IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2024-485-134
[2025] NZHC 50

UNDER	Judicial Review Procedure Act 2016 Part 30 of the High Court Rules 2016 New Zealand Bill of Rights Act 1990
IN THE MATTER	of an application for judicial review of Practice Rules and decisions made under the Real Estate Agents Act 2008
BETWEEN	JANET ELIZABETH DICKSON Applicant
AND	REAL ESTATE AGENTS AUTHORITY First Respondent
	REGISTRAR OF LICENSED REAL ESTATE AGENTS Second Respondent
	ASSOCIATE MINISTER OF JUSTICE Third Respondent

Hearing: 18 June 2024

Appearances: N M Pender, B E Morten and P A Miller for Applicant
A S Butler KC, S A H Bishop and S Deng for First and Second Respondents
K Laurenson and I M McGlone for Third Respondent

Judgment: 4 February 2025

JUDGMENT OF McQUEEN J

Table of Contents

Introduction

[1] In 2023, the Real Estate Agents Authority (the Authority) directed all real estate agents, branch managers and salespersons (licensees) to undertake a mandatory 90-minute course focussed on Māori culture, language and te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) as part of their continuing professional development (CPD) requirements for 2023. The course was titled Te Kākano. Mrs Janet Dickson, an experienced real estate agent, did not complete Te Kākano despite completing all other CPD requirements for 2023.

[2] Mrs Dickson chose not to complete Te Kākano as a matter of principle, rather than because she was in some way unable to complete the course. She considers that Te Kākano would not add any value to the performance of her real estate agency work and says the course conflicts with her personal beliefs. Under the Real Estate Agents Act 2008 (the Act), the Authority is required to cancel a real estate agent's licence if they do not complete their CPD requirements. A licensee who has had their licence cancelled becomes ineligible to hold a real estate licence for the following five years. In late 2023, Mrs Dickson applied to the Registrar of the register of licensees (the Registrar) for an exemption from completing Te Kākano. That application was declined. Mrs Dickson therefore faces the prospect of being ineligible to practise as a real estate agent for five years.

[3] Mrs Dickson then commenced this judicial review claim against the Authority, the Registrar and the Associate Minister of Justice (the Associate Minister).

[4] In her judicial review claim, Mrs Dickson says the practice rules under which the Authority and the Associate Minister prescribed (and continue to prescribe) CPD requirements are invalid under the Act. She also says that the Authority's decision to mandate Te Kākano was invalid because it was ultra vires (beyond the scope of) the practice rules, failed to adhere to the regulatory scheme and its purposes, and breached her right to freedom of expression. Finally, Mrs Dickson says that the Registrar's decision to decline to grant her an exemption from completing Te Kākano was invalid.

[5] The Authority, the Registrar and the Associate Minister oppose the application for judicial review, saying that their actions are lawful.

[6] By consent, the Court made interim orders on 1 March 2024 prohibiting the Authority from either cancelling Mrs Dickson's licence on the grounds she failed to complete Te Kākano in 2023 or declining to renew any application for renewal of her licence, pending the final determination of the judicial review application.

[7] Mrs Dickson has also applied to the Real Estate Agents Disciplinary Tribunal (the Tribunal) for a review of the Registrar's decision declining her application for an exemption from completing Te Kākano. That application has been stayed pending the determination of this judicial review proceeding.

[8] I dismiss Mrs Dickson's application in its entirety, for the reasons set out below.

Overview of the scheme for regulating real estate agents

[9] Real estate agents, branch managers and salespersons are regulated under the Act, the purpose of which is stated in s 3(1):

> … to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

[10] Section 3(2) states that the Act achieves this purpose by—

> (a) regulating agents, branch managers and salespersons:
>
> (b) raising industry standards:
>
> …

[11] The Authority derives its powers from the Act, which established it as a statutory Crown entity.[1] Under the Act, the functions of the Authority are to:[2]

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1 Real Estate Agents Act 2008, ss 10 and 11. As a Crown entity, the Authority is subject to the Crown Entities Act 2004.

2 Section 12(1).

(a) administer the licensing regime for agents, branch managers, and salespeople, including the granting and renewal of licence applications; and

(b) appoint a Registrar of the register of licensees; and

(c) ensure that the register of licensees is established, kept, and maintained; and

(d) develop practice rules for the Minister's approval and maintain these rules for licensees, including ethical responsibilities; and

…

(f) set professional standards for agents; and

…

(n) carry out any other function that the Minister may direct the Authority to perform in accordance with section 112 of the Crown Entities Act 2004; and

(o) carry out any other functions that may be conferred on the Authority by this Act or any other enactment.

The licencing scheme

[12] The Act requires those wishing to carry out real estate agency work to hold a licence.[3] Section 4 states that real estate agency work:

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

(b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but

(c) …

[13] The Act designates a Registrar who determines licence status.[4] Licences expire after 12 months unless renewed.[5] For a licence to be renewed, the Registrar must be satisfied that the applicant has completed any continuing education required by practice rules made by the Authority pursuant to s 15 of the Act.[6] Similarly, the

3 Section 6. The Act does contain exemptions, but none are relevant here.
4 Sections 33 and 34. The powers of the Registrar may be delegated in accordance with s 35 of the Act.
5 Section 46.
6 Section 52(3).

Registrar "must", under s 54 of the Act, cancel a person's licence if they have failed to complete such continuing education.[7]

[14] Where the Registrar is considering cancelling a licence, they must follow the process set out in s 55 of the Act. That process includes giving the licensee written notice of the intention to cancel and the reasons for the cancellation. Any written representations from the licensee must be taken into account by the Registrar before making their decision. However, given the Act's mandate that the Registrar "must" cancel a person's licence if they have not met their continuing education requirements, the Registrar's discretion is limited to their ability to grant an exemption to or deferral of any continuing education requirements, which I discuss further below.

[15] Where a person's licence is cancelled because they have failed to meet their continuing education requirements, the Act mandates an admittedly harsh consequence: the person becomes ineligible to hold a licence for the next five years.[8]

[16] A person who has had their licence cancelled may apply to the Tribunal for a review of that decision.[9] The Act provides for certain appeal rights from the Tribunal's decisions.[10]

The Authority's powers to set continuing education requirements

[17] Section 15 of the Act grants the Authority the power to make practice rules governing continuing education.[11] Such practice rules are secondary legislation.[12]

[18] To make practice rules setting out continuing education requirements, the Authority must follow a process outlined in s 16 of the Act: it must consult with the broader real estate industry and the Minister responsible for the administration of the Act must approve the practice rules. When deciding whether to approve any practice

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7 Section 54(d).
8 Section 37(1)(d)(i).
9 Sections 55(2)(b), 102(d) and 112.
10 Sections 116—120A.
11 Section 14 similarly permits practice rules to be made in relation to professional care and conduct.
12 Section 15(2).

rules, the Minister must have regard to certain criteria set out in s 17, among other things.

[19] The Minister also retains an ongoing discretion to amend practice rules if they consider them to be deficient in any respect.[13]

The 2018 Practice Rules

[20] The Authority created, with the approval of the Associate Minister (who was responsible for the administration of the Act), the Real Estate Agents (Continuing Professional Development Rules) Notice 2018 (the Practice Rules). The Associate Minister approved the Practice Rules on 28 November 2018, and they were published by notice in the Gazette.

[21] The Practice Rules require a licensee to complete, for each calendar year, 10 hours of "non-verifiable CPD" and 10 hours of "verifiable CPD".[14] "Non-verifiable CPD" is defined and may include supervised professional development, in house training and attendance at relevant conferences.[15] "Verifiable CPD" is also defined and means 10 hours of CPD delivered by an approved provider, made up of one or more mandatory topics as specified by the Authority and one or more elective topics chosen by the licensee from the Authority's website CPD library.[16]

[22] The Practice Rules do not specify any courses by theme or name. Nor do they specify the details of the courses that are required to be taken. Rather, the Authority publishes the courses required for "verifiable CPD", both mandatory and elective, on its website and through its newsletter.

[23] Under the Practice Rules, the Registrar may grant exemptions from or deferrals of some or all of the CPD requirements in "exceptional circumstances".[17] The

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13 Section 18.
14 Real Estate Agents (Continuing Professional Development Rules) Notice 2018, r 5(1). This does not apply to a person who revives a licence after a period of suspension: r 5(2).
15 Rule 3.
16 Rule 3.
17 Rule 13(1) and (2).

Authority may develop and make available guidelines for applications for an exemption or deferral.[18]

What happened?

Background to Te Kākano

[24] Ms Belinda Moffat, who was the Registrar and Chief Executive of the Authority at the relevant times, has given evidence by affidavit about the process that led the Authority to create Te Kākano, and about its decision to then make Te Kākano a mandatory course.

[25] Ms Moffat says that the Authority sees its continuing education programme as an important part of the Authority's consumer protection work. Each year, the Authority undergoes a process to select topics for the CPD programme. It was across 2021 and 2022 that the Authority considered including a diversity and inclusion series, made up of three courses—one of which would become Te Kākano.

[26] The development of the course that eventually became Te Kākano began in 2021, as the 2022 CPD programme was being developed. Every year, the Authority's first step in the development process is gathering data. Staff from the Authority's education team compile the results of the annual licensee and consumer surveys and identify key themes from complaints and enquiries received by the Authority, as well as issues raised in sector engagement meetings. They put this material together along with topic ideas and submit it to the CPD Advisory Group (a body including industry representatives), which further distils the ideas and makes topic recommendations to the Chief Executive and Board of the Authority.

[27] In early 2021, the Authority's education team included in the pack of materials for the CPD Advisory Group a topic idea of "serving NZ's diverse population". The topic would address matters such as diversity, discrimination, the Treaty, dealing with consumers who have English as a second language, use of pronouns, ageism and racism. The idea came about following an internal workshop where the issue of how

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18 Rule 13(3).

to support licensees to engage with the increasing diversity across consumers and the sector was discussed. The issue of discrimination was raised and considered in the context of the need to ensure licensees can meet their regulatory obligations while dealing with a wide range of people.

[28] The CPD Advisory Group met in March 2021 and supported in principle a CPD topic about "serving NZ's diverse population". However, it agreed that, given the sensitive nature of such a topic and the interests of communities who may be represented through it, a delay was necessary to ensure the topic was appropriately designed and delivered by the right provider. Accordingly, the topic was not progressed for the 2022 CPD programme.

[29] Ms Moffat refers to the Authority's regulatory strategy, as set out in Tauākī Whakamaunga Atu—Statement of Intent 2021–2025, which was published in June 2021. The strategy recognises the increasing diversity across New Zealand's communities (including real estate consumers) and the need to increase the real estate sector's knowledge and understanding of the needs of diverse consumers so that all people who wish to participate in real estate transactions can do so equitably and fairly. The strategy records that this includes increasing the real estate sector's understanding of the needs of Māori consumers and licensees. It proposes to enhance the sector's ability to protect Māori consumers and to help shape acceptable conduct by licensees. It states that the regulatory system has a responsibility to protect vulnerable consumers who may have less knowledge and are more likely to experience a problem in the real estate transaction process; licensees have an important role to play in providing clear information to those consumers and managing expectations in a dynamic environment.

[30] In 2022, the Authority's education team staff began preparing for the 2023 CPD programme, once again preparing a package of materials comprising compiled information from its licensee and consumer surveys, as well as feedback from the industry and through the complaints process.

