



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

CONSULTATION

REGULATORY IMPACT STATEMENT

PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER

May 2013



PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER

Prepared and issued by the Department of Commerce
May 2013

What is the purpose of this paper?

With the approval of the Minister for Commerce, the Hon Michael Mischin MLC, the Department of Commerce (Consumer Protection Division) is undertaking a review of the codes of conduct that apply in Western Australia to the land valuation, real estate and settlement industries.

This document aims to provide information and raise issues about the codes of conduct in order to stimulate discussion and encourage written submissions to the review. The codes of conduct contain some very important measures to help protect consumers of property industry services. Submissions received will assist the Department in making recommendations to the Minister for Commerce on the content of the codes of conduct.

The issues identified in this document are based on research conducted by the Department to date.

The paper is intended to highlight, and invite submissions on, specific issues based on the following principles:

- the paramount reason for regulating conduct of those participating in the property industries is to promote and protect the interests of consumers of property industry services and to promote public confidence in the performance of property agency work;
- conduct regulation should be designed to facilitate, support and secure fair trading practices, a competitive fair market, and protect the interests of consumers;
- the codes of conduct should provide industry participants with guidance on what constitutes acceptable behaviour and requirements they must satisfy; and
- the codes of conduct should provide an effective regulator with sufficient tools to hold licensees to account for their actions through disciplinary processes.

Terms of reference for the review and approach taken in this paper

In undertaking the review, the Department will specifically consider the following matters.

- Whether the codes promote and encourage fair trading practices in the property industry, a competitive and fair market, and protect the interests of consumers.
- Whether the codes impose regulation that is excessive to the requirements of consumer protection.
- Drafting and technical issues, including the consistency of each code with its enabling Act, regulations, and the other codes.
- Whether the codes are consistent with the Australian Consumer Law (ACL) or whether they unnecessarily duplicate the ACL.

- Whether the codes reflect best regulatory practice.
- Any other issues arising in submissions that come within these terms of reference.

How can you contribute?

Your views on the issues raised in this paper are important to ensure that the Department has the benefit of multiple perspectives in reaching its conclusions.

It will assist the Department in analysing submissions if you use the question template at the end of the paper. However, there is no requirement to do so and submissions are not limited to the questions raised in this document. The Department welcomes your comments on any other matters within its terms of reference that you believe should be considered in the review. In any event, your written submission should, wherever possible, include evidence and examples to support your position on each issue.

You can provide your comments as an individual or you may wish to contribute to a joint submission through your employer or professional association.

Copies of the paper and the existing codes of conduct may be downloaded from:

www.commerce.wa.gov.au/cpconsultations

Telephone inquiries should be directed to 1300 30 40 54.

The **closing date for written submissions is Friday, 28 June 2013**. Submissions may be lodged by email or post:

Email: responses@commerce.wa.gov.au

Mail: The Director Strategic Policy and Development
Department of Commerce, Consumer Protection Division
Locked Bag 14, Cloisters Square
Perth WA 6850

Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Department's website. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly by marking it 'IN CONFIDENCE' and it will not be made publicly available.

What happens after the public comment period closes?

After the consultation period concludes, all responses received will be publicly available on the Department website unless marked IN CONFIDENCE.

Please note that because your feedback forms part of a public consultation process, the Government may quote from your comments in future publications. If you prefer your name to remain confidential, please indicate that in your submission. As submissions made in response to this paper will be subject to freedom of information requests, please do not include any personal or confidential information that you do not wish to become available to the public.

Message from the Minister



I am pleased to release the *Property Industry Codes of Conduct Discussion Paper*. In releasing this paper, I want to draw on the vast expertise and practical experience that exists in this sector so that we have a practical and modern framework to service the interests of consumers and businesses.

This review is about ensuring we have more effective regulation of conduct in the property industries encompassing the land valuation, real estate and settlement occupations.

The property industry codes of conduct are made under the *Land Valuers Licensing Act 1978*, the *Real Estate and Business Agents Act 1978*, and the *Settlement Agents Act 1981*. Suggestions for any changes that would help the codes of conduct to support consumer protection and fair trading in the contemporary property market in Western Australia are sought.

Many people are aware of the two well-publicised cases in the last two years when residential properties were sold by scammers pretending to be the owners. These cases highlighted the danger of identity theft in the modern property market in which e-mail, internet and other electronic communication is increasingly common. In response to these incidents, amendments were made to the codes of conduct in late 2011 to strengthen provisions on client identity verification for the real estate and settlement industries.

The Department of Commerce is now commencing a broader review of the property industry codes of conduct. The review provides the opportunity to look at the overall effectiveness of the codes as a consumer protection mechanism and to modernise and restructure them. In doing so, the review will look at ensuring consistency with the Australian Consumer Law, red tape reduction, and principles of best practice regulation. The intent is to make the codes of conduct more appropriate for the current property market.

This paper raises a range of questions for consideration, some of which could amount to re-designing the existing codes of conduct, while others could lead to the reduction of regulation.

As Minister, I have an open mind about the reforms that should be pursued. I encourage everyone with an interest in this important issue to consider this paper and submit their views.

Hon. Michael Mischin MLC
MINISTER FOR COMMERCE

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EXECUTIVE SUMMARY

On 1 July 2011, the Department of Commerce and the Commissioner for Consumer Protection took over the licensing and regulatory role of the property industry occupational boards: the Land Valuers Licensing Board, the Real Estate and Business Agents Supervisory Board, and the Settlement Agents Supervisory Board. Transferring the functions provided a more streamlined operating structure with a single regulator across these occupational areas. It also produced improved integration with more general laws, such as the Australian Consumer Law.

The Commissioner for Consumer Protection is now responsible for administering the legislation to license and regulate the conduct of land valuers, real estate and business agents and sales representatives, and settlement agents. That responsibility includes developing and publishing the code of conduct for each of the property industry occupations. The property industry codes of conduct deal with the responsible and ethical conduct of people operating in the industry. These codes of conduct were first developed and published approximately 30 years ago by the three separate statutory licensing boards, reflecting industry practice and requirements at that time. All of the codes of conduct have, however, undergone varying degrees of amendment over time.

In November 2011 the real estate and settlement industry codes of conduct were amended to strengthen provisions on client identity verification after residential properties in Western Australia were sold by scammers pretending to be the owners. The Department agreed to undertake a broad review of the property industry codes of conduct at a later time. This discussion paper commences that review of the codes of conduct.

This review provides the opportunity to look at the overall usefulness of the codes of conduct in providing clarity for industry participants on performance of agency work and consumer protection. It also provides the opportunity to modernise and restructure them. In doing so, the review will take into account ensuring consistency with the Australian Consumer Law, red tape reduction, and principles of best practice regulation. The intent is to make the codes of conduct more relevant and appropriate to the current property market but not overly prescriptive.¹

The Department welcomes submissions on potential amendments to the codes of conduct. In particular, the Department looks forward to receiving comments on aspects where the codes of conduct could be amended to increase industry understanding and compliance, while at the same time reducing regulatory burden. However, any issues identified that relate to the need to amend an enabling Act or its regulations for a particular code are not within the scope of this review and cannot be considered at this time.

It would be valuable for submissions to also give consideration to whether there are alternatives to the current style for the codes of conduct. For example, one alternative is to have a clear set of general principles in the codes of conduct with guidance notes. It is anticipated that such guidance notes could provide information about the Department's interpretation of a particular provision and examples to help industry participants to conduct their day-to-day activities. This approach would enable the different codes of conduct to be modified to be less prescriptive and capable of being adopted for different property occupations.

