4 This decision was made under sections 50 and 89(2)(c) of the Act. The decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, namely 5.1 (skill and care), 6.4 (misleading or withholding information), 10.7 (disclosure of defects), 8.3 (supervision).

8. The decision does not go on to explain what each of those Rules say, or what they require of licensees. The discussion in ■ is sufficient to make a reader aware of why the CAC does not think that the licensee did anything ‘wrong’, but we think it would be beneficial for readers to understand the standard against which their conduct is being measured. This is particularly the case given that most readers will be laypeople.

9. This need not be a lengthy recital. ■ provides a good example of a succinct introduction to r 10.7:

3.2 A licensee’s obligations under rule 10.7 are twofold. Firstly, a licensee must disclose known defects. Secondly, whilst a licensee is not required to discover

hidden or underlying defects a licensee must either seek further advice or ensure that a customer is advised to obtain that advice if it appears likely that land may be subject to hidden or underlying defects.

10. We note that it may be possible to supply CACs with suggested wording as part of the decision template.
11. Relatedly, we think that it would be worth ensuring that CAC decisions explicitly explain how any 'wrongdoing' constitutes a breach of a Rule. Sometimes this analysis is not stepped through—particularly in cases where there are multiple relevant Rules. For example, we refer to the concluding analysis in [REDACTED]:
  - 3.19. The Committee does however consider that the Plumbers advice as noted in the invoice dated 12 November 2020 was information that should have in fairness been disclosed to the Complainants when it was received particularly given that the invoice was received by the Licensees during the period that the Complainants ASP was conditional. The Committee therefore finds the Licensees conduct in failing to pass on the Plumbers advice to be unsatisfactory in breach of rules 5.1 and 6.4.
12. In our view, the paragraph makes it clear how r 6.4 was breached: the licensees failed to disclose something that should have, in fairness, been provided to the purchaser. However, there is not the same clarity around why this conduct is also a breach of r 5.1. While the reader can probably infer that the non-disclosure was a failure to exercise skill, care, and diligence, it would be useful to directly address the point. This also helps to minimise the risk of appellate criticism.
13. We think that such analysis is particularly important in cases where the relevant obligation is context-dependent: for example the duty to exercise skill, care, and diligence in r 5.1, or the requirement to “properly” supervise and manage salespersons in s 50 of the Act. The reader’s understanding of the decision will be greatly assisted by a clear articulation of the standard being enforced by the CAC.
14. We also consider that framing discussion in this way will avoid the trap of conflating the issues of breach and loss. Some of the decisions blur the line between the following questions:
  - 14.1 Did an agent market a property in a misleading way or withhold information that should have, in fairness, been disclosed to a purchaser?
  - 14.2 Did the complainant nonetheless have access to the correct information before the ASP went unconditional?
15. The answer to the first question determines if the licensee has breached their obligations; the second question is only relevant to whether the complainant is entitled to compensation. Accordingly, it is important for CAC decisions to address each question separately, to keep the reasoning clear and easy to follow.
16. An example of good practice, in our view, can be found in [REDACTED]. The licensee made a representation to the complainant that the terms of the agreement for sale and purchase

(ASP) would be consistent with the existing lease of the property. This was based on a representation made to him by the vendor. The CAC found that the licensee’s representation did not amount to unsatisfactory conduct:

3.14. That is not an end to this issue as Licensee 2 also made a positive assertion to the Complainant that the terms of the lease would be reflected in the sale and purchase agreement. In doing so he was under a duty to make proper enquiries and take some precautions to check the veracity of the information.

3.15. The Committee finds the Licensees discharged those obligations in that Licensee 2 did make proper enquiries and took precautions to check the veracity of that information. It says that because:

(a) Although the vendors had told them the land would be destocked by 1 April 2020 the Licensees did not solely rely on what the vendors had told them as to the destocking date.

(b) That destocking date was specifically recorded in clause 34 of the sale and purchase agreement.

(c) As they had not seen the lease agreement, the Licensees rightfully took specific proper precautions and made enquiry with the vendors’ lawyers (who had the lease) to confirm that the lease agreement and clause 34 of the sale and purchase agreement were in accordance.

(d) The response was “yes, all good to go - lease condition is fine”.

(e) That response is sufficient to convey that the lease had been checked against the destocking date in clause 34 and that the sale and purchase agreement on that point was approved and finalised.

(f) The Licensees were entitled to have that point checked and confirmed as correct by their client’s legal advisor and to rely on that lawyers’ advice.