[31] The CPD Advisory Group discussed topic options in March 2022, this time supporting a topic on "Diverse Communities" which covered discrimination, professionalism and behaviour.

[32] In April 2022, the Authority's education team prepared a memorandum to Ms Moffat as Chief Executive about proposed 2023 CPD topics, on the basis of advice from the CPD Advisory Group and internal discussions. The memorandum "highly recommended" a series on diversity and inclusion which would include three different courses, with one taking place each year over three years:

> 1. **Te Tiriti o Waitangi** - improving the sector's knowledge, understanding and awareness of te Tiriti, New Zealand's land history, Māori culture and dynamics (whanau, hapu, iwi), whenua and its importance to Māori, other considerations (land sensitivities, disclosing sensitive issues etc). Practical steps licensees and agencies can take to establish connections with local iwi and improve their understanding and practices.
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> 2. **New Zealand's diverse population Part 1** - improving the sector's knowledge, understanding and awareness of cultural differences, New Zealand's ethnic make-up, language barriers, discrimination (vendors and agents), disabilities, ageism, the use of pronouns, LGBTQIA+ (rainbow community). Communication barriers and cultural expectations and understandings. Opportunity to tap into existing unit standard content including principles under the Human Rights Act 1993.
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> 3. **New Zealand's diverse population Part 2** - improving the sector's knowledge, understanding and awareness of mental health, dealing with difficult people, social-economic and environmental issues. Practical information on [the Authority's] expectations of licensees, to deal fairly with all parties, ensuring consumers know to seek legal and technical advice and not take advantage of a person's inability to understand relevant documents. Communication skills.

[33] The memorandum noted these topics were relevant to several of the rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Code of Conduct)[19] and the "general principle of raising trust and confidence in the sector and demonstrating strong ethical behaviour towards consumers". The memorandum also recommended that the series be made mandatory and that no exemptions should be granted for the series.

[34] Ms Moffat took the memorandum to the senior leadership team so they could together discuss their views on the diversity and inclusion series proposal. She deposes that she supported the proposed series because:

> 49.1 Licensees are required to work with all New Zealanders who seek to engage in real estate transactions in New Zealand. Our population is diverse,

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[19] Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, rr 6.2, 6.3, 9.7 and 9.8 [Code of Conduct].

> and supporting licensees to understand and meet the needs of diverse communities would help licensees to meet their conduct obligations, and also provide protection for consumers who might not otherwise be able to engage equitably in real estate transactions.
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> 49.2 Te Ao Māori (by which I mean Māori interests, language, and custom) is one of the unique aspects of operating in business in New Zealand. Real estate licensees come from diverse backgrounds–as I set out above, data indicates that more than one in four licensees were born overseas. While some licensees may have good knowledge and experience in these unique aspects of our country, not all licensees do.
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> 49.3 Te Tiriti is a founding document in New Zealand and is referenced across legislation that is relevant to real estate in New Zealand, including the Resource Management Act 1991 and Pouhere Taonga Heritage New Zealand Act 2014. It is important for licensees to have at least a working awareness of Te Tiriti and its role in legislation relevant to real estate. While not all licensees may operate with these legislations, as real estate professionals, it is reasonable for consumers to expect they will have some awareness.
>
> 49.4 Our evidence from complaints and enquiry data, survey results and discussion with sector stakeholders, informed us that this was an important area that had not previously been supported through CPD. Developing a baseline of knowledge across the sector was important.

[35] Ms Moffat also notes that the Authority has been setting mandatory CPD topics every year since at least 2019. Those topics have included anti-money laundering, disclosure, ethics, issues and best practice with sale and purchase agreements, and dealing with consumers and clients fairly. Ms Moffat says that the question of not allowing exemptions was not discussed with the senior leadership team, noting her view was that the Act and the Practice Rules provide for exemptions, and they should remain available to be assessed on a case by case basis.

[36] The senior leadership team was broadly supportive of the topic that became Te Kākano. The team discussed the possibility of resistance to a topic relating to the Treaty if it was mandatory, the importance of finding a specialist provider to ensure the topic was delivered in a meaningful way, and that a refusal to participate could lead to the cancellation of licences. The team also discussed whether to make such a course elective or mandatory, considering that there were strong arguments both ways but ultimately deciding that mandatory attendance was justified by the importance of the topic. The team also proposed a mandatory course addressing the Code of Conduct and several elective options.

[37] Ms Moffat put these recommendations to the Authority's Board at its meeting on 26 April 2022.[20] While Ms Moffat at the time held a delegation that enabled her as Chief Executive to make the decision about topics herself, she felt it was appropriate to refer the matter to the Board due to the significance of the decision and the benefit of further discussion about it. Ms Denese Bates KC, the chairperson of the Board, has said in her affidavit that the Board takes a strong interest in overseeing and monitoring the delivery of the Authority's continuing education programme, and in the selection and delivery of CPD courses for each CPD year.

[38] Ms Bates has recorded why the Board felt the proposed series was necessary, and why it felt a course on the Treaty should be the first in the series and should be mandatory:

> 14. Licensees must work with all people in New Zealand when undertaking real estate agency work. This is particularly important, given the changing demographics and socio-economic makeup of New Zealand, that licensees are able to relate to people with different backgrounds from theirs. Real estate agency work is not merely a technical discipline. Licensees must be able to connect with consumers so that they can explain transactions in ways that consumers understand, and reflect respect for the different cultures, customs and/or distinct needs that consumers from different backgrounds bring. They also have obligations to treat all people they deal with fairly, and to avoid bringing the profession into disrepute. These are all things that a licensee cannot do without base knowledge about the importance of cultural understanding and the diverse nature of New Zealand's population. I was therefore supportive of introducing a series of topics on diversity and inclusion to support licensees to meet the conduct standards we expect from them.
>
> 15. New Zealand is a bi-cultural country. Māori are our tangata whenua and Te Tiriti o Waitangi is a founding document. In my view, if we were to embark on a diversity and inclusion programme it was important that we started with a focus on Māori, and understanding the bi-cultural aspect of our country, before exploring diversity in the wider context.
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> 16. I considered it appropriate for the topic which became Te Kākano to be made mandatory. I did not consider that the [Authority] would be able to get the point across to a sufficient number of the profession if the topic was made elective only. …
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> 17. Inevitably, this meant that some licensees would be required to take the course despite feeling that they would get nothing out of it. But this will happen with any mandatory course. For example, the other mandatory course in the 2023 CPD year was the Code of Conduct. I am sure that some licensees will have felt that they already knew everything there was to know about the

[20] This did not include any recommendation not to accept exemptions for the topic that became Te Kākano. Ms Moffat's evidence is that there was no discussion of or agreement to such a policy at the Board meeting.

> Code of Conduct. But the only way for the Board to be sure that there was an appropriate baseline of knowledge across all licensees was to make this topic mandatory. The same reasoning applies to Te Kākano.
>
> (footnotes omitted)

[39] The Board ultimately endorsed the proposed series and the idea of making mandatory the course that became Te Kākano.

Te Kākano is developed

[40] After the Board's endorsement, the Authority's education team began the development process for the first course of the series: the course that became Te Kākano. The team decided to seek an external supplier to develop and oversee delivery of the proposed topic, given its specialist nature.

[41] During 2022, the Authority carried out surveys that confirmed the importance of the diversity and inclusion series. Consumer and licensee surveys undertaken across 2021 and 2022—and completed in July 2022—confirmed that real estate consumers were a wide range of people of all backgrounds (with 41 per cent of respondents to the 2022 consumer survey reporting as non-New Zealand European and 19 per cent reporting as Māori) and that licensees themselves are also a diverse group (with 33 per cent of respondents to the 2022 licensee survey reporting as non-New Zealand European and 28 per cent reporting as migrants to New Zealand).

[42] Licensee data showed that licensees across the industry described their knowledge about the Treaty and its connection with the real estate sector as less than 50 on a scale to 100. Consumer data indicated that Asian, Indian, Chinese, Pacific Peoples, and Other European consumers felt less empowered during their last real estate transaction than New Zealand European consumers, although Māori consumers reported feeling more empowered than New Zealand European consumers. The data also indicated that consumers from diverse communities were having greater problems with real estate agents than the average consumer. While on average 29 per cent of consumers had experienced issues with a licensee's conduct, consumers who were Māori, Chinese or Pacific Peoples experienced a higher incidence of issues with the conduct of licensees, with 35 per cent of Māori, 33 per cent of Chinese, and 31 per cent of Pacific Peoples experiencing issues. The rate of problems with licensees was

even greater for migrants, with 49 per cent of migrant buyers and 68 per cent of migrant sellers experiencing issues with licensee conduct.

[43] In October 2022, the Authority conducted a closed tender process to identify a suitable education provider. In December 2022, the Authority entered into an agreement with Te Whare Wānanga o Awanuiārangi (the Wānanga), a tertiary education provider with expertise in delivering similar professional development courses, to develop and oversee the delivery of the course. The Authority also accepted the Wānanga as an approved training provider to provide the Te Kākano course for the purpose of the Practice Rules. Ms Moffat records that that Wānanga was chosen to deliver this topic because of its mana, depth of knowledge and expertise in delivering similar professional development course to other public bodies.

[44] The Authority worked in partnership with the Wānanga to develop the content to ensure the course would provide information useful to licensees whilst respecting the insights brought from the Wānanga. In particular, the Authority provided the Wānanga with relevant industry context and scenarios which the course should address. Ms Moffat has described these discussions in her evidence:

> 73.1 we discussed examples of enquiries we had received from licensees about what disclosure obligations they may have where a property for sale is next to or part of an urupā;
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> 73.2 we discussed examples of Māori buyers who had raised concerns about the failure of licensees to respect tikanga, such as sitting on a kitchen bench where food is prepared or allowing hats to be placed on tables;
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> 73.3 we considered the impact on Māori consumers where a sensitive issue such as a recent death in a house is not disclosed;
>
> 73.4 we provided the Wānanga with high level information about relevant legislation that refers to sacred Māori sites, and consultation with iwi, such as the Resource Management Act and Heritage New Zealand Pouhere Taonga Act; and
>
> 73.5 we discussed whether it would be possible to capture information about the process for Māori Land Court matters. We agreed that this was a topic that would be better captured as a specialist topic and that lawyers should be engaged in developing this subject area.

[45] In 2022, the Authority also commenced targeted research to understand the barriers to participation in real estate by diverse communities. The research was

completed in 2023, after Te Kākano had been developed and after the Authority decided to make it a mandatory course. The research confirmed that Māori and other diverse groups were encountering licensees who lacked the ability to deal with all people fairly in real estate agency work. It also showed that Māori, Pacific Peoples, and Indian consumers, as well as members of the LGBQIA+ community, identified general mistreatment and disrespect, overt discrimination, and a lack of cultural competency as their biggest barriers to participation in real estate transactions.

