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# Process manual: Early Resolution team

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Date March 2019

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## Enquiries

### New complaint enquiries

Complainants are encouraged to call the REA and discuss their concerns before submitting a written complaint. Some choose to email an enquiry to [info@rea.govt.nz](mailto:info@rea.govt.nz). An enquiry will be considered a 'complaint enquiry' (i.e. a potential complaint) and allocated to a facilitator if:

- the caller/enquirer raises concerns about a licensee's behaviour that cannot be addressed with simple information (e.g. information about the multi-offer process); and
- in the case of emails, if it is clear the enquirer has not yet spoken to us, and has not completed a complaint form nor provided supporting documents with their email. It is important consumers understand our role and what our process is before choosing to lodge a complaint.

If the complaint enquiry comes through the 0800 line, the general enquiries team will forward it to the Early Resolution queue in Shoretel. The facilitators rostered on the queue that day will take the calls and:

- Listen to the complainant's story
- Clarify the key issues and concerns
- Provide information about licensee obligations under the Act/Rules
- Discuss possible options for resolving the complaint:
  - Whether the caller wishes to use the agency's in-house complaint process (FLIC outcome: **Complaint - ref agency**)
  - Whether the caller would like the facilitator to pass on the complaint and contact details to the agency manager (FLIC outcome: **Complaint - FR2A**)
  - Making a formal complaint to the REA - and what the REA complaint process looks like and possible outcomes (FLIC outcome: **Complaint**)
- If there are any current delays in looking into complaints, please explain this

#### FLIC

- Create a new enquiry
- Upload file note of conversation with the caller and add a Note of your call and any follow up calls to the agency, or any actions
- Upload any emails to the Documents tab
- Choose the appropriate outcome in the "Response" field
- Close the case

### Referring complaint enquiries back to the agency (FR2A)

When taking a complaint enquiry call, you may decide to help the complainant get their complaint to the agency where:

- The complainant has already contacted the agency and either received no response or is not satisfied with the response; or
- The complainant is unwilling to contact the agency directly; or

- The complainant asks for help communicating with the agency; or
- The complainant appears to need support to communicate their complaint to the agency; or
- The issue appears to be an urgent one (e.g. an impending auction)

If you decide to refer the complaint to the agency yourself, you should:

1. Explain the next steps to the complainant. Get their contact details and permission to pass these on to the agency
2. Make it clear you are not currently looking into their concerns and you will not be in touch again. They may expect to hear from the agency next. If their concerns are not resolved they are welcome to contact you again to discuss the next steps in the complaint process
3. Call the EO and pass on the complaint details, including:
  - What the complaint is about
  - The impact on the complainant
  - What would resolve the matter for the complainant
  - The complainant's contact details
4. Make it clear to the EO you are simply passing on the complaint and leaving the issues with the EO to address; you do not expect to hear back from the agency
5. In some cases you may feel it appropriate to follow up with a written complaint summary for the EO and/or complainant
6. If the agency does not wish to contact the complainant directly, contact the complainant to explain this and discuss the option of making a complaint to the REA

### **Reports from Licensees under Rule 7.1/7.2**

Under Rule 7.1 licensees **may** report other licensees to the REA for potential unsatisfactory conduct. Under Rule 7.2 licensees **must** report other licensees where they suspect misconduct.

Please see the REA process for dealing with, and logging, reports from licensees.

## Complaints

### Receiving new complaints

Regulation 4 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 requires a complaint to be in writing and to include:

- The complainant's name and contact details
- The licensee the complaint is about
- Details of what the complaint is about
- State the steps (if any) taken to resolve the complaint
- Be supported by any appropriate documentation held by, or available to, the complainant

Facilitators can help complainants complete a complaint form if necessary, or provide other assistance for people wanting to make a complaint (e.g. translation assistance.)

The team coordinator will read and log all new complaints. The **Date Complaint Opened** in FLIC must be the date of the business day the complaint arrived at REA, if the complaint arrived before 4pm on that day. If the complaint arrived after 4pm then it will be dated the following business day.

The coordinator:

- a. Checks the New Complaints inbox regularly, four times a day. The mail is delivered every morning and any complaints received in the post will be put on the coordinator's desk.
- b. Reads the complaint and related documentation. If there are any issues that need to be addresses urgently, the coordinator will raise this with the ER team leader. An example is the non-disclosure of information that relates to a current listing.
- c. Enters the complaint in FLIC.
- d. Some complainants may wish to remain anonymous and may not provide their details; in this case the complainant is listed as 'Anonymous' in the case title and the REA becomes the "complainant".
- e. Completes the triage form.
- f. Completes the initial assessment cover sheet by writing the case number, case title, date (in the top right corner) and the name of the facilitator who took the initial enquiry. The co-ordinator then gives the cover sheet to the team leader

#### FLIC

- Search the cases on FLIC to see if the complainant has contacted us before about this issue.
- Create a new case if they haven't contacted us before or change the enquiry to a complaint
- Create the complainant, if they do not already exist in FLIC
- Connect the complainant(s), respondent(s), lawyer (if applicable), property
- Save the triage form, complaint and any email correspondence in the documents tab
- Case manager stays in the coordinators name until the case is allocated to a

facilitator

### **Section 74(3) assessment**

*This assessment applies to all complaints received after 14 November 2018.*

Section 74(3) says:

*(3) The Registrar may determine that—*

*(a) the complaint discloses only an inconsequential matter, and for that reason need not be pursued:*

*(b) the complaint is frivolous or vexatious and not made in good faith, and for that reason need not be pursued:*

*(c) the complaint should be referred to another agency, and refer it accordingly:*

*(d) the complaint has been resolved to the complainant's satisfaction and no further action is needed.*

*If the complaint cannot be dealt with under section 74(3) it must be referred to a Complaints Assessment Committee (s 74(2)).*

For guidance on what these terms mean, see the **Table at page 22**.

