



CONSULTATION

Regulatory Impact Statement

PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER

Submission by the Australian Institute of Conveyancers WA Division Inc.

**Suite 30/443 Albany Hwy
Victoria Park
PO Box 626
Victoria Park WA 6979**

Question 1 – Meaning of terms ‘principal’ and ‘client’ and others

a) Should the Real Estate Code of Conduct be amended to clarify the meaning of ‘agent’ and ‘principal’? Please provide suggestions on how.

Answer: No comment

b) Should the Settlement Agents Code of Conduct be amended to clarify the meaning of ‘licensee’ to ensure that where appropriate it extends to an employed settlement agent? Please provide suggestions on how.

Answer: No the definition of licensee should **not** be extended to include an employed settlement agent. A client contracts with the licensee, not with a licensed settlement agent who may work for the licensee. Therefore, there needs to be a clear distinction between the roles of a licensee, the person in bona fide control and a licensed settlement agent.

A licensee is defined in the SA Act as a person licensed under this Act.

From Clause 29(1)(d) of the SA Act the person in bona fide control of the business operated under the licence is—

- (i) in the case of an application for a real estate settlement agent’s licence, licensed as a real estate settlement agent and holds a current triennial certificate; and
- (ii) in the case of an application for a business settlement agent’s licence, licensed as a business settlement agent and holds a current triennial certificate; and
- (iii) ordinarily resident in the State.

A settlement agent is a person who “is a real estate settlement agent or a business settlement agent or both

Within the Code of Conduct the opportunity exists to specify whether a rule within the code applies to the licensee or a settlement agent. We consider it is better to identify which rules should properly apply to a licensee, and which rules apply to a settlement agent, and amend the provisions of the code accordingly.

c) Do you think that the codes of conduct need to use ‘client’ instead of ‘principal’? If you think so, should they include prospective clients and should both terms be defined?

Answer: The SA Code of Conduct already refers to a client and there is no reference to a principal.

d) Are there other terms that you think should be used and defined? For example:

- customer (to be either a buyer or a seller but who is not a client);
- prudent agent;
- material facts;
- substantial time and attendance;
- frequently attend;
- current market price;
- potential conflict of interest; or
- reimbursement.

Answer: No, there are no other terms that should be defined.

Q 2

Should the codes of conduct prescribe that an agent must have knowledge of the relevant law and for agents to ensure compliance? Please comment on why or why not.

Answer: Rule 4 of the SA Code of Conduct requires a “licensee” to have knowledge of the Act, etc. The AICWA would like to see the word “licensee” changed to “settlement agent”.

Every settlement agent, whether working as a licensee or for a licensee, should have the requisite knowledge of the legislation, etc. In part this is required to ensure a settlement agent who leaves an employed position to start up their own business is fully aware of their responsibilities. In addition, a licensee will expect more of a settlement agent than someone who is employed as a conveyancer, but is not qualified or have the same level of experience as a settlement agent.

Discussion Q 3

a) Licensees must comply with their fiduciary duty to their client.

i.) Should the codes of conduct simply prescribe that ‘an agent must comply with their fiduciary duties? Please comment on why or why not.

Answer: In this instance the responsibility lies with the “licensee” so the wording in the code should refer to the “licensee” and not a “settlement agent”. The AICWA believes it would be very difficult to list all the fiduciary duties and to keep these up to date when the courts hand down decisions that amend or add in new fiduciary duties. Therefore, the AICWA is happy to have the code to simply prescribe that a licensee must comply with their fiduciary responsibilities.

ii.) Or should the codes of conduct prescribe each of the components of an agent’s fiduciary obligations? Please comment on why or why not.

Answer: No, refer to i) above.

b) Given the obligations of transparency and acting in good faith, should licensees disclose their duty, in plain English, to others who are not the client (e.g. a buyer when the licensee acts for the seller)? Do you think that requiring licensees to inform customers of their fiduciary duty to their client would assist customers to understand the role of licensees in the property market?