[46] Throughout the development of Te Kākano, the Authority kept licensees informed of the course progress and content through several newsletters, starting in October 2022. The Authority also engaged with industry stakeholders between March 2021 and February 2023, including by sending a draft topic outline to representatives from the sector for comment. The Board maintained a watching brief over the development of Te Kākano. For example, at the October 2022 Board meeting, the Board asked for a set of key messages on why the Authority was delivering a Treaty-oriented course as part of its CPD programme. A memorandum to the Board provided in December 2022 by Ms Moffat and the education team answered that query, saying the key messages were:

> a. Consistent with our strategic focus on ensuring that the benefits of the regulatory regime are accessible to all people across New Zealand's diverse communities, and that we demonstrate our commitment to te Tiriti o Waitangi, in February 2022 [the Authority] approved a Diversity and Inclusion topic series to be delivered across three years as part of the verifiable Continuing Professional Development Programme.
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> b. The programme is mandatory for all licensees and will commence in 2023 with the first topic focusing on te Tiriti o Waitangi essentials and the relevance to real estate agency work.
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> c. The Diversity and Inclusion programme is designed to support licensees to identify, avoid and address bias and discrimination, and to support diversity and inclusion by gaining a broad understanding of issues of relevance across New Zealand's diverse communities.
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> d. Te Tiriti o Waitangi is a founding document for New Zealand's bi-cultural country and is directly relevant to the relationship between Māori and the Crown.
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> e. [The Authority] considers that it is appropriate for all licensees in New Zealand to have a basic awareness of and understanding of Te Tiriti o Waitangi, the history of Māori land ownership in New Zealand, and insights into tikanga, all of which may be relevant to real estate transactions and real estate agency work. This recognises the importance

of whenua to Māori, and the importance of those who transact with whenua to understand its present and historical significance to New Zealand's tangata whenua.

f. The course is intended to ensure that licensed real estate professionals and their agencies have greater cultural confidence and capability, an understanding of te Tiriti o Waitangi, and the needs and interests of Māori in real estate context and a willingness to take practical steps to establish connections with local iwi and improve their understanding and practices.

g. [The Authority] has received strong support from both REINZ, numerous licensees and the CPD Advisory Group made up of sector representatives for this programme of work.

Te Kākano is introduced

[47] On 16 March 2023, the Authority provided licensees with an update on the 2023 CPD programme through its newsletter. The update introduced Te Kākano and its content, the provider, the cost and the way to access it.[21] On 14 April 2023, the newsletter formally announced the launch of Te Kākano, specifying that it was a mandatory course for the 2023 CPD year and therefore needed to be completed by 31 December 2023.

[48] On the Authority's website, Te Kākano is described as:

> Diversity and inclusion series: Te Kākano (the Seed) - *a practical introduction to Māori culture, language (te reo), custom (tikanga) and te Tiriti o Waitangi (the Treaty of Waitangi) in the real estate context.*

[49] The course itself took 90 minutes to complete and was made up of three modules as follows:

(a) Te reo me ōna tikanga | Māori language and customs. This module aimed to give licensees insight into te ao Māori (the Māori world) through experiencing tikanga and te reo that can be used in the real estate context. The Te Kākano workbook provides that by the end of the module, licensees would be able to:

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[21] Previously, the Authority's newsletters had referred broadly to a "Te Tiriti o Waitangi mandatory topic".

- Describe elements of the pōwhiri process (ceremonial welcome) …
- Apply correct te reo (the Māori language) pronunciation in the workplace including the correct pronunciation of placenames, and
- Apply basic greetings (mihimihi) in the workplace to enhance relationships.

(b) Te Tiriti o Waitangi | The Treaty of Waitangi. This module aimed to give licensees an understanding of the historical context leading up to the Treaty and an insight into the Treaty from a Ngāti Awa perspective, and the connection the Treaty may have in the context of real estate legislation.[22] The Te Kākano workbook provides that by the end of the module, licensees would be able to:

- Understand the historical context leading up to the signing of Te Tiriti o Waitangi (the Treaty of Waitangi) and He Whakaputanga (the Declaration of Independence)
- Describe the purpose of He Whakaputanga (the Declaration of Independence)
- Describe the differences in interpretation of the Māori and English texts of the Treaty articles, and
- Describe the purpose and origin of the Treaty principles, and
- Identify where Treaty principles may apply in the real estate context.

(c) Whenua Māori | Māori land. This module aimed to give licensees an understanding of the special connection Māori have with land and the importance of the environment. The Te Kākano workbook provides that by the end of the module, licensees would be able to:

- Understand one Māori creation story …
- Describe an example of iwi land loss and redress through the Waitangi Tribunal,
- Describe land ownership from a kaitiaki (guardian) perspective,
- Identify legislation relevant to the real estate sector which may require connecting with the local Māori community, and
- Apply relevant tikanga (protocol) in a work setting.

[50] The Whenua Māori module also included detail of examples of tikanga that are relevant in the sale and purchase of residential properties. For example, it discussed

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[22] The Treaty of Waitangi is referred to in, for example, the Resource Management Act 1991, the Urban Development Act 2020 and the Te Ture Whenua Māori Act 1993.

avoiding touching others' heads and placing hats or sitting on tables in a home. The workbook noted that there may be variations in tikanga between different groups.

[51] In total, 13,437 licensees completed Te Kākano across 2023. Feedback collected by the Authority from 749 participants (or 5.5 per cent of participants) indicated that over half of the respondents agreed or strongly agreed that Te Kākano improved their knowledge of the topic, with respondents' comments appearing to show that the course resonated with both licensees who had some existing knowledge as well as several of those who were initially sceptical about the Te Kākano course. There was also negative feedback, with 30 per cent of respondents questioning the relevance of Te Kākano to the real estate industry.

[52] For the 2024 CPD year, Te Kākano remains available as an elective topic. The second topic of the diversity and inclusion series—dealing with customers and clients fairly—was a mandatory topic for 2024.

The Registrar issues exemption guidelines

[53] On 30 October 2023, the Registrar issued guidelines for applications for exemptions or deferrals relating to CPD requirements (the Exemption Guidelines), as contemplated by r 13 of the Practice Rules.[23] The Exemption Guidelines state that "exceptional circumstances" which qualify an applicant for an exemption under r 13 of the CPD Rules are:

> circumstances that are out of the ordinary that prevents the applicant from completing CPD and will likely include:
>
> - A circumstance that is unusual, out of the ordinary, uncommon, special, or rare; [24] and
> - A circumstance that is largely outside the control of the applicant; and/or
> - A circumstance that could not be reasonably foreseen or planned for.

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23 Registrar of the Real Estate Agents Authority *CPD exemptions and deferrals under r 13 of the Real Estate Agents (Continuing Professional Development Rules) Notice 2018* (Real Estate Authority | Te Mana Papawhenua, October 2023).

24 At [4], citing *Catley v Real Estate Agents Authority* (CAC 521) [2019] NZREADT 57 at [43] and *Matson v The Real Estate Agents Authority* (CAC 410) [2019] NZREADT 9 at [18(e)].

[54] The Guidelines provide that the word "exceptional" creates a high threshold[25] and that given the importance of education within the regulatory framework, an exemption will be rare and will only be granted where a deferral is not appropriate.[26]

[55] Mr Joshua Doherty, Head of Regulatory Services at the Authority, explains that, prior to the Exemption Guidelines, the Authority had developed an internal policy for dealing with exceptional circumstances reflecting previously known case law from the Tribunal.

Mrs Dickson does not complete Te Kākano and applies for an exemption

[56] By November 2023, Mrs Dickson had not yet completed Te Kākano. This decision was based "on principle" rather than because she was in some way unable to complete the course. Mrs Dickson explains her decision in an affidavit:

> When I reviewed the "Te Kākano" course materials, I did not consider that they would add any value to the performance of my real estate agency work nor improve the way I relate to real estate consumers …

[57] On 18 November 2023 Mrs Dickson applied to the Registrar for an exemption from completing Te Kākano. In her application, she explained why she had refused to complete the course. Mrs Dickson noted her existing knowledge of te reo Māori and tikanga stemming from certifications and a history of close association with Māori communities and individuals. Mrs Dickson went on to criticise several aspects of the course, seeing it as a whole to be "political posturing". First, she criticised what she said was the Authority's decision to allow the Wānanga to "devise and alone present 15% of our pivotal [Authority] CPD" (emphasis included), which she said put "into the hands of one ethnic group the indirect power of veto over our very Licence itself". Second, she said that the course was condescending and largely irrelevant to the everyday work of real estate. Third, she noted her disagreements with aspects of the course's content. She felt the course provided an inaccurate translation or interpretation of the Treaty, referenced the Treaty principles which she did not agree with, and referenced controversial sources that were, she felt, politically motivated or

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25 At [5].
26 At [8].

anti-democratic. Finally, Mrs Dickson stated that the latter portion of Te Kākano was "completely against [her] lifelong ethical and religious convictions".

[58] Mr Doherty, to whom authority to make decisions regarding exemptions from CPD requirements had been delegated by Ms Moffat as Registrar, declined Mrs Dickson's application for an exemption. In a letter dated 7 December 2023, he advised Mrs Dickson that her application had been declined, explaining that her situation did not meet the threshold of "exceptional circumstances" under r 13 of the CPD Rules.

[59] The letter reminded Mrs Dickson that she still had time to complete Te Kākano by 31 December 2023 and that if she did not, the Authority would be required to cancel her real estate licence under s 54 of the Act.

[60] Mrs Dickson did not complete Te Kākano. On 31 December 2023, she applied to the Tribunal for review of the Registrar's decision to decline her application and in February 2024, she commenced this judicial review proceeding.

[61] As recorded earlier, pending final determination of Mrs Dickson's judicial review claim, the application to the Tribunal for review has been stayed and the parties also agreed to interim orders prohibiting the Authority from either cancelling Mrs Dickson's licence on the grounds she failed to complete Te Kākano in 2023 or declining to renew any application for renewal of her licence.

Overview of parties' positions

[62] Mrs Dickson's first cause of action pleads that the Practice Rules themselves, under which the Authority purported to mandate Te Kākano, are invalid. Should this cause of action succeed, Mrs Dickson seeks an order declaring that the Practice Rules are invalid and void insofar as they allow the Authority to specify a mandatory continuing education topic that is not the subject of a practice rule which has been approved by the Associate Minister having regard to the criteria in s 17 of the Act. Should this outcome materialise, the Registrar's decision to cancel Mrs Dickson's licence would be void; under s 54 of the Act, the Registrar must cancel a person's licence if they have failed to complete any continuing education required by practice

rules made by the Authority "pursuant to s 15 of the Act". If the Practice Rules were not made pursuant to s 15, there can be no valid cancellation of the licence.

[63] The Authority, Registrar and Associate Minister say that the Practice Rules were validly made under the Act and that they properly provide for the Authority to specify mandatory CPD topics.

[64] Mrs Dickson's second cause of action pleads that the Authority's decision to mandate Te Kākano was invalid. Should this cause of action succeed, she seeks an order declaring the Authority's requirement that licensees—including Mrs Dickson—complete Te Kākano as part of their mandatory continuing education under the Act is invalid and unenforceable. Ms Pender, counsel for Mrs Dickson, emphasises that Mrs Dickson's objection is to the mandatory requirement to complete Te Kākano rather than the Authority's decision to offer a course of this kind at all.

[65] The Authority and Registrar say the Authority's decision was properly made under the Practice Rules and the Act. The Associate Minister does not take a position on this cause of action.