¹ A requirement for all government agencies under the recommendations of the Reducing the Burden – Report of the Red Tape Reduction Group is to simplify and modernise existing regulations and processes. All government agencies are to identify regulations and processes that can be simplified, repealed, reformed or consolidated.

It is important to note, however, that a guidance note would not be intended to be a legal document or provide legal advice. The intention would be for use as a guide only as to the Department's interpretation of a particular provision.

The Department would decide whether or not to issue a guidance note on a particular issue from time to time.

Any guidance note could not be relied on as a complete statement of the law and anyone affected by the application of the legislation would need to seek their own legal advice.

Following the consultation period and analysis of feedback, the Department will develop recommendations for consideration by the Minister for Commerce.

1. INTRODUCTION

1.1 The property industry occupations in Western Australia²

The broad aim of regulating an occupation is to protect the public from the risks of that occupation being carried out incompetently or recklessly or unethically. The key regulatory instruments for the property occupations in Western Australia are the enabling Acts, the regulations, and the codes of conduct. These regulatory instruments set the standards that those participating in the occupation must maintain in conducting their business.

In Western Australia the property industry encompasses land valuers, real estate and business agents and sales representatives, and settlement agents. Some of the risks posed by those operating in the industry are dealt with by occupational licensing. In that regard, their conduct is regulated through licensing and registration under the following legislation:

- *Land Valuers Licensing Act 1978*, and the *Land Valuers Licensing Regulations 1979*;
- *Real Estate and Business Agents Act 1978*, and the *Real Estate and Business Agents (General) Regulations 1979*; and
- *Settlement Agents Act 1981*, and the *Settlement Agents' Regulations 1982*.

That legislation does not, however, deal with all areas related to the ongoing competence of those being regulated. The codes of conduct for each occupation set out the obligations of industry participants to their clients on standards of practice, disclosure, and principles of conduct for their services:

- *Land Valuers Code of Conduct 1985*;
- *Code of Conduct for Agents and Sales Representatives 2011*; and
- *Settlement Agents' Code of Conduct 1982*.

The codes of conduct were first developed and published approximately 30 years ago by the three separate statutory licensing boards: the Land Valuers Licensing Board, the Real Estate and Business Agents Supervisory Board, and the Settlement Agents Supervisory Board. Subject to some amendments, the codes of conduct reflect industry practice and requirements at that time.

On 1 July 2011, the Department of Commerce and the Commissioner for Consumer Protection took over the regulatory role previously held by the three boards. That change was part of the State Government's commitment to reduce the number of boards and committees in WA. The result is a more streamlined structure - a single regulator for these occupational areas and greater integration of generic laws such as the Australian Consumer Law.

The Commissioner for Consumer Protection is now responsible for administering the legislation to license and regulate the conduct of land valuers, real estate and business agents and sales representatives, and settlement agents. That responsibility includes developing and publishing the codes of conduct for these property industry occupations in the prescribed manner.

Robust regulatory assessment is the key to ensuring that any industry-specific consumer regulation is genuinely required, is well-targeted to meeting the needs of

² For the purpose of this paper the meaning of the term *property industry occupations* is limited to the land valuation, real estate, and settlement occupations.

consumers and does so at low cost. Periodic review of existing measures is also important to ensure that they remain appropriate in the light of changing market conditions and consumer behaviour, and of improvements to the generic law.

The reform of conduct provisions in the codes of conduct needs to be considered in relation to recommendations of the Government's Red Tape Reduction Group in its 2009 report: *Reducing the Burden*. It forms part of the whole of government requirement to simplify and modernise existing regulations and processes. This means identifying regulations and processes that can be simplified, repealed, reformed or consolidated.

1.2 Other related reforms – national licensing and consumer law

The codes of conduct review needs to have regard to other reforms that have been implemented, or are being considered. Any change to industry specific regulation, such as that in codes of conduct, must be considered as part of the general regulatory framework but should avoid unnecessary duplication.

The existence of inconsistencies between industry specific regulations in different jurisdictions across Australia is recognised as imposing unnecessary compliance costs on businesses.³ Like other business costs, it is assumed that these additional costs are passed on to the consumer. Similarly, for regulators, having a large number of overlapping legislation to administer is costly and the resulting complexity can hamper effective regulatory action. The result is various regulatory reforms being undertaken.

National Occupational Licensing System

In July 2008, the Council of Australian Governments (COAG) agreed to develop a national occupational licensing system (the NOLS). The intention being to establish a nationally uniform system of licensing for nominated occupations administered in accordance with common policies. Licensees would only need a single licence for their particular occupation to operate in any Australian jurisdiction.

The NOLS is intended to apply to the licensing of land valuers, real estate agents and sales representatives, and settlement agents. While the WA Government is yet to resolve its final position on the implementation of the NOLS in WA, it is important to note that the NOLS will not affect the regulation of conduct in WA, so that the codes of conduct will remain relevant even if NOLS is implemented. For further information on the NOLS visit <http://nola.gov.au/>

National Conduct Harmonisation Project

While the NOLS would result in a single national regime for granting and maintaining licences for the selected occupations, its scope excludes regulation of licensee 'conduct'. That is, it will not cover the regulatory requirements a licensee must comply with when undertaking licensed work (generally referred to as conduct requirements). Harmonisation of occupational conduct requirements is expected to follow.

The responsible Ministerial Council⁴ recognised the potential benefits to business and consumers from increased consistency in policy setting and regulation of the way in which work is performed. It established a Working Group to undertake harmonisation of conduct requirements for property occupations under the NOLS.

³ Productivity Commission (2008). *Review of Australia's Consumer Policy Framework*, pp. 81-88.

⁴ Previously the Ministerial Council on Consumer Affairs or MCCA, but now COAG Legislative and Governance Forum on Consumer Affairs or CAF.

That work is in progress. Where possible this paper has been developed taking into account the work and progress to date of the Conduct Harmonisation project.

Australian Consumer Law (ACL)

The ACL is a single national law that took effect on 1 January 2011. At the Commonwealth level, the ACL is contained in the Commonwealth *Competition and Consumer Act 2010* (CCA). At the State level, the ACL is restated in the *Fair Trading Act 2010 (WA)*. The ACL creates general standards for business conduct as well as providing specific protections for consumers against unfair business practices. Consumer protection agencies of the Commonwealth, States and Territories can enforce the ACL. The ACL provides a framework for regulating property occupations. Provisions of particular relevance to the conduct of people operating in the property occupations (i.e. as traders) include the following.

Misleading or deceptive conduct (ACL sections 18 and 19)

It is unlawful for a business to make statements in trade or commerce that:

- are misleading or deceptive
- would be likely to mislead or deceive.

Failing to disclose relevant information, promises, opinions and predictions can also be misleading or deceptive. Further, businesses cannot rely on small print and disclaimers as an excuse for misleading or deceptive conduct.

False or misleading representations (ACL sections 29-38 and sections 151-160)

It is unlawful for a business to make false or misleading representations about goods or services when supplying, offering to supply, or promoting those goods or services (includes representations about sale etc. of land). Whether a representation is false or misleading will depend on the circumstances. It is also unlawful for a business to make a misleading testimonial. A business must produce evidence to show that a testimonial is not misleading.

Unconscionable conduct (ACL Part 2-2 sections 20-22)

Generally, 'unconscionable conduct' is a statement or action so unreasonable it defies good conscience. A business must not act unconscionably when:

- selling or supplying goods and services to a consumer
- supplying or acquiring goods and services to or from a business.