Answer: No, No.

c) Structure - should the different components of a property agent’s fiduciary obligations be organised together and perhaps some merged to be more concise and unambiguous? If so, please provide suggestions for how this might be done.

Answer: We have stated in our response to a)i) above that the fiduciary obligations should not be individually listed, however, if the decision is made to list them then they should be grouped to make them easier to identify. At present the general fiduciary duties that are listed are covered in a number of rules including 6, 9, 14, 18 and 21.

A heading of General Fiduciary Duties could be used for this purpose.

Discussion Q 4

a) Is there unnecessary duplication or inconsistency of the relevant enabling Act in its code of conduct?

Answer: Not that the AICWA is aware of.

b) Should the codes of conduct prohibit a licensee acting or continuing to act in a transaction if any conflict of interest arises or foreseeably could arise between the licensee and their client? Please comment on why or why not (providing suggested examples where possible).

Answer: The SA Code of Conduct covers this aspect and we do not require any change to what is currently stated.

c) Should the codes of conduct prescribe that an agent must avoid conflicts of interest without informed consent? Please comment on why or why not and provide suggested examples where possible.

Answer: The SA Code of Conduct covers this aspect and we do not require any change to what is currently stated.

d) Please consider whether additional guidance is needed, for example:

i. What should the nature of the disclosure and informed consent be?

ii. What circumstances, and at what point, do you think requires ceasing to act even where informed consent has previously been given?

iii. Should real estate agents be prohibited from being engaged to sell a buyers property where the offer is subject to sale of their property?

iv. How detailed should the provisions be (please provide suggested examples where possible)?

Answer: The SA Code of Conduct covers this aspect and we do not require any change to what is currently stated.

e) Should real estate agents be prohibited from owning, controlling or having an interest in a licensed settlement agency? Please comment on why or why not.

Answer: No, Real Estate Agents cannot be prohibited from owning, controlling or having an interest in a settlement agency. Any attempt to do so would be in breach of the Australian Consumer Law.

f) Should settlement agents be prohibited from acting in a transaction where they are also the real estate agent? Please comment on why or why not.

Answer: The SA Code of Conduct already requires a settlement agent to disclose any interest to a potential client. The AICWA is not aware of any circumstances that have arisen that would require the existing wording to be modified.

g) Are there any changes you feel are necessary to the Settlement Agents' Code of Conduct Schedule Forms 1 and 2?

Answer: Yes, on Form 1 there is the following sentences – There is a maximum scale of fees. You may negotiate a fee lower than the prescribed maximum before making an

appointment of a settlement agent. The AICWA would like to see the second sentence removed from Form 1.

Discounting is a major issue to settlement agents and it is compounded when clients are informed they can negotiate their fees. The important point is that there is a maximum scale of fees that the settlement agent can apply that has been approved by the Minister for Commerce.

This issue is compounded when third parties such as real estate agents inform their clients that they should ask the settlement agent for a discount. It is not the responsibility of a real estate agent to make comments on a settlement agents fees.

We believe a settlement agent's role is deserving of the maximum fee that can be charged and feel that the current wording of Form 1 undermines this position.

h) Are there any other changes to the conflict of interest conduct requirements you think need to be made?

Answer: No

Discussion Q 5

a) Should the codes of conduct prescribe that third party fees and commissions are prohibited unless the client is fully aware of the existence of that arrangement? Please comment on why or why not. If so, how detailed should the provision be (please provide suggested examples where possible)?

Answer: Yes, the codes of conduct should prescribe that third party fees and commissions are prohibited except where the client is fully aware, in writing, of the existence of that arrangement. This will enable settlement agents to fall in line with all codes; i.e. finance brokers and real estate agents. Provided there is clear disclosure to the client, all commissions both given and received, should be allowed.

The AICWA wants the Settlement Agents Code of Conduct to reflect the position adopted in the other Codes so that it is clearer that fees from third parties may be accepted and/or paid.