[66] Mrs Dickson's third cause of action, pleaded in the alternative to the first two causes of action, says that the Registrar's decision to decline to grant her an exemption from completing Te Kākano was unlawful. Should this cause of action succeed, she seeks a declaration that the Registrar acted unlawfully in declining to grant her the exemption and orders setting aside the Registrar's decision to decline her application for an exemption and directing the Registrar to reconsider the application.

[67] The Authority and Registrar say the Registrar validly declined the exemption application and that the proper forum to challenge the decision is through the review process envisaged under the Act before the Tribunal. The Associate Minister does not take a position on this cause of action.

[68] I address each cause of action in turn.

First cause of action—are the Practice Rules invalid?

[69] Mrs Dickson's first cause of action pleads that the Practice Rules themselves, under which the Authority purported to mandate Te Kākano, are invalid. Ms Pender submits that where the Authority wishes to mandate a continuing education topic, it can *only* do so by way of a practice rule which has been pre-approved by the Minister, having regard to the criteria in s 17. This cause of action pleads two grounds. The first ground is that the requirement to complete "verifiable CPD" is ultra vires the Act because, in essence, the Practice Rules do not adequately specify the content of continuing education topics, which they must do in the event the Authority wishes to mandate a continuing education topic. The second ground is that the Associate Minister abdicated their authority when approving the Practice Rules because they did not have regard to the criteria in s 17 of the Act.

First ground —is the requirement to complete "verifiable CPD" ultra vires the Act?

[70] Rule 5 of the Practice Rules provides that a licensee must complete 10 hours of "non-verifiable CPD" and 10 hours of "verifiable CPD" each year to fulfil continuing education requirements.

[71] The term "verifiable CPD" is defined in r 3 of the Practice Rules:

> **verifiable CPD** means CPD delivered by an approved provider—
>
> (a) on 1 or more mandatory topics for up to 10 hours as specified by the Authority; and
>
> (b) on 1 or more elective topics chosen by the licensee from the CPD library on an Internet site maintained by or on behalf of the Authority for the balance, if any, of the 10-hour period.

[72] As can be seen, the Practice Rules themselves do not specify the details of the courses that are required to be taken. The Authority publishes the courses required for verifiable CPD, both mandatory and elective, on its website and through its newsletters.

[73] Under this ground of review, Ms Pender submits that the definition of "verifiable CPD" unlawfully extends the Practice Rules beyond the scope of the

Authority's powers to make practice rules as envisaged by s 15 of the Act, which states:

> **15 Continuing education**
>
> (1) The Authority may make practice rules that—
>
> (a) provide for the times or frequencies at which continuing education must be undertaken and the topics to be addressed:
>
> (b) require that particular continuing education be undertaken, or (in addition or as an alternative) require that the continuing education comply with specified requirements:
>
> (c) exempt, or provide for the exemption of, any agent, branch manager, or salesperson from all or any practice rules made under paragraph (b).

[74] Ms Pender submits s 15 must be interpreted narrowly, to mean that the Authority may only specify CPD courses in practice rules which are then subject to the s 16 process of community consultation and approval by the Minister under s 17. She says the preliminary wording (or chapeau) in s 15—which reads "The Authority may make practice rules that"—qualifies the following subsections. Accordingly, she says, it is *only* by making practice rules that the Authority is permitted to do the various things that are provided for in subs (1)(a) and (b), such as:

> (a) providing for the times or frequencies at which education must be undertaken;
>
> (b) providing for the topics to be addressed; and
>
> (c) requiring that particular continuing education be undertaken.

[75] The respondents say that s 15 should be interpreted broadly. Mr Butler KC, counsel for the Authority and the Registrar, submits that the two provisions (subs (1)(b) and (1)(b)) are disjunctive. He submits that here, the Authority created the Practice Rules under subs (1)(b), *rather* than subs(1)(a). Mr Butler submits the definition of "verifiable CPD" is valid under s 15(1)(b) and therefore is not ultra vires the Act. Ms Laurenson, counsel for the Associate Minister, agrees, submitting that the definition of "verifiable CPD" is valid under either subs (1)(a) or (b).

[76] Mr Butler and Ms Laurenson submit that a narrow interpretation of s 15 would not serve the purpose of the Act. They point to similar approaches in other professional licensee contexts as support for the submission that the approach taken by the Practice Rules is both legally permissible and a reflection of the practical reality of standards-setting.

[77] In response, Ms Pender submits that subs (1)(a) and (b) should not be interpreted disjunctively, but that even if they were, the definition of "verifiable CPD" would not be permissible under either subs (1)(a) or (b). Ms Pender says a narrow interpretation of s 15 would not create an undue administrative burden on the Authority or the Minister because CPD obligations could still be set at a high level.

[78] In support of her submissions, Ms Pender asserts that the Authority has, along with the Associate Minister and Registrar, a responsibility to minimise the potential for "distortion" in the regulatory scheme: that distortion being that a licensee who has their licence cancelled because of a failure to complete any prescribed continuing education faces a near-automatic five-year ineligibility to carry out real estate agency work, should they not qualify for an exemption.

[79] Ms Pender submits that this sanction is disproportionate and not an intended consequence of the Act. She says that this means the Authority, as statutory regulator, must exercise its powers and functions in ways which serve the purpose of the promotion and protection of consumer interests through professional regulation. In doing so, she says it also has a responsibility to ensure the system operates effectively and fairly. However, Ms Pender submits that in this case, the way the Authority has regulated continuing education in the Practice Rules renders the legislative safeguards ineffectual and has resulted in unjust distortions. She cites *Staples v Mayor of Wellington* as authority for the proposition that obligations with legal consequences should be imposed by law, not policy.[27] These factors, she says, support a narrow interpretation of s 15.

[80] This ground of review turns on the correct interpretation of s 15. I accept that if Ms Pender's interpretation of s 15 is correct, the definition of "verifiable CPD" in

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[27] *Staples & Co v Mayor of Wellington* (1900) 18 NZLR 857 (SC).

the Practice Rules would be ultra vires the Act. The starting point is that any secondary legislation must be authorised under the primary statute.[28] Section 15 is unambiguous in that it only empowers the Authority to make practice rules about continuing education insofar as they comply with the requirements of s 15(1).

[81] As I see it, the relevant questions I must address are:

(a) Should s 15 be interpreted narrowly or broadly?

(b) Is the definition of "verifiable CPD" permissible under s 15(1)(a)?

(c) Is the definition of "verifiable CPD" permissible under s 15(1)(b)?

(d) Are s 15(1)(a) and (b) disjunctive?

Should s 15 be interpreted narrowly or broadly?

[82] To decide whether s 15 should be interpreted narrowly or broadly, it must be analysed in light of its purpose and context.[29]

[83] The purpose of the Act is set out in s 3, which provides:

> The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

[84] Further light is shed on the Act's purpose by the explanatory note attached to the Real Estate Agents Bill:[30]

> Recently cases have come to light where misconduct by real estate agents or their salespeople has resulted in a financial detriment to the consumer of tens of thousands of dollars. The risks that consumers are exposed to are significant and there is the possibility of considerable consumer detriment in terms of direct monetary loss and of costs associated with the time required to pursue remedies when things go wrong.
>
> The current regime is a self regulatory model undertaken within a legislative framework and consequently there is a low level of independence from the

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28 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25].
29 Legislation Act 2019, s 10.
30 Real Estate Agents Bill 2007 (185-1) (explanatory note) at 21.

> industry. There is significant public and industry concern about whether the current licensing, complaints, and disciplinary processes are as effective as they could be in upholding industry standards.
>
> Allowing this situation to continue runs the risk of leaving consumers exposed to an unacceptable level of risk and consequent potential financial detriment. It is also likely that failing to address this issue would fatally undermine the consumer confidence required for the healthy growth of the real estate industry.

[85] As Ms Laurenson submits, the Act puts a focus on the Authority as the expert regulatory body that is reinforced by the policy considerations that were before Parliament in the making of the Act. For example, the Act established the Authority to provide for an independent regulatory body that would "rais[e]" and "set industry standards". CPD is, as Ms Laurenson says, one of the tools the new scheme conferred on the Authority to achieve these standards and be responsive to consumer need. The importance of continuing education was recognised by the select committee in its report on the Bill:[31]

> We consider that one of the most important new elements proposed by the bill is the ability for the Authority to make practice rules requiring continuing education (clause 19 [now s 15]). If used well, this requirement for continuing education is much more likely to ensure that licensees have a useful knowledge of good current industry practice than experience requirements alone.

[86] The select committee recommended that CPD requirements must be met as a condition of licence renewal, and that failure to comply could result in licence cancellation. This recommendation was adopted, as reflected in the Act.

[87] The role of continuing education in the regulatory scheme was also emphasised in the Departmental Report on the Bill:[32]

> Clause 19 [now s 15] also provides the Authority with a mechanism for ensuring that appropriate educational standards are maintained within the industry by requiring industry members to up-skill where appropriate through continuing education. It will be important for the Authority to work with the relevant recognised industry training organisation to ensure that continuing education requirements are correctly set and, where new or changes to existing unit standards are required, that these are developed by the ITO and appropriately assessed by the NZQA.

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31 Real Estate Agents Bill 2008 (185-2) (select committee report) at 10.

32 Ministry of Justice *Real Estate Agents Bill: Departmental Report — Part Two* (Ministry of Justice April 2008) at [204] [Departmental Report].

[88] According to the Departmental Report, the check on the Authority's powers to make practice rules was to be in the Minister's power to amend the rules:[33]

> It is appropriate that the Minister has the power to amend practice rules that are considered deficient. This is a necessary control on the power of the Authority and will ensure that the practice rules relating to a code of professional conduct and client care and for continuing education are fit for purpose and are consistent with the aims of the Bill.

[89] Ms Pender submits that education is not a core function of the Authority under the Act. The materials referenced above demonstrate that is unlikely to be the case. Regardless, the Act provides scope for the Authority to set continuing education requirements and the penalty for non-compliance mandated by the Act is a clear signal of the importance of education in the regulatory scheme as enacted by Parliament. Having continuing education also fosters the dual purposes of promoting and protecting the interests of consumers in respect of transactions that relate to real estate, and promoting public confidence in the performance of real estate agency work.

[90] In support of her submission that s 15 should be read narrowly, as noted earlier, Ms Pender points to the Authority's responsibility to minimise the "distortion" of the severe consequences facing those who do not complete their continuing education requirements. Ms Pender says that any resulting administrative burden would not be unduly burdensome. For example, she says should the Authority decide to mandate CPD, the Practice Rules could specify topics in a generic way. She points to continuing education rules for barristers set in New South Wales, Australia, which specify generic mandatory CPD categories.[34] This approach to interpretation would, she says, be in keeping with any high-level function of the Minister.

[91] The submissions of Mr Butler and Ms Laurenson focus on the point that Ms Pender's interpretation would require the Minister to approve each particular topic of continuing education. This interpretation would, they say, run counter to the broad scheme of the Act, which provides for the Minister to have a high-level oversight role and for the Authority to function as an expert regulator that can assess the specifics of

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33 At [216].

34 Rule 9 of the Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015 (NSW) sets out four categories which a barrister must engage in through CPD activities: ethics and professional responsibility; practice management and business skills; substantive law, practice and procedure, and evidence; and barristers' skills.

any continuing education needs of agents in any given year. They argue Ms Pender's interpretation would mean that every addition, removal or substitution of any topic would require the Authority to consult with the broader real estate industry and be approved by the Minister. These outcomes would place an unreasonable administrative burden on the Authority, the Minister and the real estate industry that could not, they say, have been intended by Parliament.