Harassment and coercion (ACL section 50)

It is unlawful to use physical force, coercion or undue harassment in connection with the:

- supply or possible supply of goods or services
- payment for goods or services
- sale or grant, or the possible sale or grant, of an interest in land, or
- payment for an interest in land.

Consumer guarantees applying to services (ACL sections 60 – 63)

A supplier must meet the consumer guarantees of providing services:

- with due care and skill
- which are fit for any specified purpose
- within a reasonable time (when no time is set)

Suppliers guarantee their services are provided with due care and skill. This means they must:

- use an acceptable level of skill or technical knowledge when providing the services, and
- take all necessary care to avoid loss or damage when providing the services.

There is a set of guides to help understand key elements of the ACL. The guides provide general information and examples that cover the areas listed above. Copies of the guides can be downloaded from the following link.

http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/guidance.htm

Interrelationship between the ACL and industry specific laws

The ACL represents the benchmark for consumer protection in Australia. With the commencement of the ACL it is important that the substantial benefits from those reforms are not diluted by provisions in industry specific laws. Where industry specific laws are required, these should enhance generic protections, rather than replace them. Divergence from the approach in the ACL should only occur where there are clear public policy reasons for doing so.

Overlap of industry specific laws (codes of conduct) and the ACL

There is some duplication of the ACL provisions in the industry specific laws for land valuers, real estate and settlement agents, including the codes of conduct. In this regard, the ACL is a generic law providing general standards for consumer protection and the industry specific conduct provisions ought to be more specialised. This is because they regulate particular kinds of market behaviour that are characteristic of the property occupations.

In some instances the industry specific provisions can provide more effective consumer protection than generic provisions. However, the overlap between industry specific and generic consumer protection laws is not always supported by a demonstrated need. The argument in support of providing specific examples of prohibited conduct in industry specific regulation through the codes of conduct is that it can provide greater certainty for businesses and consumers. Unfortunately, in some cases industry specific regulation is overly prescriptive. The industry specific regulation may, however, allow more effective regulatory action than under the general principles of the ACL.

Compliance under industry specific laws (codes of conduct) and the ACL

The current industry specific regulation enables the Commissioner for Consumer Protection to bring proceedings against a person in relation to their licence or registration for a breach of the law or for any other cause that renders the licence holder unfit to hold a licence. For the real estate and settlement occupations, this includes a breach of the requirements of the industry specific legislation (Act, regulations, or code of conduct), or any other law and which prejudices or may prejudice any rights or interest of an actual or prospective party to the transaction.⁵ For example, 'any other law' can be the ACL.

The Act for land valuers is not as comprehensive as for the other two occupations and does not refer to 'any other law' in relation to a transaction.⁶ This seems to be due to the nature of the work.

Under the NOLS proposals there will be grounds for disciplinary action if a licensee contravenes the National Law, a prescribed law, or a prescribed provision of a law of the Commonwealth or a state or territory.⁷ Conduct regulation will remain within the power of the states and territories to regulate.

⁵ *Real Estate and Business Agents Act 1978*, sections 102 and 103(2) and (3); *Settlement Agents Act 1981*, section 84(2).

⁶ *Land Valuers Licensing Act*, sections 27 and 28(2).

⁷ *Occupational Licensing National Law* section 48(1).

1.3 Purpose and structure of this paper

Prescribing conduct requirements helps protect consumers by ensuring that the licensed occupations will provide a certain quality of service. The purpose of this paper is to stimulate discussion and encourage submissions on where regulation is required so that the codes of conduct may be improved to provide appropriate conduct requirements for the land valuation, real estate, and settlement industries. It provides information and raises issues about conduct risks and whether existing requirements continue to be relevant.

This paper seeks to:

- identify the risks associated with consumers dealing with land valuers, real estate and settlement agents; and
- describe the various conduct regulations that currently apply in Western Australia and in other jurisdictions, and identify relevant provisions of the ACL which also address those issues.

Discussion on the property industry codes of conduct in Western Australia has been organised in this paper using the conduct elements from the existing codes of conduct. It identifies differences and similarities across the jurisdictions, possible coverage by the ACL and whether provisions are covered in the enabling Acts.

The paper is structured as follows:

- The codes of conduct – their scope and objectives, the Western Australian codes of conduct and those in other Australian jurisdictions.
- General regulation of conduct as provided for in the codes of conduct – existing arrangements for fiduciary and non-fiduciary elements.
- Other provisions for consideration not currently in the Western Australian codes of conduct.
- Discussion questions.

Submissions will assist the Department in making recommendations to the Minister on the optimal content of the codes of conduct provisions. To assist in preparing submissions, discussion questions are provided with each topic and also grouped together at the end of this document. When preparing submissions it is important to keep in mind the terms of reference for the review of the codes of conduct and in particular that:

- an overly prescriptive approach does not reflect best regulatory practice⁸; and
- an overarching requirement for government is to reduce regulatory burden.

Clarification of terms used in this paper

In keeping with the terminology used in the conduct harmonisation project this paper uses the following terms in the same way:

Client means a person or body corporate that retains an agent to represent their interests in a transaction (i.e. to undertake a valuation, a real estate transaction or manage real estate, or a settlement).

Consumer means a person or body corporate that transacts business with an agent but does not retain their services.

⁸ This means minimising government intervention to where there is a particular need, such as where there is a significant risk. See COAG Principles of Best Practice Regulation.

Using the terms 'client' and 'consumer' is also in keeping with the terminology used by the Real Estate Institute of Australia (REIA) in its National Principles of Conduct.

The term 'principal' is used throughout the real estate code of conduct to mean a client. However, in the REBA Act it is sometimes used to mean the licensee in charge. Neither of the other two codes of conduct uses the term 'principal'.

2. THE CODES OF CONDUCT

Scope and objectives of codes of conduct

The codes of conduct provide core rules that set competency and performance standards. Some may provide procedures for dealing with disputes. They must be read in conjunction with the Acts and regulations and should not repeat the requirements of the Acts and regulations.

Codes of conduct prescribe the kinds of behaviour required to be met when carrying out work and dealing with clients and provide direction to those whose conduct they govern. They are more specific and practical than ethics codes because they represent legislatively defined and enforceable behavioural standards with sanctions for contravention. Codes of conduct are not, however, an exhaustive statement of the conduct expected. They set minimum standards that industry participants must observe and are a reference point for discipline.

2.1 In Western Australia

Application, approval and disallowance of codes of conduct

In order to establish what constitutes acceptable behaviour from a person operating in the property industry the government is required under the relevant legislation to establish professional conduct rules as a reference point for discipline.

Land valuers

Under the *Land Valuers Licensing Act 1978* Licensed Valuers Code of Conduct 1985

The *Land Valuers Licensing Act 1978* (LVL Act) provides for the licensing of land valuers and for related purposes. A person (firm or corporation) shall not carry on business, or by any means hold themselves out, or demand or receive commission, reward or other valuable consideration for services as a valuer of land unless licensed under this Act.⁹

Under section 26, the Commissioner may, with the approval of the Minister, by notice in the Government Gazette, lay down a code of conduct for licensed valuers. The Licensed Valuers Code of Conduct was first published in 1985. A licensed valuer failing to comply with the code of conduct will be liable for disciplinary action.¹⁰

Real estate and business agents and sales representatives

Under the *Real Estate and Business Agents Act 1978* Code of Conduct for Agents and Sales Representatives 2011
(Real Estate Code of Conduct)

The *Real Estate and Business Agents Act 1978* (REBA Act) is an Act to make provision with respect to the regulation and supervision of certain persons acting in relation to real estate transactions or certain business transactions and for related purposes. A person shall not carry on business, or by any means hold himself or itself out, as a real estate agent, or a business agent, or both, unless they are

⁹ Section 23 of the LVL Act.