The Early Resolution Team Leader has delegated authority from the Registrar to consider whether the complaint might fall under section 74(3) of the Act.

1. The Team Leader must consider all complaints received by the REA, and whether they may fall under section 74(3) of the Act.
2. Complaints that appear to fit the criteria under section 74(3)(a), (b), or (c) may still be allocated to a facilitator to have an initial discussion with the complainant to ensure we understand the complaint correctly.
3. If the Team Leader considers the complaint meets the criteria, the complaint must be referred to the Registrar to make a decision under section 74(3).
4. Where the Registrar agrees the complaint fits the criteria for a decision under section 74(3)(a), (b), or (c) the facilitator and Team Leader will draft a decision letter for the Registrar to review. The Registrar signs and sends any decisions made under these three sections to the complainant.
5. The facilitator or the Registrar will send a copy of the Registrar's decision to the licensee(s) the complaint was made against.
6. The Registrar's decision will refer the complainant to the Office of the Ombudsman if the complainant is dissatisfied with the decision.

### **Section 74(3)(c) – referral to another agency**

Where the Registrar makes a decision to refer the complaint to another agency, the facilitator will contact the other agency (if necessary) to confirm the correct email address to send the complaint to.

**FLIC**

All s74(3) considerations must be recorded in FLIC in the Triage stage. The decision type is "s74(3) consideration"

### **If the complaint does not fall under section 74(3)(a), (b), (c)**

The team leader sends an email acknowledgment to the complainant, requesting further documents if necessary. Where there is a backlog of complaints the team leader assesses whether the complaint is likely to meet the criteria for referral to CAC, and if so, puts the complaint in the queue for priority allocation.

When additional information is received, the coordinator attaches it to the case.

### **Date complaint opened & Date complaint closed**

There are two fields in FLIC we use to report our complaint timeframes: Date Complaint Opened and Date Complaint Closed.

#### Date Complaint Opened

- Is the date the complaint met the definition of a 'complaint' under Regulation 4 (see *Receiving New Complaints* above)
- May be changed to the date the complainant insisted the complaint be referred to CAC if:
  - The complainant had been through the early resolution process and the complaint was closed; and
  - The complainant has insisted on the CAC referral more than 20 working days after the complaint was closed.
- May be changed where the complainant has agreed to put their complaint on hold for a period of time (usually, for example, where the complainant lodges their complaint and then goes overseas.)

#### Date Complaint Closed

- Is the date the settlement agreement was reached between the parties OR the date the Consumer Information or Compliance Advice letter was issued (Early Resolution process)
- Is the date the NFA decision, or the penalty decision (for UC), or Tribunal decision following misconduct charges is released (CAC process)
- Is the date the Registrar releases a decision to the parties under sections 74(3)(a), (b), or (c) of the Act (this does not include s74(3)(d) decisions, which are covered by the first bullet point instead).

### **Complaint allocation**

Complaints are allocated by the team leader or coordinator based on the daily report. The average case load for a facilitator is three to five complaints, depending on experience and capacity. The team co-ordinator will print the complaint and allocate the case in FLIC.

**FLIC**

- Add note to the case - "case allocated to..." and DATE
- Select the Case Manager and the Facilitator

### **Facilitator starts work on complaint**

- Contact complainant within five days to either discuss complaint or set up time to discuss complaint
- Read and understand the complaint
- Conduct research if applicable, e.g. search the property on Property Guru
- Prioritise complaint as appropriate. Cases that appear to meet criteria for referral to CAC may need prioritising to meet our 20 day timeframe, and prevent delays to overall complaint stats
- Risk assessment:
  - Check if there is a conflict of interest between the facilitator and the complainant or respondent (return to coordinator for reallocation if there is a conflict)
  - Is there media interest in this case?
  - Is language line required?
  - Are there any cultural aspects that may need consideration?
  - Is the complaint about a board member or CAC member? If so, notify the CE and Head of Regulatory Services
- You may wish to start completing the triage form, this is saved in the Document tab of the case in FLIC.

#### **FLIC**

- Complete the date in the First Contact (complainant) field
- Add a note of any work done on the case (including discussions with team leader)
- Save email correspondence or research in the document tab of the case



## **Facilitator's Initial Call with Complainant**

You then call the complainant to make sure you've understood their complaint, and they understand our process. This section gives guidance on how to structure that phone call.

### ***Reason for call***

Explain the purpose of your call and how long the call is likely to take. Explain who you are and what the role of a facilitator in the Early Resolution team is.

### ***Understanding the complaint***

Ask the caller to tell you about the complaint. Summarise and reflect back what you have heard so the caller feels you are listening to them and understanding their complaint.

- Acknowledge emotions – “I can hear this has been very frustrating for you”, “It sounds like the licensee made you angry when she said...”
- Reflect back to the complainant in a neutral way – “So you said the licensee...”, “What I heard you say about the tree was....”
- Identify the issues in the complaint and the underlying interests of the complainant
- Ask open questions to get more information from the complainant (e.g. What/How/Why)
- Clarify any points or the timeline of events that you are not sure about
- Understand the impact of what has happened on the complainant
- What would reasonably resolve the complaint for them?

### ***Explaining the REAA process***

- Explain we assess the complaints when they come in and decide what the best approach for each complaint will be. Explain the ER and CAC processes.
- Explain where you think their complaint may sit in our process. If at this stage it looks likely to fit the triage criteria for early resolution, talk to the complainant about what resolution method would suit them best.