Rule 18 of the Codes of Conduct for Agents and Sales Representatives 2011 sets out a position that the AICWA would be happy to see included in the settlement agents code of conduct.

b) Are there any other changes to the third party fees and commissions conduct requirements you think need to be made?

Answer: The inclusion of appropriate wording in the Settlement Agents Act 1981 to support the receipt or payment of third party fees, subject to full disclosure in writing prior to acting, would clarify an issue that causes great confusion amongst settlement agents.

Sections 44(7) and (8) of the Settlement Agents Act 1981 to be amended to include *"unless clearly disclosed in writing and incorporated into the authority to act documents"*.

44(7) A person shall not, whether directly or indirectly, demand, receive or hold any reward for referring to a licensee any business involving the performance of the functions of a settlement agent.

44(8) A licensee shall not, whether directly or indirectly, pay or give any reward to any person referring to the licensee any business involving the performance of the functions of a settlement agent.

Discussion Q 6

- a) Should the codes of conduct prescribe that an agent must act in the best interest of their client unless unlawful to do so? Please comment on why or why not. If so, how detailed should the provision be (please provide suggested examples where possible)?

Answer: Yes, the codes should prescribe this, however, in this case the code should refer to the "licensee" as that is the entity which the client is entering into the arrangement with.

- b) Are there any other changes to the best interest of the client conduct provisions you think need to be made?

Answer: No

Discussion Q 7

- a) Should the codes of conduct prescribe that an agent must act with honesty and fairness? Please comment on why or why not. When doing so, please consider whether there is unnecessary duplication of the ACL in the codes of conduct or whether additional industry specific regulation is required. If you consider that the codes of conduct should provide more detail, how detailed should the provisions be and please provide suggested examples where possible?

Answer: Rule 15 of the SA Code of Conduct touches on this by referring to "honestly" the inclusion of additional words that might strengthen this point is supported by the AICWA.

In this instance the reference needs to be to the "settlement agent" as it is the responsibility of all licensed settlement agents to act honestly not just licensees.

Rule 15 also uses the word "efficiently". The AICWA believes this is a poor choice of word as everyone will have a different version of what they consider efficient to be and most of those ideas would be satisfactory. In this instance the word efficiently should be removed from Rule 15 as it does not add anything to the Rule.

- b) Are there any other changes to the honesty and fairness conduct provisions, or associated provisions, you think need to be made?

Answer: No

Discussion Q 8

- a) Should the codes of conduct prescribe that an agent must exercise skill, care and diligence? Please comment on why or why not. When doing so, please consider whether there is an unnecessary duplication of the ACL in the codes of conduct. If you consider that the codes of conduct should provide more detail, how detailed should the provision be? Please provide examples where possible?

Answer: Yes, we are happy to include the words "and diligence" to the wording of Rule 18 of the SA Code of Conduct. The wording of this rule should reflect it is a "settlement agent" who needs to exercise this skill, care and diligence, not just a licensee.

The AICWA is not concerned where duplication with the ACL may exist as settlement agents are more likely to look at the Act, Regulations and Code to obtain information than the ACL, so any repetition can only make information easier to locate.

There is also a link here to the Professional Development Subjects referred to in Schedule 1A of the Settlement Agents Regulations 1982. It is a licensed settlement agent who is required to undertake the compulsory CPD not just licensees, therefore, the skill, care and diligence requirement should apply to all settlement agents.

b) Are there any other changes to the skill, care and diligence conduct requirements you think need to be made?

Answer: No

Discussion Q 9

Should the codes of conduct prescribe that an agent must maintain confidentiality of information gained from the agency relationship? Please provide comment on why or why not. If so, how detailed should the provision be and provide suggested examples where possible.

Answer: Rule 14 of the SA Code of Conduct deals with confidentiality and the AICWA is happy with the current wording. We note there is nothing in the ACL about confidentiality and are happy that the code covers this issue.