¹⁰ Section 26 of the LVL Act.

licensed as such under this Act and holds a current triennial certificate in respect of the licence.¹¹

Under section 101 of the REBA Act, the Commissioner may prescribe and publish in the manner prescribed by the regulations a code of conduct for agents, and a code of conduct for sales representatives. The *Real Estate and Business Agents (General) Regulations 1978* require the codes of conduct to be published in the *Government Gazette*.¹² There shall be proper cause for disciplinary action against an agent or sales representative if they act in breach of the code of conduct.¹³

Settlement agents

Under the *Settlement Agents Act 1981*

Settlement Agents' Code of Conduct 1982

The *Settlement Agents Act 1981* (SA Act) is an Act to make provision with respect to the licensing, regulation and supervision of settlement agents, and for related purposes. A person shall not carry on business, or by any means hold themselves out, as a settlement agent unless licensed as such under this Act and holds a current triennial certificate in respect of the licence.¹⁴

Under section 82 of the SA Act the Commissioner may, with the approval of the Minister, make rules prescribing a code of conduct for settlement agents. The code of conduct was first published in 1982. There shall be proper cause for disciplinary action against an agent if they act in breach of the code of conduct.¹⁵

The Minister's approval is required for both the land valuers and settlement agents' codes of conduct. There is, however, an important difference in the requirement for prescribing the code of conduct for settlement agents. The Settlement Agents' Code of Conduct is described as 'rules' in the SA Act. This means that the code of conduct must be tabled before Parliament and is subject to disallowance under the *Interpretation Act 1984*.¹⁶

Because these discrepancies derive from the enabling Acts they are beyond the scope of this review of the codes of conduct. The issues could, however, be addressed in an appropriate amendment Bill at the earliest opportunity.

2.2 In other Australian jurisdictions

Land valuers

Only two other jurisdictions, New South Wales and Queensland, license land valuers and have a prescribed code of conduct.

New South Wales
Under the *Valuers Act 2003*

Valuers Regulation 2010, including the Rules of Conduct in Schedule 1

Queensland
Under the *Valuers Registration Act 1992*

Valuers Registration Regulation 2003, including Code of Professional Conduct

Real estate and business agents and sales representatives

All other jurisdictions, except South Australia, have a prescribed code of conduct that applies to real estate agents. Some coverage is specific to sales representatives.

¹¹ Section 26 of the REBA Act for agents; sections 44 and 45 regarding sales representatives must be registered.

¹² Regulation 13.

¹³ Section 103(2) and (4) of the REBA Act.

¹⁴ Section 26 of the SA Act.

¹⁵ Section 84(2) of the SA Act.

¹⁶ Section 42 – Laying regulations, rules, local laws and by-laws before Parliament, and disallowance

Clarification: throughout this document in relation to these occupations where there is reference to ‘all jurisdictions’ this refers to all jurisdictions with legislative codes or rules of conduct and *excludes* South Australia.

Australian Capital Territory - the <i>Agents Act 2003</i>	Rules of Conduct in Agents Regulation 2003 – Schedule 8
New South Wales - the <i>Property, Stock and Business Agents Act 2002</i>	Rules of Conduct in Schedules 1-7 in Property, Stock and Business Agents Regulation 2003
Northern Territory - the <i>Agents Licensing Act</i>	Rules of conduct for agents as set out in Part 1 of Schedule 4 of the Agents Licensing Regulations are in addition to the rules of conduct set out in s65 of the Act
Queensland - the <i>Property Agents and Motor Dealers Act 2000</i>	Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001
Tasmania - the <i>Property Agents and Land Transactions Act 2005</i>	Code of Conduct in Property Agents and Land Transactions Regulations 2006 – Schedule 2
Victoria - <i>Estate Agents Act 1980</i>	Estate Agents (Professional Conduct) Regulations 1997

Settlement agents

Four other jurisdictions have prescribed rules of conduct for settlement agents (conveyancers); New South Wales, Victoria, the Northern Territory, and Tasmania. Three jurisdictions do not license, nor do they have a code of conduct for, conveyancers: South Australia, Queensland, and the Australian Capital Territory.

New South Wales - the <i>Conveyancers Licensing Act 2006</i>	Rules of Conduct in schedule 3 of the Conveyancers Licensing Regulation 2006
Northern Territory - the <i>Agents Licensing Act</i>	Rules of Conduct – Schedule 4 of the Agents Licensing Regulations
Tasmania - the <i>Property Agents and Land Transactions Act 2005</i>	Rules of Conduct – Schedule 2 of the Property Agents and Land Transactions Regulations 2006
Victoria - the <i>Conveyancers Act 2006</i>	Rules of Professional Conduct – Schedule 1 of Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008

2.3 Interpretation - ‘principal’ and ‘agent’

The interpretation sections in the codes of conduct define a number of key terms. It should perhaps also clarify that the terms used in the codes of conduct should be read to have the same meaning as the Act unless otherwise specified.

Land valuers

The Licensed Valuers Code of Conduct simply uses the term ‘licensed valuer’ and the terms ‘principal’ and ‘agent’ are not used.

Real estate agents

There are some difficulties between the REBA Act and the Real Estate Code of Conduct relating to the terms 'agent' and 'principal' and clarification ought to be made.

The term 'agent' in the Real Estate Code of Conduct is defined differently from how it is defined in the REBA Act. In the REBA Act it is defined as a person who is a real estate agent or a business agent, or both a real estate agent and a business agent. In article 3 of the Real Estate Code of Conduct, an 'agent' is defined to mean *an agent or a sales representative*.

The term 'principal' is used throughout the Real Estate Code of Conduct to mean a client. However, in the REBA Act it is sometimes used to mean the licensee in charge. The term is not defined in the REBA Act. It is, however, defined in the Real Estate Code of Conduct but only in relation to a sales representative. In relation to a sales representative, the term 'principal' means the principal of the agent by whom the sales representative is employed (i.e. the client of the agent). The Real Estate Code of Conduct does not expressly deal with the situation where an agent is employed by a body corporate agent, with whom the principal has contracted. The result is that there is a potential argument that articles of the Real Estate Code of Conduct that refer to duties to principals do not apply to employed agents. Such a result is clearly not intended.

Settlement agents

The Settlement Agents' Code of Conduct uses the term 'licensee' or 'settlement agent' when referring to a settlement agent.

Following judicial consideration, the term 'licensee' in rule 15 has been given a construction limiting it to *the licensee carrying on the business, being the licensee engaged by the client to undertake the real estate transaction*.¹⁷ The result is that provisions referring to a 'licensee' in the Code of Conduct have no application to the actions of an employed settlement agent. This means that an employee has no personal liability under the relevant provisions of the Code of Conduct despite holding a settlement agents' licence.

In the Settlement Agents' Code of Conduct 'agent' means a person who is an agent within the meaning of the REBA Act. The REBA Act provides that an agent means: a person who is a real estate agent or a business agent, or both a real estate agent and a business agent.

Discussion Q 1

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

¹⁷ *Settlement Agents Supervisory Board v Dawn Lorraine Watson* [2011] WASAT 73, paras 47-49; and relevant to the construction of rules 13 to 19.

