

REAL ESTATE AGENTS BILL, 2013

EXPLANATORY MEMORANDUM

The *Draft Real Estate Agents Act 2013* aims to regulate the practice of real estate agents in Uganda. The Act is intended to promote integrity, honesty, transparency and professionalism in the real estate industry. It will protect the public from unscrupulous operators, but without undue restrictions on the business of reputable operators.

Part 1: Preliminary

The sections in this Part (1-5) deal with preliminary matters. Important provisions are section 2 (Purpose of Act) and section 4 (Definitions). Section 2 states the purpose of the Act as follows:

The purpose of this Act is to regulate real estate agents and real estate salespersons in Uganda, in order to ensure honesty, integrity, transparency and professionalism in the provision of real estate agent services in Uganda.

Two key definitions will need refining in stakeholder discussions about this Draft Act. They are:

- Commissioner
- Tribunal

The Draft Act allocates to a “Commissioner” the day to day regulation of real estate agents (and real estate salespersons, discussed later). It will be necessary to set up an office of *Commissioner of Real Estate* (or the like), or to give the duties of Commissioner to an appropriate official who already exists.

The Draft Act allocates to a “Tribunal” certain more serious matters – in particular, disciplinary proceedings against licensees or salespersons. Here too it will be necessary to create a *Real Estate Tribunal* (or similar title), or to give the duties of the Tribunal to an appropriate body or court that already exists.

The Draft Act does not purport to deal with the machinery of establishing of the Commission or the Tribunal, or their continuing maintenance. That can be done by way of Schedule to the Draft Act, or by other legislation, once decisions are made as to the appropriate persons or bodies to administer those functions.

Part 2: Key concepts

The sections in this Part (6-7) deal with two key concepts.

One (section 6) is the concept of “carrying on business as a real estate agent”. From this definition flows the requirement to hold a real estate agent’s licence. The definition in turn relies on the definition of “real estate agent service” in section 6(2) – essentially, buying and selling of land. However, the definition envisages that other transactions that may be brought within the ambit of the Act by regulation. For example, regulations could provide for the collection of rental payments, or collection of mortgage payments, to be real estate agent services; in this way, the protections of the Act could then be extended to the grant of leases and mortgages.

The second key concept (in section 7) makes it clear that “passive” or “sleeping” partners in real estate businesses do not need to be licensed. Thus, for example, a partner who supplies “equity” for the carrying on of a real estate business, but does not personally act in the business, is not required to have a real estate agent’s licence.

Part 3: Real estate agent’s licence

This Part (sections 8-49) deals with licensing requirements for, and disciplinary action against, real estate agents.

A person cannot carry on business as a real estate agent without a current licence. In addition to any criminal sanction for breach, a person who does not hold a licence cannot recover fees or charges for their work.

The Act exempts a limited class of persons from the need for a licence (section 6(2)). In essence, they are persons whose office requires them to deal with land in a representative capacity – such as executors, the public trustee, a sheriff or bailiff, and the like. There is also a power to exempt by regulation.

Section 10 sets out the criteria for licence eligibility. They include any educational requirements that may be specified by regulation (section 11). Section 12 specifies what matters automatically disqualify a person from holding a licence. Key disqualifications include: conviction for a criminal offence involving dishonesty; bankruptcy; disqualification by the Commissioner; and contraventions of existing licence conditions.

This Part of the Act also requires a public notification process as a pre-requisite for obtaining a licence. Members of the public may object to the granting of a licence on the ground that a person does not meet the eligibility criteria. They could object, for example, that the applicant has a criminal record involving dishonesty. However, objection is allowed only on the ground that the criteria for eligibility are not satisfied: for example, there is no right to object on the

ground that the real estate industry already has enough licensed agents – in such a case, the market place is left to operate.

The grant of the licence is in the power of the Commissioner, who may add conditions to the licence. There are limited rights to appeal to the Tribunal. A licence normally lasts for one year, and may be renewed.

Finally, this Part enables disciplinary action to be taken against licensees (sections 25-28). These are key elements in the “consumer protection” aspects of the legislation. Section 28 specifies the grounds for disciplinary action. They include:

- that the licensee has been convicted of an offence in relation to the sale of land;
- that the licensee is contravening a “rule of conduct” (see later);
- that the licence was obtained by fraud or mistake.

Given the potentially serious consequences for the agent, the actual disciplinary action is taken by the Tribunal, not by the Commissioner. The Tribunal can cancel or suspend the licence, or take any other action that may be allowed to it by regulation (section 28).

Part 4: Registration of salespersons

It would not be sufficient to regulate those who conduct real estate businesses without also regulating their employees. And so Part 4 (sections 29-49) sets up a system for registration of salespersons. The system parallels that for licensees. It includes public notification of the intention to apply for registration, the eligibility criteria, and the Commissioner’s power to impose conditions on registration. As with licensees, the Commissioner may request the Tribunal to take disciplinary action against a registered salesperson who breaches the requirements of the Act.