[92] I prefer the submissions for the respondents. I agree that the Act's purpose and the statutory context of s 15 indicate that Parliament intended for the Minister to have a high-level role, while it is for the Authority to play the part of the expert regulator setting specific courses for licensees to complete. Ms Pender's preferred narrow approach to interpreting s 15, including the chapeau argument, does not fit well with this intention so cannot be sustained, so far as the plain wording of the section permits.

[93] First, a narrow approach to interpreting s 15 is not practical. The Authority, as part of its role, gathers up-to-date information on consumers' experience, making it well placed to assess licensees' CPD needs each year based on what consumers require. Should a narrow interpretation of s 15(1)(b) be taken, the Authority would face a high administrative burden should it wish to change mandatory topics year to year to ensure consumer needs are being met on an ongoing basis. Each addition, removal, or substitution of any mandatory topic would need to be consulted on with the industry and approved by the Minister. The resulting burden on the Minister, the industry, and the Authority may well be too much to bear, possibly resulting in the needless repetition of topics. The impracticality of this suggestion is reinforced by reference to the level of oversight over the development of Te Kākano the Authority's Board had throughout 2022; it would not be practical for the Minister to fulfil this function in respect of each mandatory CPD topic for each year. While I accept a narrow interpretation of s 15 would not necessarily require this level of specificity, perhaps only requiring CPD topic titles, for example—and while I accept that any specificity would only be required in the event the Authority chose to implement mandatory CPD—a narrow approach to interpretation would impede the Authority's ability to maintain currency with consumers and the real estate sector through its mandatory CPD requirements.

[94] Second, considering s 15 within the context of the Act more widely supports this view. Compared to other forms of secondary legislation envisaged under the Act, which must be made by "prescribing" (rather than "providing for") matters,[35] CPD is a less significant time commitment and is intended to be flexible. Had Parliament intended a similar degree of ministerial oversight over CPD requirements, it could have used similar language in s 15. Moreover, the criteria the Minister must consider when approving practice rules under s 17 of the Act are set at a high level which reflects the high-level role the Minister has generally under the Act in relation to continuing education.

[95] The Departmental Report in relation to the Real Estate Agents Bill supports the view that the Minister is to have a less involved role in setting specified course requirements than they perhaps did under the previous legislation:[36]

> 39. There is a minor diminution of the role of the Minister. Under the current Act the Minister approves the subject matter and syllabus of educational examinations. Under the Bill minimum standards of education will be set by regulation.
>
> 40. The REINZ ITO has responsibility for developing the content of various real estate educational courses. These range from a basic 2 week salesperson course to a 2 year Diploma in Real Estate which is the minimum requirement to become a real estate agent licence holder.

[96] The context for s 15 and the practical reality of the situation support the view that Parliament did not intend for s 15 to be read narrowly, so far as the plain wording of the section allows. A broad approach to interpretation is preferable because it allows the Authority to take its current approach, which was approved by the Associate Minister, where mandatory topics can be added and changed each year without the Minister's approval, in turn allowing the Authority to maintain currency more easily with the professional development needs of real estate agents. This approach would not stop the Minister from acting as a check on the Authority's power by amending the Practice Rules under s 18, should they consider this necessary.

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35 See, by way of example, Real Estate Agents Act, s 156(1)(b), in relation to entry qualifications for licensees.

36 Departmental Report, above n 32.

[97] Ms Pender's submissions about avoiding distortion in the regulatory scheme, which are repeated in relation to the various grounds of review, do not change my conclusion on this point.

[98] First, I do not see it as the Authority's responsibility to minimise the "distortion" in the Act as advanced by Ms Pender. Becoming ineligible to hold a real estate licence for five years following cancellation for failure to complete CPD requirements is certainly a harsh consequence. In Mrs Dickson's case, it means she will not be able to carry out real estate agency work, her chosen vocation, for a significant period of time. I accept Ms Pender's submission that this harsh consequence is also somewhat out of step with the comparatively lighter penalties facing those who have carried out arguably worse behaviour, such as unsatisfactory conduct[37] and even misconduct.[38]

[99] However, this is a consequence that flows directly from the Act. It must be assumed that Parliament intended a harsh consequence to follow a failure to complete CPD requirements. It is plain on the face of the Act. It is also logical considering the importance the Act places on continuing education for licensees as a tool to address the problems that led to the Act's introduction. And as Mr Butler submits, the penalty is readily avoided by a licensee simply completing the CPD requirements—for Mrs Dickson, who has completed all other CPD requirements for 2023, this required only that she complete the 90-minute Te Kākano course.

[100] The penalty imposed by Parliament does not, in my view, require the specifics of particular courses to be spelled out in secondary legislation. It requires that licensees are made aware of the continuing education requirements and the potential penalty should they not meet those requirements. So far as there is any responsibility

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37 Under s 93(1) of the Real Estate Agents Act, a Complaints Assessment Committee may make various orders after finding a licensee guilty of unsatisfactory conduct (defined in s 72); notably, a Committee does not have the power to order the cancellation of the licence of a licensee guilty of unsatisfactory conduct.

38 While under s 110(2) of the Act, the Tribunal may cancel or suspend the licence of a licensee guilty of misconduct, Ms Pender submits it is only in the most serious of cases that this actually takes place, citing, for example: *Complaints Assessment Committee 2102 v Hoogwerf* [2023] NZREADT 31 (penalty decision), where the licensee had intentionally altered a document; and *Complaints Assessment Committee 2108 v Rankin and Tremain Real Estate Wairarapa Ltd* [2022] NZREADT 15, where the licensee had deliberately forged a document.

incumbent on the Authority to minimise any distortion, it would be satisfied by the Authority communicating the penalty clearly to licensees.

[101] The Authority goes to great lengths to ensure licensees are aware of such requirements and of the high bar to be granted an exemption, as Ms Moffat has deposed:

> 61. To support licensees to avoid the consequence of the cancellation provisions, the [Authority] provides considerable support to licensees to meet their obligations through clear information on our website, and through a range of communication channels to remind licensees to complete their CPD on time. I understand that Joshua Doherty, in his affidavit, outlines the information provided by the [Authority] to licensees about the CPD programme and the steps taken by [Authority] in 2023 to remind licensees to complete their CPD on time, including completing the 90-minute online Te Kakano topic. The [Authority] is conscious of the fact that cancellation is mandated by the Act where licensees do not complete CPD and gives licensees every opportunity to avoid this consequence.
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> 62. Throughout 2023, the [Authority] was also developing our guidelines for applications for exemptions and deferrals of CPD requirements in exceptional circumstances for eligible licensees. These guidelines were developed in early 2023 and issued in November 2023 … I was strongly of the view that these guidelines be issued to ensure that licensees who may be eligible for an exemption or deferral were aware of the threshold to be met and the information we needed to receive. The availability of exemptions and deferrals was an active consideration before the Board, and the Board's and my recognition of the availability of exemptions or deferrals is reflected in our support for the development of these guidelines.

[102] The statutory regime is clear and well-known. Indeed, Mrs Dickson says in her own affidavit that she was aware of the consequences should she fail to complete Te Kākano. In the Registrar's letter to Mrs Dickson, declining her application for an exemption, she was reminded that she had until 31 December 2023 to complete the 90-minute course or face having her licence cancelled.

[103] In circumstances where licensees are well aware of the continuing education required of them should they wish to renew their licence, there can be no lack of natural justice and there is, accordingly, no need to add a gloss to the statutory language by interpreting s 15 narrowly.

[104] I add that *Staples* does not help Mrs Dickson. In that case, the Court was dealing with a by-law that provided that:[39]

> … in cases of building, adding to, altering, repairing, or renewing "any hotel, boardinghouse, or any building used or intended to be used for public meetings or as assembly rooms, or as a theatre or music-hall, or dancing-hall, or for any public performance or public amusement whatever … it shall be lawful for the City Council … to impose such conditions as the Council shall in each case think necessary for the protection of the public using the building from fire; and, in particular, the Council may require any parts of any such buildings to be constructed of different materials and in a different manner from those required by Part III. of the Consolidated By-law, 1898"

[105] The Court held this by-law was invalid because it allowed the Council to "legislate for individual cases"[40] so that the law of the Council "may vary every fortnight, or as frequently as the Council may meet", with no safeguards. I do not see that as akin to what is happening here. Mrs Dickson, in common with all other licensees, knew that she would be required to complete up to ten hours of verifiable CPD on one or more mandatory topics specified by the Authority in any given year, and was notified that the mandatory topics for 2023 were Te Kākano and Code of Conduct, leaving other CPD at her election.

[106] Finally, I address the practice for other professions with similar legislative schemes. Mr Butler and Ms Laurenson have directed me to several such practices which, they submit, all operate such that the responsible Minister does not approve CPD requirements other than at a very high level, with the relevant regulatory body determining course details. These examples support, they say, a broad interpretation of s 15 and reflect the practical reality that professional regulatory bodies are best placed to identify the contemporary education needs of the sector regulated by it. I only address the New Zealand scheme regulating lawyers as it is the most similar.[41]

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39 *Staples & Co v Mayor of Wellington*, above n 27, at 861.

40 At 864.

41 I was otherwise referred to the regulatory schemes for immigration advisers, the Social Workers Registration Board, Medical Council, Dental Council, Optometrists and Dispensing Opticians Board, Chiropractic Board, Midwifery Council, Nursing Council, Podiatrists Board, Medical Radiation Technologists Board, Medical Sciences Council, and Veterinary Council. These are said to be other legislative examples where the responsible Minister is not required to approve CPD requirements.

[107] The regulatory framework under the Lawyers and Conveyancers Act 2006 and its related CPD rules[42] is nearly identical to the Act and Practice Rules. The Law Society, not the relevant Minister, specifies the details of any specific topics outside of the framework of the relevant rules. The problem with comparison to this regime is, as Ms Pender points out, that there is no evidence the Law Society has ever imposed a mandatory requirement. More importantly, the validity of this practice has never been subject to judicial scrutiny. The approaches of both the Law Society and the Authority could be unlawful. As a result, the practice of the Law Society is of limited assistance in interpreting s 15. There is, however, something to be said for the widespread acceptance of approaches that are similar to that taken by the Authority under the Practice Rules reflecting a common practical reality: that a framework that allows the relevant Minister to take on a high-level oversight role, with the relevant regulatory body setting down any specifics of continuing education in response to ever-changing data and experience, is a practical and appropriate balance of responsibility. I consider this supports my conclusion that Ms Pender's suggested narrow approach to the interpretation of s 15 would tend toward placing an unreasonable administrative burden on the Minister that was unlikely to have been Parliament's intention.

[108] To conclude, I consider that a broad interpretation of s 15 is to be preferred where the plain wording of s 15 allows it.

[109] I now turn to the technical discussion of whether, notwithstanding a broad interpretation of s 15, the Practice Rules exceed its scope.

Is the definition of "verifiable CPD" permissible under s 15(1)(a)?

[110] For convenience, I repeat subs (1)(a), which provides the Authority may make practice rules that:

> … provide for the times or frequencies at which continuing education must be undertaken and the topics to be addressed:

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[42] Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013.