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.

3. GENERAL REGULATION OF CONDUCT

3.1 Knowledge of Act and code of conduct

This part deals with knowledge of the law required by those operating in the property occupations. In this context the law means the Act, regulations and code of conduct.

The REBA and SA Acts specifically require that agents (including sales representatives) comply with other laws relevant to their conduct.¹⁸ Such laws include relevant Commonwealth and State legislation and local government regulations relating to: anti-discrimination and equal opportunity; consumer protection; environmental issues; occupational safety and health; privacy; franchises and business practices; and property management.

It is generally expected that licensees will have knowledge of other laws. The obvious need to have knowledge of the relevant real estate, settlement or land valuers legislation is treated differently across the three occupations.

Is there a problem that requires the government to intervene?

There are two main problems that requiring an agent to have knowledge of the law before conducting business with a consumer is designed to overcome:

- in most cases consumers have limited knowledge of the property market because they engage in property transactions relatively infrequently - consumers are, therefore, at a considerable disadvantage; and
- the risks consumers face in the market arising from failure of an agent to know and comply with the relevant law can be significant and cause irreparable harm.

What is the main purpose of prescribing knowledge of the law?

An agent must have knowledge of the law that applies so as to minimise risk of harm to consumers when undertaking business transactions.

It is fundamental to business practice to know the laws under which that business must be conducted. The objective of requiring knowledge of the law is that when the person knows what is required of them, they can carefully and diligently try to perform those duties.

What are the options to deal with the problem?

Option 1 – Specific prescription in enabling Act or regulations so that there is a specific duty in the law to know and understand the legislation under which an agent must conduct themselves.

Option 2 - Specific prescription in a code of conduct is an alternative to having it in the local Act – i.e. to prescribe the requirement in an enforceable code of conduct. This may emphasise the importance of knowing and complying with the law and bring it to the attention of property agents and consumers. It would also provide a mechanism for disciplining an agent for contravention of conduct provisions.

Option 3 – No specific prescription and leaving non-compliance to be dealt with under the relevant legislation, as a contravention of the particular provision, when that may occur. It is fundamental to operating in any industry that participants must

¹⁸ Disciplinary action provisions: REBA Act s103(2) and SA Act s84(2).

know the law that applies to their conduct and prescribing it in a code of conduct may be unnecessary.

Existing arrangements

Land valuers

The Western Australian Licensed Valuers Code of Conduct requires that a licensed land valuer must ensure that they, and any other person assisting them, comply with the duties and obligations imposed by the Act, regulations and code of conduct. Claiming ignorance of any requirement as a reason for non-compliance is expressly excluded.¹⁹

Examples from other jurisdictions

In New South Wales, a valuer must have knowledge and understanding of the Act and the regulations under the Act, and any such other laws as may be necessary to enable the valuer to properly exercise his or her functions as a valuer.²⁰ The Queensland code of professional conduct also provides that a registered valuer must comply with that code when making a valuation.²¹

Real estate agents

Western Australia is the only jurisdiction that does not specifically stipulate the requirement for an agent to have knowledge of the law in its code of conduct.

Examples from other jurisdictions

Six other jurisdictions provide that an agent must have knowledge and understanding of the Acts and regulations. Queensland provides that an agent must have a reasonable knowledge and understanding of the Act and the code.²² Victoria, Northern Territory and the Australian Capital Territory also state that an agent must have knowledge of other laws and rules to the extent that they are relevant to the conduct of his or her profession.

Victoria has three relevant provisions. An agent must have a working knowledge of the Act and any regulations, and other statutes and any rules or regulations in force in that State to the extent that it is relevant to the conduct of their profession.²³ The code also requires a working knowledge of the duties and obligations towards a client.²⁴ Finally the Victorian code also says that, in conducting their profession, an agent must not contravene or fail to comply with any statute, rule or regulation in force in that State to the extent it is relevant.²⁵

New South Wales and the Australian Capital Territory further provide that an agent must not make false representations about: a provision of the Act or regulation, or that a particular form of agency agreement is required by the Act.²⁶ The New South Wales general rules of conduct also prescribe that agency agreements must comply with the Act and regulations.

Settlement agents

The Western Australian Settlement Agents' Code of Conduct prescribes that a licensee must ensure they have at all times complete knowledge of the Act,

¹⁹ Licensed Valuers Code of Conduct r 1.

²⁰ Valuers Regulation 2010, Rules of Conduct r 5.

²¹ Valuers Registration Regulation 2003, Part 2 Code of professional conduct, s 7A.

²² General rules of conduct, r5.

²³ Regulation 9 – knowledge of the law.

²⁴ Regulation 8 – duties and obligations.

²⁵ Regulation 10 – compliance with legislation.

²⁶ NSW Schedule 1, r 18; ACT Schedule 8, r8.18.

regulations, code of conduct and to appropriately comply with all requirements.²⁷ The code of conduct also provides that ignorance is no excuse for non-observance of the provisions.

Examples from other jurisdictions

New South Wales has the same provision as Western Australia. The other three jurisdictions with rules of conduct: Victoria, Tasmania, and the Northern Territory, vary in their approach. Victoria does not prescribe a knowledge requirement. Tasmania provides that a contravention of the Act, regulations or code of conduct may constitute unsatisfactory professional conduct or professional misconduct.²⁸ An agent not keeping informed and up to date about the Act, regulations, the code of conduct and any other legislation which affects the agency business may also be guilty of unsatisfactory professional conduct.²⁹

The Northern Territory has two relevant provisions.³⁰ An agent must have knowledge of the Act, the regulations and rules of conduct as well as thorough knowledge of the practices and procedures of government offices relevant to transactions in which they are involved. The other is a general provision applying to all agents that they shall comply with the rules of practice of the Real Estate Institute of the Northern Territory.

Discussion 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.

3.2 Fiduciary obligations and an agent's general duty to their client

Fiduciary duties are not imposed by statute - they exist by virtue of the relationship between the parties and the voluntary undertaking of responsibility by the agent.³¹ They are the most demanding of the standards imposed by the law of equity.³² The relationship of agent and client gives rise to a number of obligations and duties on both sides. These duties and obligations are both contractual and fiduciary. The same obligations may, however, also be specifically prescribed in legislation.³³

It is generally accepted that the relationship between a property agent and their client is a fiduciary one. But property agents fall into a different category from other agents - in the absence of an express agreement, the property agent has no power to enter into legal relationships on behalf of their client. In all jurisdictions many of the provisions in the codes or rules of conduct are simply a general statement of what are fiduciary duties. Some do, however, go into more detail.

²⁷ Rule 4 – knowledge of Act, regulations and Code; Rule 20 - ignorance no excuse.

²⁸ Property Agents and Land Transactions Regulations 2006 Schedule 2 Code of Conduct, r3 and 13(f).

²⁹ Schedule 2, r 12(h).

³⁰ Agents Licensing Regulations Schedule 4 Rules of conduct, r 6 and 7.

³¹ Edelman J, *When Do Fiduciary Duties Arise?*, *Law Quarterly Review*, Vol. 126, pp. 302-327, 2010.

³² Rosemary Teele Langford, *High Court of Australia on Fiduciary Theory in Sampford C, Coghill K and Smith T, (2012) Fiduciary Duty and the Atmospheric Trust*, Ashgate Publishing Ltd.

³³ For example, s64 of the REBA Act – conflict of interest of agents.

What is a fiduciary?