17. We consider that this extract steps through the analysis well: it explains what obligations applied to the licensee, and how he discharged them.

**Are the five CAC decisions consistent with each other?**

18. While each of the decisions deals with a unique factual scenario within the overall theme of misrepresentation, we think the decisions under review can be grouped into two categories:

18.1 [REDACTED], [REDACTED], and [REDACTED] all involve a licensee placing reliance on erroneous information supplied by a vendor. In [REDACTED] and [REDACTED], the CAC found that the reliance was reasonable; in [REDACTED] the CAC found that it was not. We think that the different outcomes are readily explicable on the facts of each case.

18.2 [REDACTED] and [REDACTED] both involve a licensee with direct personal knowledge of the matter in issue. In both cases the CAC found unsatisfactory conduct.

19. Within each category, we think that the decisions are consistent—both in terms of their outcomes and the way that they apply the relevant Rules.

20. Looking between categories, we observed one possible inconsistency between [REDACTED] and [REDACTED]. The inconsistency arises out of the application of r 6.4:
- 20.1 In both cases marketing contained representations about the property that were not true: in [REDACTED], that the property would be de-stocked by a certain date;<sup>1</sup> in [REDACTED], that the property came with two carparks.
  - 20.2 In both cases a more accurate picture was available to the purchaser before they signed the ASP: in [REDACTED], the ASP made it clear that this was an aspirational date only; in [REDACTED], the purchaser had access to the title (which only showed one carpark).
  - 20.3 In [REDACTED], the CAC did not make an explicit finding about whether the licensee had breached r 6.4 by marketing the property. The decision did not squarely address the difference between the promises made in marketing and in the ASP.
  - 20.4 In [REDACTED], the CAC found that the property had been marketed in a misleading way, and that this was a breach of r 6.4.
21. However, on balance, we think that this is likely to be due to a slight gap in the reasoning of [REDACTED], rather than a genuine inconsistency in approach. The CAC's reasoning could apply to the marketing, as well as the later communications discussed in the decision—the point is just not made explicitly.
22. Therefore, we are satisfied that the five decisions are consistent.

**Does each decision clearly identify the evidence supporting the CAC's factual findings?**

23. In our view, four of the five decisions clearly identify the evidence that supports the CAC's factual findings.
24. We do, however, have some concerns with regard to [REDACTED]. This is because the decision turns on the way that the CAC dealt with conflicting evidence from the licensees and the complainant.
25. As noted above, [REDACTED] was a complaint about the way that the licensees marketed an apartment. The marketing asserted that the apartment had two car parks; in fact only one was on the title—under the body corporate rules it could not be used by (or leased to) non-owners.
26. The CAC concluded that the marketing of the apartment was misleading. We have no concerns with the determination of this issue.
27. The second issue was whether the complainant himself had been misled. There was conflicting evidence. The licensees said that the situation had been explained to the complainant prior to him entering into the ASP, and that he had been provided with written information on the car parking arrangements. The complainant denied this.

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<sup>1</sup> There was a second misrepresentation in [REDACTED], but the CAC found that the licensee had no way of knowing the true situation.

28. The CAC accepted the complainant's evidence. Its reasoning was as follows:
- 3.11. While we accept that it is quite possible that the Licensees did indeed provide the information by email as they claim, we were not provided with clear evidence such as copies of accompanying emails (to which the information had been attached) to persuade us that it was likely they had done so.
  - 3.12. Although the Committee is unable to find conclusively that the Licensees failed to disclose to the Complainant that the carparks could not both be used as an additional source of revenue, we nevertheless found that on the balance of probabilities, the Complainant was not made aware of the requirements of the body corporate in such a way that he was able to make an informed commercial decision whether to proceed with the purchase or not, and for this reason we find that the Licensees have failed in their duty to disclose relevant information to the Complainant or have withheld information which should, in fairness, have been provided to him.
29. The CAC could not reach this conclusion without also concluding that the licensees were not telling the truth in their response to the complaint. It was, in essence, an adverse credibility finding against them. We are concerned that the CAC decision does not confront this; instead it appears to hedge its position somewhat by noting that it was "unable to find conclusively that the Licensees failed to disclose". As a result, it does not clearly identify why it has preferred the complainant's evidence over that of the licensees.<sup>2</sup>
30. The approach in [REDACTED] can be contrasted with [REDACTED]. In that case, there was a dispute whether the vendors had provided the licensee with a copy of a lease agreement. The vendors told the complainant that the licensees had been given a copy. The licensees maintained that they never received one. The CAC found as follows:
- 3.6. The Committee is satisfied that it is more likely than not that the Licensees, despite numerous requests for a copy of the lease, were never provided one by the vendors. This is for the following reasons:
    - (a) The Licensees mutually supporting statements that the lease was never provided to them.
    - (b) Accords with what the Complainant says he was told by Licensee 2, which was that the vendors would not provide the lease.
    - (c) The lack of a credible reason why the Licensees would not give the lease to the Complainant if they had received it.
    - (d) The necessity of the Licensees seeking written confirmation from the vendors' lawyers that it had a copy of the lease and that the lease accorded with the sale and purchase agreement and in particular clause 34.