### ***Reality testing***

- Manage the caller's expectations about the process and the likely outcomes
- If there are no disciplinary concerns, be upfront about this. Explain if we go through the early resolution process and the parties are not able to resolve the complaint, we're unlikely to be able to help further.

### ***What next?***

Give the complainant a time-frame for when you will contact them and make sure they understand the next steps.

After the call to the complainant, make a file note of your conversation and add any additional information to the triage form. Ensure you write in your file note if you have explained the complaint process, and note that you have explained the complainant's right to the CAC process.

#### **FLIC**

- Complete the date in the First Contact (complainant) field with the date you first contacted the complainant (this includes voicemail messages and emails)
- Save the file note to the document tab of the case
- Add a note to the case

### **Clarify issues with a senior facilitator/team leader**

Make time with a senior facilitator or team leader to discuss the complaint and the issues that you have clarified. This is to help your thinking about the likely triage outcome, so you can test the licensee's interest in resolving the complaint (if that's the triage outcome) and start planning your likely resolution approach.

If, from the information you have so far, the complaint looks like it might meet the triage criteria for referral to CAC, apply the following criteria to see whether the (Further Information Gathering) FIG process should be followed:

- Based on the information on the complaint form alone, the disciplinary issues appear to meet the triage criteria for referral to CAC; and
- The facts can be evidenced by production of a document by the licensee, agency or others, or by verbal confirmation from the vendor or purchaser.

### **Facilitator calls the eligible officer (likely CAC outcome)**

If the complaint is likely to be referred to a CAC, call the eligible officer (EO) and:

- Explain the complaint details
- Explain the key issue(s) and why we are considering referring the complaint to a CAC

If applicable, explain the FIG process and what documents we're looking for to help with our triage decision. Make it clear we will share ALL information received with the complainant.

Follow up your conversation with the template FIG email (**Appendix 1.**) The timeframe for providing documents is 3 working days. Facilitators have the discretion to increase this to 5 working days.

Once you have received the documents, triage the complaint. Do the documents address the key issue(s)?

### **Facilitator calls the eligible officer (likely ER outcome)**

Where practical, make a time to discuss the complaint with the EO and licensee together. If it is not practical, discuss the complaint with the EO only, but explain the licensee respondent is welcome to be involved in the process.

#### **Reason for call**

- Explain who you are and what the role of a facilitator in the Early Resolution team is. Explain the REA has received a complaint about X and Y and we are talking to the parties to decide the best approach to the complaint.
- Briefly outline the two process options (ER and CAC) and that at this stage we're looking at whether the complaint might be resolved between the parties.

### **Understanding the respondent's perspective**

- Explain the complainant's concerns, the key issues, and the impact on the complainant
- Ask the respondent to tell you their perspective on what's happened. Summarise and reflect back what you have heard, so the caller feels you are listening to them and understanding their complaint.
- Acknowledge emotions, understand impacts, ask open questions
- Clarify any points or the timeline of events that you are not sure about

### **Reality testing**

- Manage the licensee's expectations about the process and likely outcomes
- Explain what the complainant says would resolve the complaint for them

### **What next?**

- Check the licensee's willingness to engage in the ER process. Gently explain that if the complaint is not resolved we may need to refer the complaint to a CAC.
- Give the licensee a time-frame for when you will contact them and make sure they understand the next steps
- Facilitators: you'll be making a decision with the team about which process the complaint will follow and get back to them
- Senior facilitators: you can make a call on the phone about which process to follow, so talk to the EO/licensee about the best resolution approach

#### **FLIC**

- Complete the date in the First Contact (licensee) field
- Add a note to the case of your call (do not file note the call unless agreed with Team Leader – e.g. if there is an admission of guilt to a serious issue)
- Save email correspondence in the document tab of the case

### **Triage**

The purpose of triage is to assess cases against agreed criteria and decide what complaint process is most appropriate for the individual case. For practicality and customer service reasons, the REA decided in 2011 to offer an alternative process to the CAC in appropriate cases. The triage criteria ensures consistency and quality of decision making. All decisions and reasons must be recorded in FLIC.

### **Preparation**

The facilitator will prepare and complete the triage report template and upload the document to FLIC.

## Criteria

There are two complaint processes available: CAC and Early resolution. When deciding which process is appropriate for the complaint, the triage criteria are:

### **Is the complaint suitable for the early resolution process? This includes:**

- Limited loss, or consumer harm has occurred as a result of the alleged behaviour
- It does not appear the licensee intended to breach the rules/Act
- The licensee has no disciplinary findings in the past three years for similar conduct
- The issues are unlikely to be a matter of public interest or have a wider impact on industry
- Conduct is not repetitive or ongoing
- Both parties are willing to explore Early Resolution.

### **If NO to any of these questions, the complaint must be referred to a CAC.**

#### **Does the complaint raise issues that should be referred to a CAC?**

- More than minimal quantifiable loss, or consumer harm, has occurred because of the alleged behaviour; OR
- The alleged conduct appears to be intentional, reckless or negligent; OR
- The behaviour appears to be repeated and serious; OR
- The issues are a matter of public interest<sup>1</sup>, have a wider impact on the sector or are a regulatory priority for REA; OR
- The behaviour must be addressed to maintain professional standards (e.g. set a precedent) and reputation of the industry

### **If YES to any of the above issues, refer the complaint to a CAC.**

<sup>1</sup> *Public interest* considerations include:

- The main consideration is the seriousness of the breach
- The complaint alleges violence, threats, offensive or abusive messages
- The respondent was the organiser/ringleader
- The victim was particularly vulnerable, or the offender was in a position of trust
- Elements of dishonesty or corruption are present in the conduct

## How to make a decision

Facilitators should be well prepared to present their case at triage. A triage presentation should be no more than five minutes, followed by time for team discussion/questions. The presentation should cover:

- Party names and history
- A summary of the complaint 'story'
- The outcome the complainant is looking for

- The disciplinary issues identified
- The facilitator's proposed approach to the complaint

There are three possible ways of having a triage meeting:

### **1. Team triage meeting**

The team has two scheduled triage meetings per week (this is flexible). The types of complaints that facilitators should bring to this meeting are:

- Complex fact situations or complex disciplinary issues
- Novel issues where you don't know how they fit in the triage criteria
- Extraordinarily interesting complaints that might be helpful for the team to know about

After any triage, take the opportunity to reflect on the questions the group asked you, and how you might address those questions with future complaints.