[111] Ms Pender submits that the definition for "verifiable CPD" is insufficiently specific to provide for the "topics to be addressed", as required by s 15(1)(a), should the Authority wish to mandate courses. Ms Laurenson submits that the wording "provide for" under subs (1)(a) implies a broader ability for practice rules to create high level outlines of topics, such as 'mandatory' or 'elective', rather than the details of any topic subjects.

[112] I agree with Ms Pender that Ms Laurenson's interpretation strains the ordinary meaning of "topic". The Oxford English Dictionary defines a "topic" as "a subject of a text, speech, conversation, etc".

[113] The plain meaning implies greater specificity than "mandatory" or "elective" but would not necessarily require more than a general level of detail. Even a broad interpretation of s 15 cannot overcome that plain meaning. Therefore, the real focus under this ground of review are the next two questions: whether the Practice Rules are authorised under s 15(1)(b) and, if they are, whether they are valid despite not being authorised under s 15(1)(a).

Is the definition of "verifiable CPD" permissible under s 15(1)(b)?

[114] Next, I turn to subs (1)(b), which permits the Authority to make practice rules that:

> … require that particular continuing education be undertaken, or (in addition or as an alternative) require that the continuing education comply with specified requirements:

[115] Ms Pender submits that s 15(1)(b) similarly requires any mandatory courses to be specified in the Practice Rules, as they are "particular continuing education" or "specified requirements". Given my conclusions above, I agree with the respondents that a narrow interpretation of s 15(1)(b) that *requires* the details of a mandatory topic to be specified, including something as high level as a topic name, would counter Parliament's intended roles for each of the Minister and Authority and would create an unintended excessive administrative burden on those parties. Further, Parliament chose not to include a requirement to set out "topics" in subs (1)(b).

[116] The question then becomes what the terms "particular continuing education" and "specific requirements" require, when interpreted broadly, and whether the Practice Rules in fact comply with such requirements.

[117] I consider there is sufficient particularisation or specification within the Practice Rules to meet the requirements of s 15(1)(b). Rule 5 sets out a requirement that particular education be undertaken: 10 hours of non-verifiable CPD and 10 hours of verifiable CPD. Rule 3 sets "specific requirements" for verifiable CPD by requiring that it be CPD delivered by an approved provider on one or more mandatory topics specified by the Authority and one or more of the elective topics from the CPD library for the balance of the required 10 hours of verifiable CPD.

[118] Therefore, the Practice Rules will be valid if s 15(1)(a) and (b) are disjunctive, such that the Authority made them under s 15(1)(b) rather than s 15(1)(a).

Are subs (1)(a) and (1)(b) disjunctive?

[119] In Mr Butler's submission, the Authority created the Practice Rules under subs (1)(b), *rather* than subs (1)(a). He submits that the two provisions are disjunctive: the Authority may make practice rules that either provide for the times, frequencies and topics of continuing education (under subs (1)(a)) *or* that require particular continuing education be undertaken (under subs (1)(b)). Then, given the broad ability for practice rules to set "specified requirements" under subs (1)(b), the Practice Rules are well within the intended scope of s 15.

[120] In support of this argument, he points to several textual components of s 15:

(a) First, the use of a colon at the end of each para within s 15(1), which in his submission is the standard drafting technique used to form a list of separate items.[43]

(b) Second, the different phrasing of the two subsections. Subs (1)(a) says that the Authority may make practice rules that "provide for" the times

[43] Citing Te Tari Tohutohu Pāremate | Parliamentary Counsel Office "3.4A Legislation: Using paragraphs to enhance readability and clarity" (13 August 2024) <https://www.pco.govt.nz/3.4a/>.

and frequencies for continuing education, and "the topics to be addressed". In contrast, subs (1)(b) makes no references to topics as such, but rather empowers the Authority to make practice rules which "require that" particular continuing education be undertaken.

(c) Third, and most importantly, the fact that subs (1)(c) allows the Authority to "exempt" licensees (or licensees meeting certain criteria) from "all or any practice rules made *under paragraph (b)*" (emphasis added). In Mr Butler's submission, the necessary corollary is that the Authority cannot exempt licensees from practice rules made under subs (1)(a) and therefore it is possible for the Authority to set practice rules under (1)(b) and not (1)(a).

[121] I agree. That position is supported by the textual components of s 15 and any other interpretation would be inconsistent with the broad interpretation of s 15 that I have already concluded is preferable.

[122] Therefore, even though a practice rule setting out continuing education under s 15(1)(a) would need to specify "topics", the Authority can set broader practice rules under s 15(1)(b) so long as they require that "particular continuing education" be taken. The Practice Rules in question did so require that "particular continuing education" be taken. They are therefore validly made within the scope of s 15.

Conclusion

[123] I conclude that the Practice Rules, including the definition of "verifiable CPD", fall within the scope of allowable practice rules as set out in s 15(1)(b) of the Act.

Second ground —did the Associate Minister abdicate their authority in approving the Practice Rules?

[124] Section 17 of the Act provides the criteria to which the Minister must have regard when deciding whether to approve any practice rules. Those criteria are:

(a) the principle that it may be necessary or expedient to impose duties or restrictions on agents, branch managers, or salespersons in order to protect the interests of consumers:

(b) the principle that the burden of a duty or restriction should be proportionate to the benefits that are expected to result from the imposition of the duty or restriction:

(c) the consistency of the rules with New Zealand's international obligations:

(d) the provisions of this Act and all rights and obligations of agents under the law.

[125] Ms Pender submits that where a practice rule sets mandatory continuing education requirements without specifying particular subjects of that education, the Minister is unable to conduct the s 17 assessment required under the Act. They cannot weigh up—or in terms of s 17, "have regard" to—the criteria that:

(a) it may be necessary or expedient to impose duties or restrictions on agents, branch managers, or salespersons in order to protect the interests of consumers, under s 17(a); and

(b) the burden of a duty or restriction should be proportionate to the benefits that are expected to result from the imposition of the duty or restriction, under s 17(b).

[126] Ms Pender submits the Associate Minister was, as a result, unable to consider whether the Practice Rules were consistent with the Act and the rights and obligations of agents under the general law, including the Bill of Rights Act 1990. Ms Pender also points to the briefing paper that was provided to the Associate Minister in relation to the Practice Rules. She says the paper did not warn that approval of the requirement for "verifiable CPD" risked abdicating the Associate Minister's duty to vet continuing education rules before the Authority makes them.

[127] I agree with the submissions made by Mr Butler and Ms Laurenson that where practice rules relating to continuing education specify the time required for licensees to commit to, the Minister is capable, despite a lack of specificity in subject matter, of "having regard" to the principles in s 17. Here, the Associate Minister could have had regard to the principle that it may be necessary or expedient to impose duties or restrictions on licensees in order to protect the interests of consumers, by having regard to the fact of mandatory topics to be set by the Authority and to the time imposition

on licensees of 20 hours CPD per year. Similar logic applies to the principle that the burden of a duty or restriction should be proportionate to the benefits that are expected to result from the imposition of the duty or restriction. For example, had the time imposition of CPD requirements been, say 2,000 hours, that would clearly be disproportionate to the expected benefits of that much CPD time.

[128] The Practice Rules cannot be seen as ultra vires for a lack of Ministerial oversight under s 17. This conclusion is reinforced by my view expressed earlier that the Act envisages the Minister providing high-level oversight.

[129] Whether or not the briefing paper addressed the risk that the Associate Minister may abdicate their duty because the Practice Rules did not specify CPD topics is irrelevant. The question here is not whether or not the Associate Minister was aware there could be such a risk, but whether that risk actually materialised. Here, that risk did not materialise.

[130] I conclude that the Associate Minister has not abdicated their duty by failing to apply the s 17 criteria when deciding whether to approve the Practice Rules.

Conclusion on first cause of action

[131] This cause of action must fail.

Second cause of action—review of the Authority's decision to mandate Te Kākano

[132] Mrs Dickson's second cause of action pleads that the Authority's decision to mandate Te Kākano was invalid on three grounds. The first ground is that the decision was illegal. The second ground is that the decision was made for an improper purpose. The third ground is that the decision was inconsistent with the right of freedom of expression, including the freedom to seek, receive and impart information and opinions, guaranteed by the New Zealand Bill of Rights.[44]

[44] New Zealand Bill of Rights Act 1990, s 14.

First ground —was the Authority's decision illegal?

[133] Ms Pender says the Authority's decision to mandate Te Kākano was illegal either because the requirement to complete "verifiable CPD" in the Practice Rules is ultra vires the Act, or, alternatively, because Te Kākano was too specific to fit within the definition of "verifiable CPD". The first argument cannot succeed because I have not accepted that the Practice Rules, or the definition of "verifiable CPD" within them, are ultra vires the Act as pleaded under the first cause of action. As a result, I focus on Ms Pender's alternative argument, that Te Kākano is not a "topic" under the definition of "verifiable CPD".

[134] Ms Pender submits that the definition of "verifiable CPD", which permits the Authority to specify mandatory or elective "topics", only enables the Authority to set general subjects or themes, rather than to mandate prescribed training courses such as Te Kākano. Ms Pender says this reflects the ordinary meaning of "topic".

[135] This interpretation cannot be consistent with the Act and its purpose. The purpose of the Act is to protect consumers and instil public confidence in real estate work. The Act plainly envisages one way this purpose may be achieved is through continuing education that is required of licensees should they wish to renew their licence. It is difficult to see how consumer protection and public confidence in real estate work could be achieved through continuing education if the Authority only set vague topics for licensees. There is no excessive administrative burden caused by this result; given my conclusion above that it is the Authority as an expert regulator that has technical knowledge, it is well placed to prescribe specified topics.

[136] This conclusion is consistent with the plain meaning of "topic". While, as I said above, the term cannot mean something so broad that it sheds no light on what the content of a course may be, there are varying levels of detail that can be prescribed while still complying with the meaning of the word. While a "topic" would not *necessarily* require more than a general level of detail, it feasibly could set out more than a general level of detail. For example, turning to the Oxford English Dictionary definition, the "subject of a text, speech, conversation" could be defined in broad or narrow terms. This is not to say that the Authority necessarily *must* prescribe topics

with the rigorous level of detail it did for Te Kākano, but that it is permitted to do so and that that level of detail falls within the ordinary meaning of the word.

[137] To conclude, Te Kākano was not too specifically prescribed to fall outside the meaning of "topic" and therefore outside the scope of the Practice Rules.

Second ground —did the Authority's decision fail to adhere to the purposes of the Act or the criteria set out in s 17?

[138] Ms Pender submits that the Authority, in deciding to mandate Te Kākano as a "topic", exercised its power for an improper purpose. Two justifications are given in support of this submission. First, Ms Pender says the decision had to adhere to the umbrella criteria set out in s 17 of the Act because the Authority's power to specify mandatory "topics" stems from the Practice Rules, which themselves are subject to the Act—including s 17. She submits the decision failed to do so because it was not necessary to protect consumers (in terms of s 17(a)) and because the Authority did not, in making it, weigh up whether the burden of a mandatory course was proportionate to the benefits to real estate consumers (in terms of s 17(b)). In her submission, the burden on licensees outweighs any benefit. Second, Ms Pender says the decision had to give effect to the purposes of the Act—again because the Authority's power to specify mandatory topics stems from the Practice Rules, which are themselves subject to the Act. She submits the decision failed to do so because the subject matter of Te Kākano is not relevant to core real estate business.