Discussion Q 10

a) Should the codes of conduct prescribe that an agent must carry out instructions and act within their authority? Please provide comment on why or why not. If so, how detailed should the provision be and please provide suggested examples where possible?

Answer: The work that a settlement agent may carry out is prescribed in the Act and Regulations and does not need to be reinforced with a rule in the Code of Conduct.

b) Are there any other changes to the carry out instructions and act within their authority conduct rules you think need to be made?

Answer: No

Discussion Q 11

Should the codes of conduct prescribe that proper accounts must be kept? Please provide comment on why or why not. Comment is also sought on how the Act, regulations and code of conduct could be reconciled.

Answer: Rule 21 of the SA Code of Conduct addresses this issue and the AICWA considers the current wording appropriate.

The Act, Regulations and Code are aligned and do not need amendment.

Discussion Q 12

a) Should the codes of conduct prohibit agents soliciting or inducing or attempting to induce people in relation to property transactions? Please provide comment on why or why not. If so, how detailed should the provision be and please provide suggested examples where possible?

Answer: No, so long as the proper requirements to disclose are in place the AICWA does not consider this an issue.

b) Are there any other changes to the inducements conduct provisions you think need to be made?

Answer: No

Discussion Q 13

a) Should supervision and control of an agency business be a matter regulated under the codes of conduct or should it be a business decision for the licensee (who retains full responsibility regardless of the operational model chosen)?

Please provide comment on why it should be in the codes of conduct or why not.

If you think it should be regulated in the codes of conduct – how detailed should the provision be and please provide suggested examples where possible?

Answer: Rules 13 and 17 deal with this issue and the AICWA is happy with the wording as it currently exists.

b) Comment is also sought on how the Act and code of conduct for real estate agents and sales representatives could be reconciled in relation to any duplication or inconsistency.

Answer: No comment not a settlement agent issue.

c) Are there any other changes to the supervision and control of the business conduct rules you think need to be made or terms defined?

Answer: No

Discussion Q 14

a) Should the codes of conduct prescribe that an agent advise their client what the agent considers to be the current market price and give reasons for their opinion? Please provide comment on why or why not.

If you think it should be regulated in the codes of conduct, how detailed should the provision be? Please provide suggested examples where possible.

Answer: No comment not a settlement agent issue.

b) Are there any other changes to the conduct requirements about advising on market price you think need to be made?

Answer: No comment not a settlement agent issue.

Discussion Q 15

a) Should the codes of conduct prescribe when and how an agent may claim reimbursement of expenses? Please provide comment on why or why not.

If it should be prescribed, how detailed should the provision be?

Answer: This issue is addressed in the Settlement Agents Act and Regulations that require a valid appointment to act and settlement to occur before payment can be received from a client. This is not an issue as far as settlement agents are concerned and there is no need to address this in the Code.

b) Should commercial agents be exempt from the formal requirements of Real Estate Code of Conduct articles 16 and 17, especially where an appointment is prepared by qualified lawyers?

Answer: No comment not a settlement agent issue.

Discussion Q 16

Should the codes of conduct regulate when and how services can be terminated? Please provide comment on why or why not.

If you think it should be prescribed, please provide comment on how detailed such a provision should be and any other suggestions.

Answer: This aspect is addressed in the SA Act and Code of Conduct at Rule 28. The AICWA is not aware of any problems arising and proposes the existing wording be retained.

Discussion Q 17

Should the codes of conduct prescribe requirements about confirming instructions? Please provide comment on why or why not.

If so, please provide comment on how detailed such a provision should be and any other suggestions.

Answer: No, again there is no evidence to show that this is causing problems at the current time and the inclusion of an additional step to require the confirmation of instructions is additional work that is not justified.

Discussion Q 18

Should the codes of conduct prescribe requirements for agents receiving deposits? Please provide comment on why or why not.

If so, please provide comment on how detailed such a provision should be and any other suggestions.

Answer: The Act, Regulations and Code already cover this issue and the AICWA does not see any benefit to amending the existing wording.