Part 5: Conduct of Licensed Real Estate Agents and Registered Salespersons

This Part (sections 50-69) is a central plank of the draft legislation. Key provisions include:

- A licence-holder must have a main place of business (section 50).
- A licence holder may carry on business in more than one place, but each place of business must be under the control of a licence-holder (section 51), and a licence-holder must not control more than one place of business (section 52). Exemptions are possible (section 53).
- A licensee must not share commissions etc with an unlicensed person (section 54).
- A licensee may employ only salespersons who are registered under the Act (section 55).
- Agents must disclose any personal interest they have in a transaction, including kickbacks and other benefits (section 57); so too must salespersons (section 58). There is an exemption if the agent or salesperson makes full disclosure.

- Agents must not obtain any beneficial interest in land when acting on a sale (section 59); nor must salespersons (section 60). There is an exemption if the agent or salesperson makes full disclosure.
- Agents must not act for both buyer and seller in a transaction (section 61); nor must salespersons (section 62). Here too, exemptions are possible.
- Agents and salespersons must not make false representations about their estimate of the selling price of land (sections 63, 64).
- Regulations may require agents or salespersons to provide specified information to buyers about the land (section 65), and may authorise agents or salespersons to take certain steps towards creating a binding contract for sale (section 66).
- Agents and salespersons must not publish false or misleading advertisements about properties (section 67).
- Agents and salespersons must not “lend” their licenses or registrations to others (sections 68, 69).

These provisions are important “consumer protection” provisions. They give the licensing and registration regimes real teeth. They should ensure that real estate transactions are conducted transparently, thereby reducing the incidence of improper and dishonest conduct in the real estate industry, without imposing unduly onerous restrictions on those who are honest.

Part 6 – Agency agreements

This Part (section 70) is intended to reduce arguments over the contents of agency agreements. In line with similar provisions in many other countries, an agent will not be able to recover commission or expenses from a principal unless the agency agreement:

- is in writing;
- sets out the amounts the agent is entitled to receive; and
- complies with any regulations.

In addition, the principal must promptly be given a copy of the agreement.

Part 7— Trust accounts

This Part (sections 71-91) contains important protections in relation to trust accounts.

Agents must keep one or more trust accounts (sections 73, 74). Trust moneys must be used only for the purposes for which they are held (section 75). Agents must prepare quarterly statements of their trust account balances (section 77) and must notify the Commissioner if trust funds are overdrawn (section 76). Trust funds must be audited each year (sections 78-83).

This Part also provides a mechanism for disbursing unclaimed trust moneys, via the public trustee’s office (sections 84-91)

Part 8—Records

Agents must keep proper records of all transactions (sections 92, 93). They must also give receipts for trusts moneys received (section 94).

Importantly, the Commissioner can “freeze” trust accounts, where he or she considers that trust moneys are at risk of being, or have been, stolen, misappropriated or misapplied (section 96).

Part 9—Administrators

Part 9 (sections 102-106) provides for the appointment of administrators to the business of licensed real estate agents. The appointment is made by the Commissioner (sections 103, 104). The administrator must carry out the agent’s obligations under the Act (section 105).

Part 10—Administration of Act

This Part contains machinery provisions for administering the Act (sections 107-110). It includes an obligation on the Commissioner to keep a “register” of information in relation to agents and salespersons (section 108). It also exempts the Commissioner from liability for anything done honestly for the purposes of the Act.

Part 11—Miscellaneous

This Part (sections 111-117) deals with a number of miscellaneous matters. Included are:

- a prohibition on making false or misleading statements in relation to obtaining a real estate agent’s licence or registration as a real estate salesperson (section 111);
- a power to prescribe by regulation “rules of conduct” to be followed by agents and salespersons (section 112);
- a power in the Tribunal to review a person’s disqualification as an agent or salesperson (section 113);
- a power in the Commissioner to prescribe forms to be used under the Act (section 116); and
- a power in the Minister to make regulations for the purposes of the Act (section 117).

Part 12—Transitional provisions

This Part (sections 118-121) permits agents and salespersons engaged in real estate business at the time the Act comes into force to continue as such without requiring to be licensed or registered under the Act.

However, the Act provides for regulations to impose time limits on the right to continue to practice before needing a licence or before needing to be registered as a salesperson (section 118(1)). It also precludes persons from continuing to act as an agent or salesperson if they have been convicted of an offence involving dishonesty, or have been declared bankrupt (section 118(2)). And it provides for regulations to prescribe that, as a condition of continuing to act, agents or salespersons must acquire specified educational qualifications (section 120). Finally, it gives the Commissioner the power to disqualify persons from continuing to act as agents or salespersons if the Commissioner considers that they are not of good character or are not a fit and proper person to be an agent or salesperson (section 112); there is a right of appeal to the Tribunal.

Part 13—Amendments to other Acts

This Part (section 122) inserts an amendment to the *Auctioneers Act* (cap 270), to require an auctioneer of land to hold a real estate agent's licence (unless exempted under the transitional provisions).

Minister of Lands, Housing and Urban Development