Did the decision need to meet s 17 criteria?

[139] The first justification is flawed. Section 17 of the Act is titled "Criteria in relation to approval of practice rules by Minister". It provides that the "Minister must, in deciding whether to approve any practice rules, have regard" to certain criteria. There is nothing to indicate that the criteria in s 17 are matters to which the Authority, rather than the Minister, should have regard. Moreover, the Authority is not "deciding whether to approve any practice rules" in terms of s 17 when it sets mandatory "topics" under the Practice Rules. Section 17 is not irrelevant, however. It assists in interpreting the Act's purpose insofar as it relates to any practice rules and their application.

Did the Authority act in accordance with the Act's purposes?

[140] The second justification fails on the facts. I agree with Mr Butler that the decision to make Te Kākano mandatory was consistent with the purpose and scheme of the Act.

[141] As the parties all accept, the Authority must act in accordance with the Act and its purposes, including when setting any mandatory topics under the Practice Rules.[45] That does not mean that any mandatory topics must be "necessary" to protect consumers, as Ms Pender has said in relation to the first justification. Instead, there must be a nexus between any compulsory topics and the work of real estate agents. Any compulsory topics should promote and protect the interests of real estate consumers and should promote public confidence in the performance of real estate agency work—a lower bar than requiring topics to be "necessary" to protect consumers.

[142] As I said above, s 17 may shed additional light on these purposes in the context of continuing education. The criteria in subs (a), (c) and (d) do not assist. For example, the principle set out in subs (a) that it may be necessary or expedient to impose duties on licensees to protect the interests of consumers does not add anything to the Act's purposes set out in s 3. However, the principle set out in (b), that the burden of a duty should be proportionate to the benefits that are expected to result, is relevant. It suggests that the Act's purpose of protecting the interests of consumers may be somewhat qualified as it relates to continuing education. Protecting the interests of consumers should not perhaps be pursued at the cost of a disproportionate burden on licensees.

[143] In Ms Pender's submission, the Authority did not act in accordance with the purposes of the Act because the subject matter of Te Kākano was made mandatory, yet is not relevant to real estate work. Te Kākano is, she says, a rudimentary course on basic tikanga concepts with a "cursory overview" of the Treaty. While acknowledging that the course was well-received by some attendees, Ms Pender points to the fact that

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45 *Unison Networks v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50]–[51] and [53].

the majority of agents that completed the course and responded to a survey indicated they were unlikely to recommend the course to a colleague and the fact that almost one third of those licensees commented that the course was "not relevant to real estate industry".

[144] As I have observed earlier, over half of respondents agreed or strongly agreed that Te Kākano improved their knowledge of the topic. Overall, respondents positively rated the course, with a 68 per cent average rating score.

[145] However, the question for this Court is not how licensees responded to Te Kākano, but whether the Authority's decision was in accordance with the purposes of the Act.

[146] Ms Pender further submits that Te Kākano did not protect consumers because, for example, it did not address the top five complaints from consumers or the top five enquiries from consumers, and that the consumer survey from 2022 referred to above found that out of all ethnicities, in relation to feelings during a transaction process, Māori were the most empowered to participate effectively with 91 per cent being "somewhat empowered" to "very empowered" during their last transaction. Mr Butler's response is that these complaints are made in the context of complaints under the Code of Conduct and so a superficial review of how the complaints are framed does not reveal the true underlying concerns. In any event, these matters do not undercut other concerns Te Kākano was designed to address.

[147] As can be seen from the Authority's process in developing Te Kākano, which I described earlier, the course was introduced in part to address real problems facing consumers of services provided by real estate agents; or in other words, to promote and protect the interests of consumers. Take, for example, the following evidence from Ms Moffat:

> 23. Consumers engage with licensees to help them carry out significant real estate transactions: transactions which are legally complex, carry considerably high financial and emotional risk, and often represent one of the most significant financial decisions that the consumer will make in their life. It is critical that licensees are equipped to engage with consumers of all backgrounds and be able to explain things in ways the consumer will understand. In turn, licensees should also be able to understand what is

> important to consumers and to appreciate the context in which the consumer makes their decisions. Licensees must have the competency to deal respectfully and fairly with people from all cultures and demographic groups, including knowing how to avoid causing accidental offence.
>
> 24. In addition, licensees ought to understand the operating context which is unique to New Zealand. This includes having an appreciation of the language, custom and mores of New Zealand's tangata whenua, particularly when dealing with land which may be special or sacred to Māori and when engaging with Māori consumers. The [Authority] considers that licensees will benefit from having a basic understanding of the Treaty of Waitangi which features in legislation relevant to real estate work in New Zealand.

[148] Mr Gulliver, the manager of projects at the Wānanga at the relevant time, provides further examples of ways that licensees were failing to live up to their professional conduct obligations in respect of Māori consumers:

> 20. While we were designing Te Kakano, we heard stories from real estate agents we had contact with that they might have made mistakes when moving onto whenua Māori, for example by taking food and water onto sacred sites. Getting offside in a relationship is not a good start for any real estate agent, and we wanted to provide some tikanga and knowledge that could keep real estate agents culturally safe in these spaces. When designing this module we decided to weave in purakau (ancient stories) showing how the land was created. This was to highlight the importance land has to Māori - it is not just "dirt", but there are whakapapa connections, stories handed down from our ancestors, which show that whenua Māori needs to be approached with care and respect.

[149] The course content was developed slowly, with care and consideration. In particular, the content for Te Kākano was intentionally developed to avoid imposing controversial messages on participants, as Mr Gulliver's evidence demonstrates:

> 30. … when it came to the Te Tiriti o Waitangi part of the Te Kākano course, we were conscious about presenting information as opposed to imposing ideas on the participants. It was important to us that participants were allowed the freedom to decide for themselves about the meaning and status of Te Tiriti. We focused on providing some base knowledge on Te Tiriti and to highlight the strong connection between Te Tiriti and whenua Māori (Māori land). We drew on respected authorities for this section.
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> 31. Our approach to delivering Te Kākano was that it was the beginning of a journey for the [Authority] and real estate agents. It is a first step, that is why it is called "te kākano" or "the seed". As educators we need to be conscious of knowing our audience, of being aware that this may be a new space for some and a familiar space for others. With over 16,000 people, we expected that there may be a reluctance to engage and that everyone will come from a different starting point with their existing knowledge and views. We are used to dealing with a large range of experiences, knowledge, and attitudes.

> 32. Our main role as an education provider is to consider how we can present information to get the best learning for the participants. It is not about us pushing our view in a combative way. We understood that this was a platform to present in as neutral a manner as possible what has occurred in Aotearoa. For example, in the course we compare the differences between Te Tiriti and the English translation, but we do not go further and provide commentary on those differences. Our intention was to acknowledge the tension and let the participants form their own opinions on those differences.
>
> 33. An important part of providing education on Te Tiriti and te ao Māori is about asking people to look at their own cultural citizenship. We think that it makes people better cultural citizens if they understand other cultures in New Zealand, and in this programme specifically, understanding some more about the Māori culture …

[150] The educational value of Te Kākano was not undermined by the fact the course operated from a Ngāti Awa perspective, as Ms Pender has suggested. While the course content drew on the expertise of prominent scholars in te ao Māori, much of the course content reflected a Ngāti Awa perspective—this was made explicit in the foreword to the Te Kākano workbook. As Mr Gulliver explained to the Authority, while there are some broad areas of agreement between iwi and hapū, there is no such thing as a generic Māori perspective on matters of tikanga, te reo and history:

> 23. Often, in the Pākehā world, there is a tendency to generalise things when it comes to te ao Māori by viewing Māori as a homogenous group. There are some similarities and differences in reo and matauranga within iwi around the motu. We are very conscious of respecting the autonomy of each iwi and hapū. We would never speak on behalf of other iwi or on behalf of New Zealand Māori as a whole. This is why we wanted to be clear with both participants and the [Authority] that we were coming from a Ngāti Awa perspective.
>
> 24. When it comes to Te Tiriti o Waitangi it is up to each iwi to share their view and interpretation. Tikanga that applies to a particular situation or Te Reo can differ from iwi to iwi. It might surprise Pākehā people to know that even on a hapū level there can be different practices, and that members of our hapū can have different ways to the hapū just down the road.
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> 25. We did do our best to highlight where there would be different practices or perspectives within te ao Māori, and suggested how participants could learn more. For example, we provided information to real estate agents on who they could contact to learn about the tikanga in their area.

[151] Further, as Ms Moffat has explained, the Authority recognised it was highly unlikely that all the diverse views on such topics that exist in te ao Māori could fit within a single course that was short enough to be appropriately set as continuing

education. I see no issue with the approach of either the Wānanga or the Authority in these circumstances.

[152] As Mr Butler submits, Te Kākano also assisted licensees to meet their obligations arising under the Code of Conduct. The Code of Conduct require licensees to act in good faith and deal fairly with all parties engaged in a transaction.[46] It also requires licensees to avoid any conduct that is likely to bring the industry into disrepute.[47] In Mr Butler's submission, Te Kākano would naturally assist licensees in complying with these aspects of the Code of Conduct. The Code of Conduct also require licensees to have a "sound knowledge of the Act … and other legislation relevant to real estate agency work". Mr Butler says that "other legislation" includes legislation with references to the Treaty and its principles, such as the Resource Management Act 1991, which Te Kākano considered. While the Code of Conduct is not equivalent to the Act's purposes, it is mandatory for the Authority to create under the Act.[48] Further, I consider that a course that assists licensees to act in good faith and deal fairly with all parties, avoid bringing the industry into disrepute, and have sound knowledge of relevant legislation will also assist in promoting and protecting the interests of consumers and public confidence.

[153] I acknowledge, as Ms Pender points out, that the timing of consumer and licensee surveys, the targeted research commissioned by the Authority and completed in 2023, and the reports of licensees' culturally insensitive behaviour as reported by Mr Gulliver in his affidavit, means that this material was not available to the Authority before it decided in principle in April 2022 to mandate Te Kākano for 2023. Despite this, it is apparent that the Authority had previously turned its mind to the need to ensure that licensees are appropriately equipped to address the increasing diversity of New Zealand. I regard knowledge of this fact and recognition of the legal landscape in New Zealand (including the Treaty and the impact of tikanga and Treaty principles) to be well within the general knowledge of the Authority.

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46 Code of Conduct, above n 19, r 6.2.
47 Rule 6.3.
48 Real Estate Agents Act, s 14(2).

[154] Accordingly, Te Kākano does, in my view, squarely meet the Act's purposes of promoting and protecting the interests of consumers and promoting public confidence in the performance of real estate agency work, through increasing the ability of licensees to deal appropriately and professionally with Māori consumers.

[155] The decision to make Te Kākano mandatory also falls within the purposes of the Act. Making Te Kākano mandatory ensured that all licensees, including those that may otherwise be resistant, achieve a baseline of knowledge that would help consumers—whether or not they intended to work with Māori consumers. As Ms Moffat said in her evidence:

> 50. … The [Authority's] view is that all licensees need to be prepared to be able to deal with all people when undertaking real estate transactions, and that this includes dealing with Māori consumers.