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<sup>2</sup> We note that, on appeal, the Real Estate Agents Disciplinary Tribunal quashed this part of the CAC's decision, holding that the CAC did not have sufficient evidence to make this finding: *Feng v Real Estate Authority* [2021] NZREADT 15 at [54]–[55].

- (e) The reluctance and failure of the lessee or vendors to also provide a copy of the lease to the Authority despite requests and indications it would be provided.

31. We recommend that CAC decisions provide this level of detail when choosing between (or reconciling) conflicting evidence.

**Conclusion**

32. A summary of our advice is provided above at paragraph 2.

33. We hope that our comments are useful. We are very happy to discuss them further if that would be of assistance.

Yours faithfully

**Luke Cunningham Clere**

A handwritten signature in blue ink, appearing to read 'Timothy Bain', is written over a horizontal line.

**Dale La Hood | Tim Bain**

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## **Appendix: summary of decisions**

*C37411 Cowlishaw, Nalder, Schulz (Cowlishaw)—7 December 2021*

1. Ms Cowlishaw, a salesperson, marketed a property as having three bedrooms when in fact only one bedroom was consented. She was working for Mr Nalder's agency and was under the supervision of Ms Schulz.
2. The purchaser complained and sought compensation and improvement in the agency's practices.
3. Ms Cowlishaw said she had relied on the vendor's representations and was unaware of the requirement that every bedroom have a window. She noted that she was new to the industry and that none of her supervisors had raised any concerns.
4. Mr Nalder placed responsibility on the vendor's misrepresentations and Ms Cowlishaw's failure to follow her training.
5. Ms Schulz also placed reliance on the vendors' representations and a building report as explaining her failure to notice the issue with the property.
6. The CAC found that Ms Cowlishaw had committed unsatisfactory conduct, in that:
  - 6.1 She had breached r 6.4 by misleading the complainant about the number of bedrooms in the property. She was aware of documentation that showed the property having one or two bedrooms. She should not have represented that it had three bedrooms.
  - 6.2 She had breached r 5.1 by not exercising the skill, care, competence, and diligence of a reasonable licensee. She should have sought help and/or made further enquiries once she was on notice of the discrepancies.
  - 6.3 She had breached r 10.7 by not responding reasonably once on notice that the property might have defects.
7. The CAC determined to take no further action against Mr Nalder, as he was not the branch manager responsible for supervising Ms Cowlishaw.
8. The CAC found that Ms Schulz had failed to properly supervise Ms Cowlishaw as required by s 50 of Act, in that:
  - 8.1 She provided insufficiently in-depth supervision to Ms Cowlishaw, given that she only had 15 months' experience as a salesperson.
  - 8.2 Given her visits to the property and access to the property file, she should have known that two of the "bedrooms" were not legally able to be used as bedrooms.



*C40563 Seidel, Urbahn (Seidel)—30 November 2021*

9. Mr Seidel and Ms Urbahn marketed a property which had suffered ceiling damage from a leak in the roof. They told the complainants (purchasers) that the leak had been fixed by a plumber. They did not disclose that the plumber had recommended engaging a tile roof specialist to examine the roof and check whether his repairs were sufficient. The complainants were required to carry out this work after settlement. They also had concerns about the effect of the leak on the ceiling beams.
10. The complainants sought an apology and compensation for the cost of undertaking repairs.
11. Mr Seidel advised that he was not aware of any ongoing defects with the property, and that he understood that the leak had been repaired. He did not receive the plumber's recommendation until the complainants advised that their building inspection had raised no concerns. (In fact, the complainants had never organised a building inspection, but he was not aware of this fact.)
12. Ms Urbahn took the same position as Mr Seidel.
13. The CAC found that both licensees had engaged in unsatisfactory conduct, in that they had failed to disclose the plumbers' recommendation. This information should have been disclosed to the complainants; it was received during the period that the purchase was still conditional. It did not matter that the licensees believed the complainants to have engaged their own building report. The failure to disclose was a breach of rr 5.1 and 6.4.
14. Conversely, the CAC found that there was insufficient evidence that the licensees had breached r 10.7. It could not be said that it was more likely than not that they were aware of issues with the ceiling beams but failed to disclose it. Nor were they on notice of an underlying defect that they failed to investigate.