### **2. 'Virtual' triage with a Senior/Team Leader**

At any time you can triage a complaint with a Senior Facilitator or Team Leader. The types of complaint that should be 'virtually' triaged are:

- Where you have FIG'd the complaint
- Simple or straight-forward complaints
- Complaints where you have a clear precedent or idea where it should go

### **3. 'Self' triage**

Senior Facilitators are able to independently make triage decisions.

#### **FLIC**

- Add the triage outcome to FLIC. This must include:
  - The criteria involved in your decision and which facts meet which criteria
  - Any relevant rules or sections of the Act
  - Any relevant case law you considered when making your decision
- Add a note to the case with the triage outcome

## **Triage outcome: CAC**

**Timeframe: 20 days to refer**

### **Notify all parties**

The facilitator ensures all parties to the complaint are aware the complaint is being referred to a CAC, and what the CAC process is. This includes the Eligible Officer of the licensee respondent.

If the licensee has moved agency, contact their current EO to notify them there is a complaint being referred to a CAC. Explain the situation arose in the licensee's previous

employment, and they should talk to the licensee directly for details. Also call the licensee respondent directly, and the previous EO.

### Confirm the key concerns

Confirm the key concerns by email with the complainant. The key concerns are the problems the complainant has with what's happened, **not** our assessment of what the disciplinary issues/breaches of the rules might be. Explain to the complainant if you have identified some concerns you will also raise with the CAC.

### Initial referral report

The coordinator will upload a copy of the "Initial Referral Report" template to FLIC and the facilitator will complete this report.

Where you have identified issues that are separate to the complainant's key issues, note them in the "Key Issues" section, labelled "*Additional issues identified by the REA that the CAC may wish to consider.*"

Where you are including FIG documents describe the documents as a bundle in the "Documentation and Evidence" table of contents as: "*Documentation requested from the agency – note this is not the licensee's formal response under section 83 of the Act*" and then separately if required "*Complainant's reply to the documentation requested from the agency.*"

All referral reports must be peer reviewed by another facilitator.

### Complaint documents/appendices

The facilitator creates the appendices, which is the bundle of documents sent to the CAC about the complaint. This should include:

- The initial complaint and any supporting documents
- Any further supporting documents provided by the complainant
- The file note of your conversation(s) with the complainant
- Any emails to/from the complainant that are about the subject matter of the complaint (i.e. not process emails). This includes the email where the complainant confirms the issues
- Any compliance advice or consumer information letters sent to the parties
- Any FIG documents obtained from the agency/licensee
- Any response from the complainant to any FIG documents
- **Do not** include file notes of conversations with licensees without approval of the Team Leader.

Put the documents in logical order. Any FIG documents go at the **back** of the referral bundle. Add bates numbers (i.e. page numbers) to the appendices in Nitro and name the appendices "CXXX Initial CAC Referral Appendices."

### Redacting the appendices

Where the referral contains FIG documents, **redact** third party contact details or sensitive information from the entire appendices. Third party names do not need to be redacted.

Upload two versions of the appendices to FLIC:

- The redacted version (labelled **Redacted**) – this version is sent to the complainant and the respondent
- A non-redacted version – this version is sent to the CAC

Make a note on the file for the CAC Administrator that you have redacted the appendices.

#### **FLIC**

- Save the initial referral report to the documents tab of the case
- Save the PDF appendices to the documents tab of the case
- Fill in the 'Handover to CAC Team' date – if it is after 2pm then the date will be the following working day
- Complete the "peer reviewer" field
- Add notes to reflect the actions taken
- Change the case managers name to the rostered CAC administrator's name

## **Triage outcome: Early Resolution**

### **Timeframe: 30 days to resolve**

Early resolution is a flexible process where a facilitator or REA mediator applies dispute resolution skills to enable the parties to resolve the complaint between them. The most common dispute resolution methods used at the REA are:

- Facilitation (shuttle negotiation or teleconference)
- Mediation (teleconference or in person)

Factors to consider when deciding which type of Early Resolution (ER) will best suit the parties' needs:

- Do the parties want a confidential process?
- How complex is the problem?
- Who needs to be involved?

Discuss the methods with the parties to find out what will work best for them.

### **Facilitation (shuttle negotiation or teleconference)**

Facilitation is a non-confidential discussion between the parties where the facilitator is an independent third person who guides the discussion. The facilitator's role is to facilitate discussion between the parties to help them understand each other's perspective and brainstorm ideas for resolving the complaint, provide neutral information about the Real Estate Agents Act and Rules, and assist the parties to record any agreements.

The parties **must** agree and understand this is not a confidential discussion. While the information provided will not be shared with anyone outside the REA, any information shared may be documented or kept on file, and may be passed on to the CAC if the complaint is not resolved.