Discussion Q 19

Should the codes of conduct prescribe requirements for agents to undertake property inspections? Please provide comment on why or why not.

If so, please provide comment on how detailed such a provision should be and any other suggestions.

Answer: No comment not a settlement agent issue.

Discussion Q 20

a) Should the codes of conduct prescribe further responsibilities for agents in undertaking their functions? Please provide comment on why or why not.

If so, please comment on how detailed such a provision should be and provide suggested examples.

Answer: The Act and Regulations already prescribe what tasks a settlement agent can perform. Further discussion on this issue needs to be undertaken in conjunction with a review of the Scope of Work for settlement agents in the context of national licensing.

There is no requirement to make changes until this Scope of Work is reviewed.

b) Are there any other changes to the professional responsibilities conduct provisions you think need to be made?

Answer: No

Discussion Q 21 – Agents to publicise the code

Do you support a similar provision in Western Australia?

Answer: No

Discussion Q 22 – Complaint system

Do you support the codes of conduct prescribing that licensees must have a complaint resolution system?

Answer: No, this is not an issue that has been raised by consumers or members of the Institute and would add to the red tape of running a small business.

Discussion Q 23 – Additional Guidance

a) Do you support additional guidance in particular provisions so as to provide more detail and examples for agents to use in day-to-day activities? For example, there may be provisions in other jurisdictions that you would like to see added as is or in a modified form. If so, please provide suggestions for appropriate areas of conduct.

Answer: The AICWA considers the existing Code to be simple to understand and does not see the need to make the Code longer than it already is by adding examples.

b) Do you support some provisions across the three codes being made consistent for all of the property industry in Western Australia as well as across jurisdictions? If so, please provide suggestions.

Answer: No, the work performed is different and each code needs to be considered in isolation. We support the adoption of a consistent approach where possible, but expect there will always be items that affect one code and not the others.

Consistency of codes across jurisdictions would be very hard to do given the differences in the Scope of Work. However, at the time the Scope of Work issue is revisited the Codes could be looked at as well.

Discussion Q 24

a) Are there any provisions that you consider unnecessarily duplicate the ACL or their enabling Acts which should not be in the codes of conduct?

Answer: No

b) Are there any provisions that are duplicated in the ACL or the enabling Act but you feel the industry specific codes should retain? If so please explain why.

Answer: No

Discussion Q 25

Are there any other anomalies in the codes of conduct that you think should be fixed? Please identify and provide comments and any suggestions for how to do so.

Answer: No

Question Q 26

Do you support requirements relating to conjunction sales being prescribed in the code of conduct? If so please provide details.

Answer: No comment not a settlement agent issue.

Question Q 27

Do you support a code of conduct provision requiring a selling agent to give a managing agent immediate notice of their appointment to sell the property?

Answer: No comment not a settlement agent issue.

Question Q 28

Should the codes of conduct include provisions to cover electronic transactions?

Answer: Yes, particularly in relation to passing fees charged to use the electronic conveyancing platform onto the client. It is the understanding of the AICWA that these costs will be incurred on a transactional basis. These costs need to be passed onto the client, if they cannot be passed on then it will be a disincentive to use the national electronic conveyancing platform.

Question Q 29

Should the codes of conduct include provisions to support the requirements of mutual recognition?

Answer: Yes, however, the Institute would need to be involved in the development of this system which again is linked to the question of national licensing and scope of work and needs further work.

Additional item

Inclusion to the Code of Conduct for Agents and Sales Representatives 2011

The AICWA receives numerous complaints from settlement agents about real estate agents advising their clients on settlement agents' fees. These comments generally follow the line of "make sure you ask for a discount as that money is better off in your pocket than the settlement agents".

This attitude and approach demeans the industry and is insulting given the disparity in fees charged between real estate agents and settlement agents.

AICWA suggests an amendment to prevent real estate agents from advising clients about settlement fees other than to inform their client of the maximum fee that can be charged.