*C27330 Feng, Li (Feng)—2 May 2019*

15. Mr Li was the listing agent, and Ms Feng was the selling agent, of an apartment. The apartment was advertised as having two carparks. One of these carparks was on the title, but the other remained part of the body corporate's unit title. The owner of the apartment had use of that carpark, but was not permitted to lease it.
16. The purchaser complained that the licensees had misled him about the number of carparks associated with the title, and failed to disclose to him that he was not able to lease the second carpark. He sought compensation.
17. Ms Feng said that she had explained the car parking arrangements to the complainant, and emailed him copies of body corporate minutes which featured discussion on this topic. She said she introduced the complainant to the body corporate manager after an open home, and that they had a discussion about the car park rules.
18. Mr Li supported Ms Feng's account, saying that he was present for detailed discussions between the two of them and the complainant. He said that the complainant confirmed to both him and Ms Feng that he understood the system. He confirmed that the complainant had been provided with a copy of the title, which showed only one car park.

19. The CAC found that Mr Li and Ms Feng had committed unsatisfactory conduct, in that:
- 19.1 They had marketed the property as a “beautiful freehold 3 bedroom apartment with 2 carparks”, which was likely to mislead consumers about the legal status of the second car park. This was a breach of r 6.4.
- 19.2 On the balance of probabilities, they did not disclose to the complainant that the carparks could not “both be used as an additional source of revenue”. This was also a breach of r 6.4.

C36410 [REDACTED]—5 August 2021

20. [REDACTED] and [REDACTED] were agents for the vendor of a stock farm. They marketed the property on the basis that it could be de-stocked by 1 April 2020. The marketing also claimed that the property held three water tanks. In reality, the terms of the existing lease on the property meant that the vendors could not guarantee that the property would be de-stocked before 1 May 2020. As well, two of the three water tanks belonged to the lessee and could be removed by them at the end of the lease. The remaining water tank was not able to be used once the other two had been removed.
21. The ASP specified that vacant possession would pass on 1 May 2020 but that “best endeavours” would be used to have the property de-stocked by 1 April 2020. This was expressed as a moral obligation only, not a legal one.
22. The purchaser complained and sought compensation.
23. The licensees claimed that all information they had passed to the complainant was accurate to the best of their knowledge, based on the vendors’ representations to them:
- 23.1 They never received a copy of the lease agreement, despite repeated requests.
- 23.2 The vendors and their solicitors had approved all marketing materials and specifically approved the de-stocking condition in the ASP.
- 23.3 The vendors had repeatedly represented to them that the three water tanks were part of the property; they had no reason to disbelieve them.
24. The CAC decided to take no further action on the complaint. It accepted the licensee’s evidence that they had acted in reliance on representations by the vendors and their solicitors. It found that they had undertaken reasonable enquiries where necessary and found that nothing would have put them on notice that things were other than they were told.
25. The CAC noted that there may be a live issue between the vendor and the purchaser but that this does not mean that the licensees had not complied with their obligations.

C39989 [REDACTED]—23 February 2022

26. [REDACTED] sold a property on behalf of a 90 year-old vendor and her daughter. The vendor had lived in the property since her husband built it in the 1960s. Some years after the sale, a

neighbour surveyed their property and realised that the garage was encroaching onto their property by 25mm. It then became clear that the garage had not been consented.

27. The purchaser complained and sought that the licensee pay for remedial work.
28. ██████ advised that the vendor had not disclosed any unconsented works on the property. The LIM report showed that the vendor had twice received consents for other additions to the property. The garage appeared to be part of the house, constructed at the same time and of the same materials; there was nothing to suggest that it was unconsented. Nor had there been any suggestion that the garage encroached onto the neighbouring property—the boundaries had been checked against Auckland Council maps and no issue was apparent.
29. The CAC determined to take no further action. It accepted that the boundary encroachment was a hidden defect, possibly one that would have been impossible to detect prior to the advent of modern surveying technology. There was nothing putting ██████ on notice to make further enquiries. Nor was there any reason for ██████ to suspect that the garage was not covered by the same permits as the other construction on the property.