The relationship between property agents and their clients places agents in a position of trust, confidence and responsibility in which their primary duty is to act in the best interest of their client. Fiduciaries are under a strict duty to act in the best interests of the person to whom the duty is owed, to the exclusion of their own interests, and are required to avoid circumstances in which there is the possibility of those interests conflicting. The fiduciary is accountable for any benefit acquired by virtue of their position.

It is well established that an agent's duty of disclosure can, however, outweigh the duty to act in the client's best interest and there are various provisions in the codes of conduct and case law specifying such a duty.³⁴ For example, the general duty in the codes of conduct is that an agent must act in the best interest of their client unless unlawful to do so (unreasonable or improper). An agent must be fair and reasonable to all parties and must not mislead or deceive any party in negotiations or a transaction. An agent has an obligation to disclose material facts. The ACL also prohibits false or misleading conduct or conduct that is likely to mislead or deceive.

General fiduciary duties

Loyalty	<ul style="list-style-type: none">• Owes undivided loyalty to the client and must put the client's interest above their own• Must not put himself in a position of conflict without informed consent• Must not make a profit from their position without informed consent• Must act in the best interests of the client• Must act in good faith• Must disclose to the client any information they receive that may benefit the client's position in a negotiation (disclosure)• Must obey all lawful orders that the client gives them (obedience)
Care	<ul style="list-style-type: none">• Must use all their skills to the best of their ability on behalf of the client
Confidentiality	<ul style="list-style-type: none">• Must keep confidential any information given to them by or about their client, their business, financial, personal affairs or motivation. The duty lasts forever.
Accounting	<ul style="list-style-type: none">• Must account for all funds entrusted in them and not combine client/customer funds with their own personal and/or business funds

In summary, the property agent 'stands beside' the client (normally the vendor for real estate agents) as more than a mere representative. While stopping short of 'stepping into the shoes' of the client, the agent owes the client undivided loyalty, is bound to follow the client's instructions, act in the client's best interest, fully disclose anything material to the client, and not to divulge confidential information to a third party.

Is there a problem that requires the government to intervene?

The difficulty with the duty to act in the 'best interests' of another and of 'to act in good faith' is not in understanding it as part of an express or implied fiduciary undertaking, rather, the problem is that the duty is extremely vague.

In one sense the duty of good faith is an obligation imposed on every person, fiduciary or not. Honesty is a duty of universal obligation. This obligation exists

³⁴ Real estate code of conduct, articles 4, 6, 7, 9, 10; also the Gonzales case – *Hinton & Ors v Commissioner for Fair Trading* (GD) [2007] NSWADTAP 17; see also 3.2.3 to 3.2.5 below.

independently of contract or of special obligation whenever a person intervenes in the affairs of another.³⁵ It is the obligation not to act dishonestly that is imposed by law.

However, when reference is made to a fiduciary duty of 'good faith', courts usually mean to refer to a broader duty than the imposed duty of honesty. The fiduciary duty of good faith has been described as incapable of precise definition but as a duty which requires candid, reasonable, honest and forthright action.

What is the main purpose of prescribing fiduciary duties?

Fiduciary duties are not imposed by law - they exist by virtue of the relationship between the parties and the voluntary undertaking of responsibility by the agent. The objective of prescribing the fiduciary duties an agent owes to their client in codes of conduct is to emphasise and remind agents of their existence and to provide guidance to overcome their general vagueness. By doing so, the aim is to:

- reduce harm to consumers due to an agent inadvertently breaching those duties through lack of knowledge or information; and
- ensure that the disciplinary sanctions for breaches of the obligations are effective, which can only be done through statutory regulation.

Due to the various elements of fiduciary obligations currently being under different headings in the codes of conduct, an area of improvement would be to organise and perhaps merge some of the elements into a more concise and unambiguous set of provisions.

Options

What are the options to deal with the problem?

Option 1 – Specific prohibition in the Act that provides a clearly stated overarching duty in legislation requiring compliance with certain fiduciary duties; such as currently exists in relation to conflict of interest. Such a provision in the legislation would then give power to make more detailed conduct requirements in the regulations or code of conduct.

Option 2 - Specific prohibition in a code of conduct as an alternative to having it in an Act. Clearly articulating the obligation of agents, that is enforceable, would give effective guidance to regulators, agents and consumers on the policy intent and compliance requirements of the obligation. It would also establish clear performance standards by detailing how agents should act and imposing punitive sanctions for non-compliance. Consumer confidence in the property industry is also part of the policy intent of the regulatory regime and would potentially be enhanced through such provisions.

This option would, however, need to ensure that code of conduct provisions do not exceed the powers given in the Act to make them.

Option 3 – No specific prohibition and leaving breaches of fiduciary duty to be dealt with under the common law in equity. A fiduciary will be held to be accountable for any benefit or gain acquired through breach of his or her duty, but the nature of the remedy awarded will vary according to the circumstances of the case; constructive trust, account of profits, damages or equitable compensation.

Many areas of law, e.g. corporation's law, contract law, and consumer protection law, have protected people from the unethical conduct of others for many years. The fact that no actual code of conduct exists does not prevent a court or tribunal from

³⁵ See Edelman J, *When Do Fiduciary Duties Arise?*, *Law Quarterly Review*, Vol. 126, pp. 302-327, 2010.

applying ethical principles in judgment. It is arguable, therefore, that the risk to the public of using service providers who are not subject to a code of conduct would be minimal where the grounds for complaint are sufficiently broad to include unethical behaviour.

This option also involves leaving it to self-regulation with obligations being set out in an industry code of practice or leaves it for individual agencies to develop protocols.

Existing arrangements

The fiduciary duty as the agent for a client requires that a property agent must be loyal and keep the client's best interests ahead of those of any other party, including the agent themselves.

Fiduciary obligations – general issues for consideration

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.
 - 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.
- 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?
- 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.

3.2.1 Avoid conflicts of interest (without informed consent)

The law currently provides that the ONLY way for a fiduciary to enter into an arrangement where there might be a conflict of interest and duty or some benefit arrived at through the fiduciary position is with the informed consent of the client/s. This places a heavy emphasis on the need for disclosure, so as to provide for informed consent based on full and relevant disclosure of all information pertinent to the transaction and, if need be, to provide some adequate explanation of that information. However, the duty of disclosure does not extend to facts the fiduciary is unaware of, even though enquiry might reveal such.

Land valuers

In Western Australia, the Licensed Valuers' Code of Conduct deals with conflict of interest in several provisions. In particular, it prescribes that a licensed valuer shall disclose an interest of any kind in a property to be valued or developed and particulars of any conflict of interest,³⁶ and must have written consent to perform a valuation where a conflict exists.³⁷

The code of conduct also provides that a licensed valuer must not accept or continue an engagement where a conflict of interest would or does arise unless: the written particulars of the conflict are provided; and the client gives written consent to perform the valuation. The prohibition extends to where another member of the same firm is involved as an advocate in the same matter.³⁸

Examples from other jurisdictions

New South Wales and Queensland differ. The rules of conduct in New South Wales provide valuers with a guide to the professional and ethical standards expected by their clients. Some of the rules simply restate fiduciary obligations and these include avoiding conflicts of interest,³⁹ and disclosure of interest.⁴⁰

Queensland's code of professional conduct does not specifically include conflict of interest. The board may, however, take disciplinary action against a licensed valuer or refer the matter to the Queensland Civil and Administrative Tribunal (QCAT) where it considers their conduct constitutes professional misconduct or incompetence or negligence.⁴¹

In Queensland, professional responsibility includes the board's approved code, or otherwise the API code (Australian Property Institute Code of Ethics and Rules of Conduct). The API code provides specific guidance on standards of behaviour for a valuer. This includes a prohibition on acting in a matter where a conflict of interest or potential conflict of interest is identified unless all interested parties have been made aware of the conflict and consented to the valuer continuing to act.⁴²

Real estate agents

In Western Australia, an agent must not accept an engagement to act, or continue to act, where to do so would place their interest in conflict with that of their client.⁴³ An agent is also restricted from acquiring an interest in a property they are engaged to sell or lease without first obtaining written consent from the client. Additionally consent must also be obtained before they may take commission.