There are two ways of carrying out facilitation:

- Through shuttle negotiation - where the facilitator passes understandings/messages between the parties without the parties talking directly to each other; and
- Through teleconference - where the facilitator facilitates a meeting between the parties on the phone

Where the agreed approach is a teleconference, the facilitator will follow the Resolution Institute 'diamond' (mediation model). Where the agreed approach is shuttle negotiation, a suggested process is:

***a) Helping the parties to feel heard***

The first step in any dispute resolution method is to allow the parties the opportunity to feel heard. By this stage in the process the complainant and licensee/EO should have explained their perspective to you. If necessary, spend more time with them making sure to:

- Understand and acknowledge their recollection of what happened, their emotions, what impact this has had on them
- Reflection and summary is a key tool at this stage of the process

***b) Helping the parties to hear each other/share information***

The next stage is to help the parties begin to understand each other's perspective. How can you share the other person's recollection/understanding in a neutral and de-toxified way? Ask what their understanding is of what's important to the other party.

Explore underlying interests. Encourage them to ask each other questions and clarify understandings.

***c) BATNA and reality testing***

Explore options if the complaint is not resolved.

- what are the options outside the REA process?
- what are the options within the process?

If helpful for the parties to understand a licensee's obligations, provide general information about the Act/Rules/case law says. It's important to frame this neutrally as it's not your role to judge what has happened/should have happened at this stage of the process.

***d) Option generation***

What options can they think of to resolve the complaint? How might that meet the other party's needs?

***e) Settlement/agreement***

If the complaint is resolved (via shuttle negotiation or facilitation), assist the parties to record their agreement.

## **Mediation**

Mediation is confidential process where an REA mediator facilitates a discussion between the parties to help them understand each other and resolve their concerns.

The REA may offer parties **mediation** during the early resolution process where:

- There are no safety concerns for the parties; AND
- The parties are willing to explore mediation; AND



- The concern is able to be remedied by the licensee and/or their agency.

### **The facilitator's role**

If the complaint is triaged for early resolution and the parties have indicated they would like a confidential early resolution approach, the facilitator will:

- Call both parties and confirm they would like the complaint referred to mediation. Explain what the mediation process looks like, that it is a confidential process, and that the mediator's role is not to provide information about the Act/Rules.
- If appropriate or requested, provide information to the parties about the Act/Rules/case law – as the Facilitator you are able to provide this information
- Provide information about the complaint process options if the complaint is not resolved through mediation - consumer information, compliance advice, insisted CAC
- Email the parties to confirm referral to a mediator

Next allocate the file to the Early Resolution Team Leader, who will allocate the file to an REA mediator (i.e. a facilitator who is an accredited mediator).

If the complaint is not resolved the file is returned to the facilitator to assess the next steps.

#### **FLIC**

- Change the 'case manager' to the mediator's name
- Complete the mediator field in the Early Resolution tab with the mediator's name

### **The mediator's role**

The mediator's role is to assist the parties to discuss the issues and explore options for resolution. The mediator must not offer an opinion, assess the merits of the complaint, or provide information about the Act/Rules. The focus of the mediation is resolving the issues as the parties see them.

The mediator, unless otherwise agreed with the Team Leader, should follow the Resolution Institute model of mediation.

All mediations are done by telephone unless there are clear benefits to a face to face meeting. Decisions about face to face mediation are at the discretion of the Team Leader.

### **Pre-mediation calls**

The mediator calls both parties to discuss:

- Confidentiality
- Authority to settle
- What the process will look like 'in the room'
- Explain there will be an observer present
- The role of each party
- What's happened from each party's perspective
- What's their understanding of the other party's perspective
- What might happen if the complaint is not resolved (BATNA/WATNA)

The mediator will get agreement to the date/time of mediation. Provide instructions, if by teleconference, for how the parties will get on to the call. Follow up with an email confirming details.

### **The mediation**

Mediations are always observed by another facilitator so:

- The facilitator can observe and learn
- The facilitator can provide feedback and observations to the mediator
- The mediator has support with any health and safety issues (e.g. threats of harm)

The observer must not be the same facilitator who was initially dealing with the complaint.

The mediator will follow the Resolution Institute model of mediation.

#### **FLIC**

- Add the 'Date parties agreed to Mediation' in the Early Resolution Tab
- Add the 'Date of Mediation' once mediation completed
- Add 'Resolution Method' in the Early Resolution tab
- Add any settlement agreement to the Documents tab

### **Complaint resolved through early resolution**

Any agreement reached between the parties must be documented and kept on file. The agreement must include:

- The date of the agreement
- The parties to the agreement (full names)
- Details of what is agreed: who will do what by when? Be specific - will the payment be made by internet banking or cheque? By when? What happens if it does not appear by that date?
- The statement: "This agreement is in full and final settlement of Real Estate Authority complaint reference CXXXX."
- That the parties are welcome to seek legal advice about the agreement

### **Recording the agreement**

The options are (it is for the parties to decide which option):

- For you to record your understanding of what they have verbally agreed/offered and email to both parties to confirm/agree. You might confirm your initial understanding by email, and then record this in the "*ER\_To Parties Complaint Resolved*" template
- For you to record on a formal settlement document (template "*ER\_Signed resolution agreement*") what the parties have agreed and have all parties sign the document. Make sure the parties check the draft document before signing.
- Have the parties draft their offer by email and you pass their email to the other party to accept (again by email)

- Have the parties draft their own formal settlement agreement and have all parties sign the settlement agreement.

No matter what format of agreement is signed, the settlement must involve a statement that the complainant agrees to (in writing) to say the complaint is resolved to their satisfaction.