[156] Finally, I do not accept that the decision to make Te Kākano mandatory was a disproportionate burden on licensees compared to its benefit to consumers. A 90-minute prescribed course is not a disproportionate burden compared to the ability of the course, from the Authority's perspective, to better enable licensees to meet their professional obligations.

[157] To conclude, I do not consider that the Authority's decision to make Te Kākano a mandatory course was undertaken for an improper purpose.

Third ground—was the Authority's decision a breach of Mrs Dickson's right to freedom of expression?

[158] The Authority is a Crown entity with public functions, powers and duties under the Act. The Bill of Rights Act requires that the Authority exercise those functions, powers and duties consistently with that Act.[49]

[159] The Bill of Rights Act provides:

> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

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49 New Zealand Bill of Rights Act, s 3.

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[160] While Mrs Dickson's statement of claim asserted inconsistency with both ss 13 and 14 of the Bill of Rights Act, the focus of Ms Pender's submissions on this ground of review was on the right to freedom of expression under s 14.[50]

[161] Ms Pender submits that the Authority's decision to mandate Te Kākano engaged Mrs Dickson's right to freedom of expression because the course provided a one-sided perspective on historical material and did not enable discussion or debate because the course was largely delivered as a pre-recorded online webinar. Therefore, Ms Pender says, the Authority was required to show that it considered how Te Kākano would interfere with the right to freedom of expression and was satisfied that mandating Te Kākano would be a justifiable limitation on the right under s 5 of the Bill of Rights Act.[51] Ms Pender says the Authority did not do this and that the decision to mandate Te Kākano is invalid as a result.

[162] As the Supreme Court recently clarified in *A v Minister of Internal Affairs*, decision makers must turn their mind to and engage with the question of whether it is reasonable to limit any affected rights by their decisions.[52] In the decision of *New Health New Zealand Inc v Director General of Health*, this Court discussed this requirement, explaining that statutory decision makers must, before exercising a discretionary decision-making power that might restrict a right protected under the Act, consider whether the decision is a demonstrably justified restriction of the right in terms of s 5 of the Act and only go forward with the decision if they can, themselves, be satisfied that it is such a justified restriction—if they do go forward with the decision, they must explain to those affected why it is a justified limit on the right.[53]

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50 Ms Pender addressed the right to freedom of conscience in the context of the third cause of action.

51 Citing *New Health New Zealand Inc v Director General of Health* [2023] NZHC 3183 at [103]; and *A v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372 at [138] and [140].

52 *A v Minister of Internal Affairs*, above n 51, at [138]; *Moncrieff-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [83].

53 *New Health New Zealand Inc v Director General of Health*, above n 51, at [103].

[163] However, before this requirement comes into play, there must be a reasonable prospect that the proposed decision will restrict the right: in other words, the right must be engaged.[54] As I come on to explain, here there was no reasonable prospect that mandating Te Kākano would restrict the right of licensees to freedom of expression and so there was no duty on the Authority to turn its mind to the question of whether it was reasonable to restrict it.

[164] The right to freedom of expression has been expressed as a "fundamental value"[55] and a "necessary condition" of good government, intellectual progress and personal fulfilment".[56] The right, which includes the right to seek, receive and impart information and opinions,[57] is principally a negative right: its function is largely to obligate the state to refrain from unjustifiably restricting expression.[58] While there are situations where the right will entail positive duties[59]—for example, the state has a duty to proactively put state information of public interest in the public domain—Mrs Dickson has not suggested that is the case here. In setting an educational course, the Authority is not restricting the ability of licensees to express themselves, to seek out and receive conflicting information outside of the course, or to impart contrary information and opinions to others—including perhaps other course participants. It is simply asking licensees to receive information in a professional context. The fact Te Kākano was conducted as a webinar that did not allow participants to discuss their opinions of the topic within the course setting does not prevent them from doing so outside of it, as Mrs Dickson has herself demonstrated through her public comments.

[165] Ms Pender did not provide me with any authority in which the right to freedom of expression was recognised in a situation involving attending a seminar or otherwise receiving information. The fact is that Mrs Dickson remains free to hold her own views about the matters discussed in Te Kākano.

[166] Ms Pender appeared to submit that the right engaged includes Mrs Dickson's ability to source her own continuing education needs. I do not accept such a

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54 At [84] and [103].
55 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [176], per Thomas J.
56 *Jennings v Buchanan* [2004] UKPC 36, [2005] 2 NZLR 557 at [6], per Lord Bingham.
57 New Zealand Bill of Rights Act, s 14.
58 *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 52, at [67]–[69].
59 At [68]–[72].

submission. Rather, I agree with Mr Butler that were Mrs Dickson's claim under this head to succeed, the implications would be broad. Any mandatory education would be seen, prima facie (on first impression), as an infringement of the right to freedom of expression. Mrs Dickson's position appears to imply that s 14 encompasses the right not to be required to listen to views the listener does not agree with. Such an approach would extend s 14 of the Bill of Rights Act well beyond its intended scope. This is especially so in circumstances where the Authority is setting courses for those who have exercised a choice to work and become qualified in a regulated commercial field.[60] As Mr Butler submits, the right to freedom of expression arises in the present case in a peripheral way by comparison with both *New Health New Zealand Inc v Director General of Health* and *A v Minister of Internal Affairs*, where decision-maker engagement with Bill of Rights considerations was at the heart of the matters arising.

[167] I consider there is no reasonable prospect that the right to freedom of expression was restricted by the Authority mandating Te Kākano. Therefore, there was no duty incumbent on the Authority to expressly consider the right to freedom of expression in its decision making.

[168] In any event, as the Supreme Court held in *A v Minister of Internal Affairs*, where a decision is a justified limit on rights, a failure to address the issue would not be fatal to the validity of the decision.[61] Here, I consider that even if the Authority's decision to mandate Te Kākano could be properly understood as a restriction on the right to freedom of expression, it reflects a justified limit.

Conclusion on second cause of action

[169] The second cause of action must fail.

Third cause of action—review of the Registrar's refusal to grant an exemption

[170] Mrs Dickson's third cause of action pleads that the Registrar's refusal of her application for an exemption from CPD requirements was invalid because a no-

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60 A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, 2015, LexisNexis, Wellington) at 537–541.

61 *A v Minister of Internal Affairs*, above n 51, at [140].

exemption policy had been adopted by the Authority. Mrs Dickson says that given this policy, the decision not to grant her an exemption was based on irrelevant considerations and/or the Registrar fettered their discretion to grant an exemption.

[171] In support of this allegation, Ms Pender relies on Mrs Dickson having been refused an exemption for the course despite having a background understanding and knowledge of te reo Māori, the Treaty, and Māori and Treaty history. Mrs Dickson has, for example, completed a School Certificate in te reo Māori while teaching in a school with predominately Māori students, and grew up with Canon Wi Huata, a prominent Māori priest and military chaplain, as a "father figure". Ms Pender submits that the Registrar is required to exercise their discretion to grant an exemption consistently with s 17(b) of the Act and so should have taken Mrs Dickson's prior experience into account. Ms Pender also says the Registrar should have considered Mrs Dickson's rights under the Bill of Rights Act.

[172] This cause of action is premised on a factually incorrect allegation that the Registrar applied a generic no-exemption policy for Te Kākano on the Authority's instruction. It is clear there was no such no-exemption policy for Te Kākano. Ms Pender cannot point to any evidence that the Registrar applied a blanket policy to the effect that all applications for exemption from completing Te Kākano were or would be refused, regardless of circumstance. While the Authority's education team recommended in a memorandum to the senior leadership team that no exemptions be allowed for the proposed diversity and inclusion series (which would include Te Kākano), Ms Moffat has said in her evidence that this recommendation was not advanced. It was not raised with the senior leadership team nor the Board.

[173] I do not accept Ms Pender's submission that the mere reference in the initial memorandum to not allowing exemptions can be understood as a decision to adopt a blanket no-exemption policy for Te Kākano because the discretion to grant an exemption is an operational matter that lay with Ms Moffat as Registrar. Ms Moffat says she would not contemplate such a policy; rather she considers that as the Act and the CPD Rules provide for exemptions and any applications for exemption should be considered by the Authority on a case-by-case basis.

[174] Mr Doherty confirms in his evidence that he did not apply a blanket no-exemptions policy for completion of Te Kākano:

> 38. I confirm that I did not receive any instruction from the Registrar Ms Moffat, or the [Authority] Board, that there would be no exemptions for completion of Te Kākano. Indeed, Ms Moffat was strongly of the view that we needed to issue guidance on how we assess applications for exemption and deferral from CPD requirements in exceptional circumstances to ensure transparency of our process and to support licensees to make appropriate applications if their circumstances justified it.

[175] Indeed, Mr Doherty appears to have considered Mrs Dickson's application carefully. He declined the application on the basis her situation did not meet the threshold of "exceptional circumstances" that prevented her from completing Te Kākano—as required by r 13 of the CPD Rules and as set out in the Exemption Guidelines, which expressly follow the case law of the Tribunal. Mr Doherty has given evidence of his view that:

> 40. …Mrs Dickson's application did not raise circumstances that prevented her from completing [Te Kākano]. Her circumstances appeared to simply be her personal opinion that the topic was not relevant to her real estate agency work. She did not identify any circumstance that prevented her from completing a 90-minute topic. I did not consider her circumstances met the definition of 'exceptional' nor that her circumstances prevented her from completing the topic by 31 December 2023.

[176] The letter dated 7 December 2023 from Mr Doherty to Mrs Dickson declining her application is to the same effect.

[177] In these circumstances, no fetter on the Registrar's ability to grant an exemption through a no-exemption policy has been established.

[178] I acknowledge Mrs Dickson's evidence that she has some knowledge relating to tikanga and te reo Māori, given the community in which she was raised. Ms Pender also points to Mrs Dickson's discomfort with Te Kākano for religious and political reasons. Mrs Dickson has said the references to Māori gods sit uncomfortably with her own monotheistic Christian belief. I accept that this is Mrs Dickson's view. Ms Pender argues that these matters raise an issue of Mrs Dickson's freedom of conscience (under s 13 of the Bill of Rights Act). Ms Pender says no consideration

was given to these substantive grounds for why Mrs Dickson should be granted an exemption.

[179] Mrs Dickson's claim as pleaded relies on the existence of a generic no-exemption policy and substantive matters of the kind referred to by Ms Pender are not therefore relevant. However, even if they were, it is not this Court's role in a judicial review claim to assess whether the Registrar was correct or incorrect in assessing whether these reasons did or did not constitute "exceptional circumstances" under r 13. That is properly the role of the Tribunal, to whom Mrs Dickson has applied to review the Registrar's decision. Further, the Act provides for rights to appeal from a decision of the Tribunal.[62]

[180] The third cause of action must fail.

Result

[181] The application for judicial review is dismissed.

Costs

[182] Costs should follow the event. The parties should seek to agree costs if possible. If agreement cannot be reached, the respondents may file brief memoranda as to costs within 20 working days with Mrs Dickson to file any memorandum in response within a further 10 working days. I will then determine costs on the papers.

McQueen J

Solicitors:
Franks Ogilvie, Wellington for Applicant
Luke Cunningham Clere, Wellington for First and Second Respondents
Crown Law Office, Wellington for Third Respondent

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62 Real Estate Agents Act, ss 116–120A.