There are some real estate and business agents in Western Australia that have a direct financial interest in a settlement agency. Such circumstances have become known as tied settlement agents. In these circumstances it is common to recommend their client, or the purchaser, appoint the tied settlement agency to complete settlement on the transaction. The convenience that this provides to consumers in what can be a complex and daunting process is a major incentive for them to agree to such an arrangement.

Previously stakeholders have had mixed views on whether a settlement agent should be prohibited from acting in a transaction where they are also the real estate agent.

³⁶ 1.5(d) and (e)

³⁷ 2.4, 2.6, and 2.9.

³⁸ 2.9.

³⁹ Rules of Conduct, r10.

⁴⁰ Rules of Conduct, 5.

⁴¹ *Valuers Registration Act 1992*, ss 50 and 51.

⁴² API Code of Ethics, 4 and Rules of conduct, rule 2.

⁴³ REBA Act s64; Code of Conduct for Agents and Sales Representatives 2011, Article 12.

The issue of tied settlement agents is dealt with in more detail below in relation to settlement agents.

Examples from other jurisdictions

Queensland, New South Wales and the Australian Capital Territory provide that an agent must not accept an appointment to act if doing so will place their duty or interests in conflict with the client's interest.⁴⁴

Tasmania also provides that an agent must not accept an appointment to act, or continue to act, for a client where to do so would place the agent's interests in conflict with that of the client.⁴⁵ Tasmania does, however, provide more detail in its provision: must not have both parties as clients; clearly explain rights and obligations before signing a client to an agency agreement; presentation of offers as soon as possible; advise person making offer as soon as possible of acceptance or rejection; must not disclose particulars of any other offers to a prospective purchaser.

Victoria simply provides that an agent must have a working knowledge of the duties and obligations of an agent towards the client.⁴⁶

Settlement agents

The Western Australian Settlement Agents' Code of Conduct prescribes that an agent must have knowledge of their duties both at law and in equity to their client.⁴⁷ In particular, an agent must be aware that their obligation to their client is one of the utmost good faith requiring their duty to the client not to be put in conflict or in likelihood of conflict with any other interest.

Before an agent is appointed they must disclose any interest to a potential client in the prescribed form.⁴⁸

An agent must make a full and frank disclosure to their client of any interests they may have in any transaction and if it is adverse to that of the client terminate their appointment.⁴⁹ Further, no licensee may act or continue to act in the settlement of a transaction if any conflict of interest arises or foreseeably could arise between the licensee and his client.⁵⁰

Generally an agent can only act for one party to a transaction. An agent may, however, sometimes act for both parties.⁵¹ This is specifically stated to be subject to section 46 of the Act (each of the parties acknowledge in writing and prior consent given) and to rule 5 (obligation to client of utmost good faith which requires him not to put his duty to his client in conflict or likely conflict with his own). Rules 7 and 9, already referred to, are also relevant.

Stakeholder consultation undertaken by the former Settlement Agents Supervisory Board showed a mixed response to whether the Act and code of conduct ought to be amended to remove the ability of a settlement agent to act for both parties to a settlement transaction.

Examples from other jurisdictions

Victoria has three relevant provisions. The Victorian rules of professional conduct prescribe that a conveyancer must comply with their fiduciary obligations, and must not accept instructions to perform or continue to perform conveyancing work for a

⁴⁴ Qld General rules of conduct, r 17 – conflict of duty or interest; NSW rule 11; ACT Regulation Schedule 8, 8.12.

⁴⁵ Regulations Schedule 2 r 10 – conflicts of interest, rights and obligations.

⁴⁶ Regulation 8- duties and obligations.

⁴⁷ Rule 5 – knowledge of legal and equitable duties.

⁴⁸ Rule 8 – disclosure of interest to potential client; Form 2 in the Schedule.

⁴⁹ Rule 6 – disclosure of interest.

⁵⁰ Rule 9 – conflict of interest.

⁵¹ Rule 7 – when licensee may act for both parties.

client if to do so would place their interest in conflict with those of the client.⁵² A conveyancer is also prohibited from acting for more than one party to a transaction unless each party consents in writing and neither party will have their interests compromised.⁵³

New South Wales has the same three provisions regarding: compliance with fiduciary duties; not acting when there is a conflict of interest; and not acting for more than one party to a transaction except in the limited circumstances described.⁵⁴

The Northern Territory rules require agents not to act for two or more parties with conflicting interests in a transaction unless they have given notice in writing and the interests may not be the same.⁵⁵ There is no requirement for consent of the parties. However, where a conflict arises the agent must cease to act.

Tasmania deals with conflict matters by prescribing that an agent must discharge their legal and professional obligations to their client, requiring disclosure and written consent for acting where a conflict of interest, and cease to act where interest is adverse to the client.⁵⁶

Tied settlement agents

During the settlement process, circumstances may arise where the interest of the real estate agent, in seeking to ensure settlement of the transaction proceeds, may conflict with the interest of the client of the settlement agent. That is, where it is not in the best interest of the settlement agent's client for settlement to proceed. The complexity arises where the settlement agency is owned or controlled by the real estate agent.

In relation to this issue of tied settlement agents, the fiduciary relationship owed by the settlement agent to their client is one of loyalty; they have a no-conflict duty. However, this duty is not unqualified – a settlement agent may act in a conflict situation where they have the client's informed consent to the settlement agent continuing to act.

While the existence of tied settlement agents may more readily give rise to a conflict of interest, they will not come into a position of conflict in every case in which they act where the relevant real estate agent has an interest. By way of illustration, there are many uncomplicated property transactions or transactions where nothing untoward occurs between the sale contract being signed and its completion. In any event, a tied settlement agent is bound to comply with the relevant regulatory provisions.⁵⁷ Where it is proposed that a tied settlement agent will act on the settlement of a property transaction negotiated by an interested real estate agent the settlement agent must first give the specified notice in writing (Form 2).⁵⁸

When things go wrong during the settlement process involving a tied settlement agent, the real estate agent's financial interest in the settlement of the transaction proceeds, by way of prospective commission, can affect the position of the settlement agent. The settlement agent will have a personal interest in assisting the real estate agent to secure the commission. Depending on the circumstances, this personal interest may give rise to a conflict with the tied settlement agent's duty to their client.

⁵² Rules 3 and 9.

⁵³ Rule 10.

⁵⁴ Rules 4, 11 and 12.

⁵⁵ Schedule 4 Part 2 r7.

⁵⁶ Rules 2, 12 and 13.

⁵⁷ See sections 46 and 47, rules 5, 6, 8 and 9, and Forms 1 and 2.

⁵⁸ Rule 8(1) .

The decision of the State Administrative Tribunal in the *Settlement Agents Supervisory Board and Crozet Pty Ltd*⁵⁹ is instructive on tied settlement agents and conflicts of interest. The case does not stand for there being a conflict whenever a settlement agent is associated with a real estate agent in the transaction. Factors affecting whether a conflict arises include: the level of association, role of the settlement agent in both agencies, and the interest they have in the transaction. It appears that generally, however, no conflict of interest arises where the real estate agent is not also in bona fide control of the settlement agency.