Under section 74(3) of the Act, the Registrar may decide not to consider the complaint further if the complaint has been resolved to the complainant's satisfaction. It is important the complainant is aware that by agreeing to the settlement agreement, the Registrar is likely to also make a decision that no further action is needed and so it will not go to a CAC.

### **Section 74(3)(d) decision – complaint resolved**

When the settlement agreement has been confirmed, pass the file to the Early Resolution Team Leader. The Team Leader will consider whether no further action is needed on the complaint under section 74(3)(d) of the Act (exercising delegated Registrar powers). If so, the Team Leader will communicate this decision in writing to the parties.

#### **FLIC**

- Upload s74(3)(d) decision and complete "s74(3) outcome" in FLIC
- Complete fields in Early Resolution tab – at a minimum the Resolution Method and Outcome fields
- Make sure all of the documents are in FLIC
- Complete the 'Resolve' tab field by adding the Date closed
- Click on the 'Resolve case' button

### **Complaint not resolved by early resolution**

If the concerns cannot be resolved through the early resolution process, discuss the next steps with Team Leader or Senior Facilitator. The options are:

1. Send a letter to the complainant (CC the licensee) explaining why there do not appear to be any breaches of the rules alleged in the complaint.
2. Send a compliance advice letter to the licensee, copying in their EO. Also send a copy to the complainant. This letter reminds the licensee of their obligations under the Act.

If the letter addresses their concerns, and they are satisfied the complaint is **resolved**, we need the complainant to confirm in writing. The Early Resolution Team Leader may consider issuing a decision under section 74(3)(d) that the complaint has been resolved.

If the complainant is not satisfied the complaint is resolved the two options are:

- The complainant does not wish to pursue the matter further. We consider these complaints 'withdrawn.' Confirm this in writing with the complainant, complete the Early Resolution tab in the case, and 'Cancel' the complaint. Where the complainant does not respond to attempts to contact, consider the complaint withdrawn.
- The complainant does wish to pursue the matter further. Refer the complaint to CAC, following the CAC process above. It is helpful the complainant understands:
  - Timeframes for the CAC looking into a matter
  - The possible outcomes of the CAC process (DNTI, NFA, UC, charges)

- Our initial assessment of the complaint (i.e. that it didn't meet the triage criteria for referral to CAC, which is why we suggested early resolution instead)
- If there is a finding of UC, the possible penalties. What outcome is the complainant seeking? Is that achievable through the CAC process?

**FLIC**

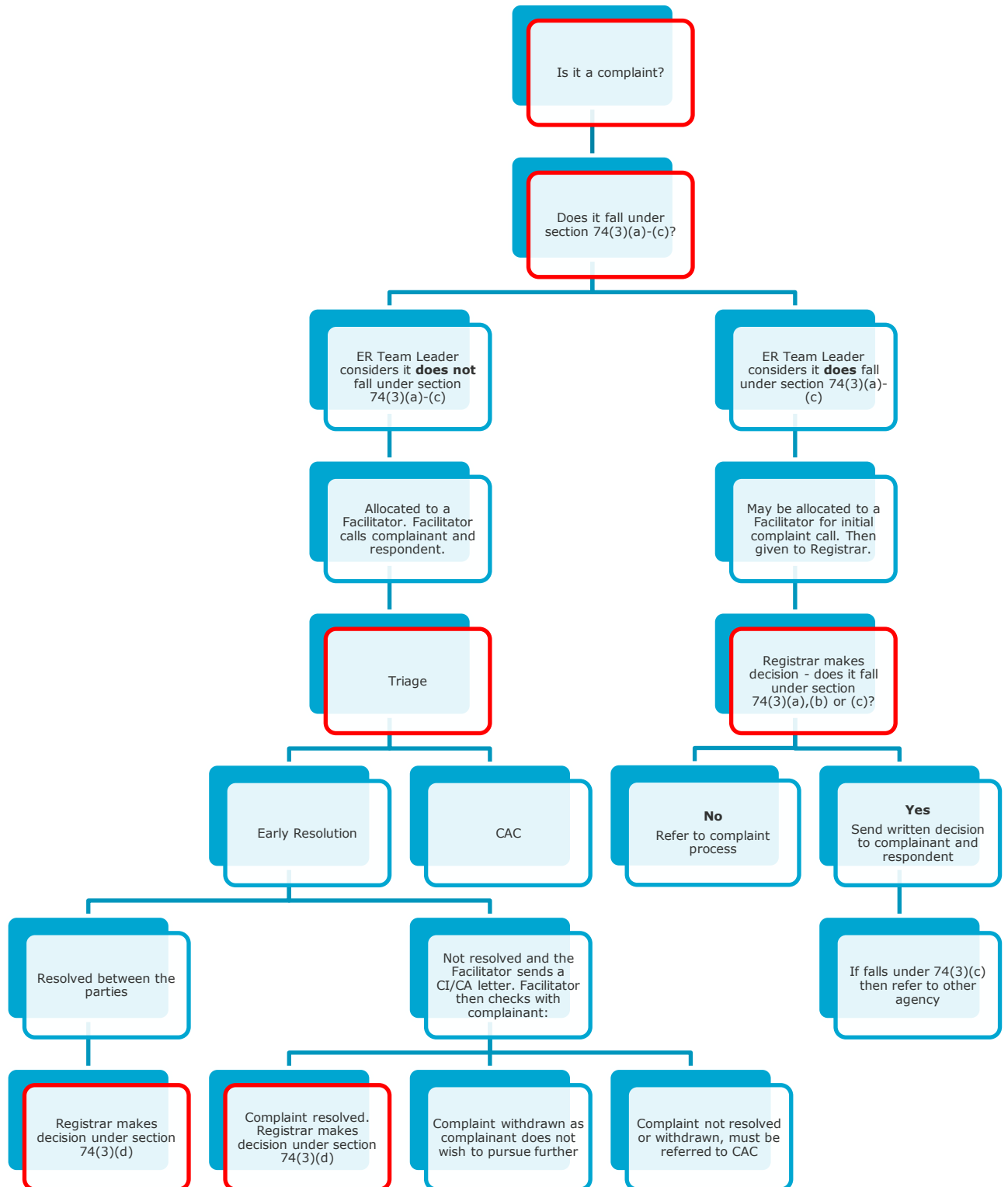
**If resolved** – follow steps in box above

**If withdrawn** – complete 'Resolution method', and record 'ER outcome' as "Not Resolved"

**If referred to CAC** – Triage the case with an outcome of 'insisted CAC'

## Early Resolution decision tree/process map

\*Red boxes show a decision point in the process.



## Triage criteria

Early Resolution	CAC
<p>Is the complaint suitable for the early resolution process? This includes:</p> <ul style="list-style-type: none"> <li>Minimal quantifiable loss, or consumer harm has occurred as a result of the alleged behaviour</li> <li>It does not appear the licensee intended to breach the Rules/Act</li> <li>There is no breach of the Rules/Act</li> <li>The licensee has no disciplinary findings in the past three years for similar conduct</li> <li>The issues are unlikely to be a matter of public interest or have a wider impact on industry</li> <li>Conduct is not repetitive or ongoing</li> <li>Both parties are willing to explore Early Resolution.</li> </ul> <p>If NO to any of these questions, the complaint must be referred to a CAC.</p>	<p>Does the complaint raise issues that should be referred to a CAC? This includes:</p> <ul style="list-style-type: none"> <li>More than minimal quantifiable loss, or consumer harm, has occurred because of the alleged behaviour; OR</li> <li>The alleged conduct appears to be intentional, reckless or negligent; OR</li> <li>The behaviour appears to be repeated and serious; OR</li> <li>The issues are a matter of public interest<sup>1</sup>, have a wider impact on the sector, or are a regulatory priority for REA; OR</li> <li>The behaviour must be addressed to maintain professional standards (e.g. set a precedent) and reputation of the industry</li> </ul> <p>If YES to any of the above issues, <b>refer the complaint to a CAC.</b></p> <p><sup>1</sup> <i>Public interest</i> considerations include:</p> <ul style="list-style-type: none"> <li>The main consideration is the seriousness of the breach</li> <li>The complaint alleges violence, threats, offensive or abusive messages</li> <li>The respondent was the organiser/ringleader</li> <li>The victim was particularly vulnerable, or the offender was in a position of trust</li> <li>Elements of dishonesty or corruption are present in the conduct</li> </ul>

## Section 74(3) criteria

This table sets out the criteria the Registrar should consider when making a decision under section 74(3).

Section 74(3)(a)	Section 74(3)(b)	Section 74(3)(c)
<p><b>Does the complaint disclose only an inconsequential matter?</b></p> <p>What is “inconsequential” will depend on the context / facts of the case. Overriding questions to ask are:</p> <ul style="list-style-type: none"> <li>Is the alleged conduct serious enough to warrant disciplinary sanctions?</li> <li>Has there been a departure from the acceptable standards of the real estate industry?</li> </ul> <p>Not every breach warrants a disciplinary response. To determine whether a breach is inconsequential, all factors must be taken into account.</p> <p><i>Factors to consider:</i></p> <ul style="list-style-type: none"> <li>The nature of the provision of the Act, Regs or Rules breached – eg is the breach relatively minor eg breach of s 121(1)(a) with no impact on transaction or complainant, or is it a more serious breach such as a breach of rule 6.4 (misleading conduct).</li> </ul>	<p><b>Is the complaint frivolous, vexatious or not made in good faith?</b></p> <p>See table below for definitions of terms.</p>	<p><b>Should the complaint be referred to another agency?</b></p> <p>If the subject matter of a complaint is not within the jurisdiction of REA and fits within the different jurisdiction of another agency, the Registrar should refer the matter there.</p> <p>If the conduct is serious but not serious enough to amount to misconduct under s 73, it will not be within the jurisdiction of REA.</p> <p><i>Example</i></p> <p><i>A complaint about a bond not being lodged under a residential tenancy agreement would usually be better dealt with under the Residential Tenancies Act, and by Tenancy Services.</i></p> <p>If the conduct appears <b>criminal</b> in nature, the matter should be discussed with Legal, the Head of Regulatory Services and the Chief Executive to determine whether it should be referred to the Police, the Serious Fraud Office or the Commerce Commission. For example, a complaint is received alleging that</p>

<ul style="list-style-type: none"> <li>• Is there more than one breach?</li> <li>• Was the conduct inadvertent (not intentional), a simple mistake or mere slip?</li> <li>• Was the impact of the breach on the transaction minor?</li> <li>• Did anyone suffer any harm or financial loss, or could have suffered harm or loss?</li> <li>• Has the licensee remedied, or taken steps to remedy, the conduct or alleged harm?</li> <li>• Likely penalty that would be imposed if a disciplinary finding was made taking into account personal factors and previous disciplinary history of licensee eg was likely conduct minor, the licensee has no disciplinary history and of good character and likely penalty was an apology?</li> </ul> <p>Can be used where the complaint is frivolous, but made in good faith</p> <p>If the behaviour is a more than minor breach of the rules, it cannot be considered inconsequential.</p>		<p>a licensee took a sum of funds from a trust account to pay company expenses intending to repay it at some time. This could be fraudulent activity or theft and consideration should be given to whether it is referred to the Police of SFO.</p>
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<i>Frivolous</i>	<i>Vexatious</i>	<i>Not made in good faith</i>
<ul style="list-style-type: none"> <li>Impossible to take seriously</li> <li>Used to direct insults at another party</li> <li>Doesn't matter whether it's likely to be successful</li> <li>Insincere, no reasonable person would consider the complaint bona fide</li> <li>The complaint does not serve any useful purpose</li> <li>Because of a misconception, the complainant has brought a complaint which is entirely misconceived</li> <li>So insincere and trivial that it is a waste of resources looking further into the matter.</li> </ul> <p><i>Example</i></p> <p><i>Licensee A and licensee B used to work together but due to a disagreement licensee B left and started his own agency. Licensee A made a complaint that licensee B has not placed on his new company logo that he is licensed under the REAA, even though it is on all other branding. On hearing about the complaint, Licensee B makes a complaint about Licensee A for breaching the REA audit regulations because he had in the past not filed his annual report to REA</i></p>	<ul style="list-style-type: none"> <li>Where the substance of the complaint has already been considered by a CAC (same complainant or different) and the complaint is an attempt to revisit a matter already considered and determined</li> <li>Where the complainant could have raised their issues in another complaint that's already been considered by another CAC, but didn't</li> <li>Has an element of impropriety, often a procedural impropriety – eg is there a misuse of the complaints process</li> <li>Complainant is seeking a civil remedy that is inconsistent with the purpose of the REA Act (ie to raise industry standards and protect consumers), its processes or the remedies available under the Act</li> <li>Further investigation would be unnecessary troublesome or cause distress to the respondent</li> <li>Complaint does not raise disciplinary concerns</li> <li>Complaint lacks merit or is baseless, even if the complainant thinks it has merit               <ul style="list-style-type: none"> <li>Where need to protect defendants from groundless litigation</li> </ul> </li> </ul>	<p>It is likely that if a complaint is vexatious, it will not be made in good faith but that is not always the case.</p> <p>The complainant is complaining in a way that is dishonest or with improper motives.</p> <p><i>Example</i></p> <p><i>Licensee X provides an appraisal on a property. Licensee X finds out that Licensee Y has also provided an appraisal and then obtains the listing. This has happened twice before, and Licensee X is tired of missing out on listings to Licensee Y. He can't understand why Licensee Y gets the listing but believes it is because Licensee Y is doing something that should be investigated. Licensee X makes a complaint claiming that licensee Y is telling vendors that Licensee X has been found to engage in unsatisfactory conduct. He has no evidence to support the claim but believes if licensee Y was investigated something would be found!</i></p> <p>NB: If the complaint is frivolous, it could have been made in good faith – for instance, where the complaint is genuinely misconceived.</p>

<p><i>within 10 days as required. REA records showed it was filed 5 days late. Neither provided evidence that there was any consumer harm or loss. The complaints against each other are just a way to get at each other and to inquire further into them would not serve any useful purpose.</i></p>	<ul style="list-style-type: none"> <li>- Need to protect limited resources of the judicial system for use in genuine proceedings</li> <li>• Pattern of complex and sometimes incomprehensible complaints</li> <li>• Repeat complainant with increasing circle of respondents</li> <li>• Extravagant complaints or scandalous allegation that there is no prospect of substantiating or justifying.</li> </ul> <p><i>Example</i></p> <p><i>A couple separate and the family court orders the sale of the matrimonial home. The agency that the wife works in is appointed by the Court to sell the property. Licensee D attends the house to take photos and the husband is at the property. He challenges the licensee that he has no authority to be on the property and, as the licensee did not have a copy of the order, the husband makes a complaint that Licensee D was on the property unlawfully. A CAC finds that there was a valid order and that no further action should be taken. The house is subsequently sold and several weeks later the husband makes another complaint about the agency where Licensee D works because the agency sold the house unlawfully. Consideration of the complaint by a CAC would traverse the same matters that have already been considered and resolved.</i></p>	
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## Best practice dispute resolution

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It's important for facilitators to reflect on their practice. This should be done on a regular basis by:

- Taking some time after calls to think about what went well and what might have been done differently
- Debriefing enquiry and complaint calls with colleagues, reflecting on what went well and what might have been done differently
- Listening to recorded phone calls with colleagues or the team leader
- Having structured coaching conversations with the team leader
- Having structured feedback and reflective practice sessions following mediations and teleconferences

Where a call comes in through the 0800 number, you may record it as there is a message explaining calls will be recorded. Where you are recording phone calls through your DDI, you must ask the caller for their permission to record the call. You should explain why you want to record the call, and that the call will be deleted after you review it.

## Appendix 1

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### Email template for requesting documents from Agency

Subject: REA case # CXXXXX – Request for information

Dear XXX

CC: Licensee

As discussed, we have received a complaint about [Licensee]. The key issues we are considering in the complaint are:

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#### Please provide documents

We are considering referring the complaint to a Complaints Assessment Committee (CAC), and need more information to help us decide whether to refer the complaint or not. Please provide the following information by **5pm day and date [give 3 working days]**:

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At this stage, we don't need any other information you might hold about the complaint.

We will share any information you provide with the complainant. We will remove any names, contact details or personal information relating to third parties before we share this information.

#### What happens next?

Once we have received the information we will contact you to explain the next steps. We may decide to refer the complaint to a CAC or to try to resolve the complaint between the parties.

#### If the complaint is referred to a CAC

If the complaint is referred to a CAC we will give the documents you provided to the CAC. If the CAC decides to inquire into the complaint the investigator will contact you to provide a formal response to the complaint.

Please contact me if you have any questions about this, or if you have any difficulties meeting the timeframe above.

Kind regards

[EMAIL SIGNATURE]