The *Crozet* decision was directed at circumstances where a director of a licensed real estate agency was also the director and person in bona fide control of the settlement agency engaged. The director therefore stood to gain commission and a settlement fee on finalisation of the transaction. The case also involved two transactions – the main transaction and also a buy-back transaction. There was no Form 2 (disclosure of interest) for the first transaction and no Form 1 (appointment to act) or Form 2 for the second transaction.

In these circumstances, the starting out position in this case is that the settlement agent and the real estate agency are separate entities, and that whatever the interest of the real estate agency is in a particular transaction, cannot automatically be equated with, or treated the same as, that of the settlement agent who is instructed to carry out the settlement, just because they share a common director. The position might be different if there is some positive law to the contrary. (In this context, r 8 of the Code of Conduct is of some relevance in that it creates special rules of conduct in certain cases requiring notice of interest to be given by a settlement agent who is in prescribed relationships with the real estate agent who effected the sale).

It may well be that the settlement agent in this case was, at all material times, contractually bound by its arrangements with the vendor, Mr Smith, to pay the real estate agency its commission upon settlement of the transaction effected. However, this obligation to pay commission would ordinarily arise under the arrangement with the vendor, not by reason of an enforceable arrangement or other relationship between the settlement agent and the real estate agency.⁶⁰

Crozet was decided on its particular facts and it was the failure to complete Forms 1 and 2 that was crucial to the decision.⁶¹ Specifically, at no time did the settlement agent have the fully informed consent of their client to act and to proceed to settlement notwithstanding the conflict of interest it had by reason of the commission payable to the real estate agency.

The previous consultation process undertaken by the former Settlement Agents Supervisory Board sought feedback on whether an amendment to the Act and code of conduct to prohibit a settlement agent from acting in a transaction where they are also the real estate agent was supported. As referred to above, there were different views on this matter. For example, some respondents consider that real estate agents should be prohibited from owing, controlling or having an interest in any licensed settlement agent. For others it was considered a restriction of competition in the market place and a prohibition on tied agencies was not supported. Other respondents did not support a prohibition as they considered that appropriate legislative protection already exists. Forms 1 and 2 could, however, be improved to clarify what may constitute a conflict of interest and how a party may be disadvantaged.

Examples from other jurisdictions

Both New South Wales and Tasmania prohibit tied settlement agencies. There appears to be no prohibition in the Northern Territory or Victoria.

In New South Wales, a licensee who conducts a conveyancing business, or who is employed in the conduct of a conveyancing business, is prohibited from conducting,

⁵⁹ *Settlement Agents Supervisory Board and Crozet Pty Ltd* [2006] WASAT 65.

⁶⁰ *Crozet* decision at paragraphs 66-67.

⁶¹ See *Crozet* decision at paragraphs 99, 101 and 113.

or being employed in the conduct of, the business of an agent (within the meaning of the *Property, Stock and Business Agents Act 2002*).⁶²

In Tasmania, a conveyancer is prohibited from being employed in, or carrying on the business of, a real estate agency or the business of mortgage-brokering.⁶³

Discussion Q 4

- a) Is there unnecessary duplication or inconsistency of the relevant enabling Act in its code of conduct?
- 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).
- 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.
- 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)?
- 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.
- 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.
- g) Are there any changes you feel are necessary to the Settlement Agents' Code of Conduct Schedule Forms 1 and 2?
- h) Are there any other changes to the conflict of interest conduct requirements you think need to be made?

3.2.2 Must not accept secret commissions; third party referrals and benefits

The fiduciary relationship between an agent and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the agent of any hidden fees or benefits.

A common feature of the different jurisdictional laws is that fees and commissions from a third party are generally prohibited unless the client is fully aware of the existence of that arrangement, and has given their written approval. Additionally, an agent is not permitted to profit at the expense of their client. For example, kickbacks,

⁶² Section 28 of the *Conveyancers Licensing Act 2003*, and r 9 of the *Conveyancers Licensing Regulation 2006*.

⁶³ Section 16 of the *Conveyancing Act 2004* and r 10 of the *Conveyancing Regulations 2005*.

spotter's fees, and rebates while acting on behalf of a client are all generally prohibited. Certain types of commissions are unlawful; such as accepting secret commissions or kickbacks.⁶⁴ They are offences under the criminal law.⁶⁵

There are two main concerns regarding agents receiving benefits, whether financial or otherwise, from third parties. First, it is the duty of the agent to refer clients to the best person for the work – not the one that pays them. And second, clients engage agents for objective unbiased advice. If the agent is getting a kick-back from the other person then the objectivity of advising the client to use the other person's services is questionable.

Information an agent gives a client about costs and commissions must be accurate and reflect the true price of the services provided. The objective of requiring disclosure of rebates and commissions is to promote agent transparency and accountability so that a client is fully aware of any arrangements. It also serves to reduce behaviour by agents, which at its best may be considered self-serving and at its worst fraudulent.

Two important issues arise about dealing with agents' rebates or whatever term is used to describe the financial gain: disclosure – what must be disclosed and how; and retention – whether the gain may be retained or not and in what circumstances.

Land valuers

There are no specific prohibitions in any of the jurisdictions' codes of conduct. Under the API Rules of conduct⁶⁶ members are prohibited from paying commission, allowance or other benefit to a person for introducing clients without appropriate disclosure. Members are also prohibited from accepting payment or favours from another party which may affect their relationship with their client.

Real estate agents

Real estate agents are often asked by vendors and purchasers to refer them to other service providers, such as a local solicitor, conveyancer, building inspector or mortgage broker, to assist them with the process of buying or selling land. Agents must, however, remember that they have a fiduciary relationship with their clients and their dealings with their clients must be free of any conflict between their own interests and that of their clients. While the referral and acceptance of a fee or benefit from the service provider for the referral may seem innocent, agents need to pay particular attention to their legal obligations of disclosure.

In Western Australia an agent must make a written disclosure to the party of any significant relationship, connection or affinity between the agent and the supplier of services recommended.⁶⁷ An explanation of the nature of the potential conflict is also required.

Other provisions relating to restrictions on commissions and other benefits and reward for services fall within this component.⁶⁸ In particular, an agent is prohibited from accepting or demanding any commission from another person for any service performed by the agent when they are entitled to receive it from the client. Further,

⁶⁴ A secret commission is any fee or other benefit an agent receives from a third party; The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly to someone in return for facilitating a transaction or appointment; kickback *noun* bribe, payoff, backhander (*slang*), enticement, share, cut (*informal*), payment, gift, reward, incentive, graft (*informal*), sweetener (*slang*), inducement, sop, recompense: [Collins Thesaurus of the English Language](#) – Complete and Unabridged 2nd Edition. 2002 © HarperCollins Publishers 1995, 2002

⁶⁵ *The Criminal Code* ss 529-538 – Corruption of agents, trustees, and others in whom confidence is reposed.

⁶⁶ Rule 1 – 1.8 and 1.9.

⁶⁷ WA Code of conduct art.18 – disclosure when recommending.

⁶⁸ Articles 15 and 16.

an agent may only obtain a discount or rebate relating to a service in connection with the transaction if the client has given written consent having been fully informed.

Examples from other jurisdictions

New South Wales and the Australian Capital Territory provide that an agent must not falsely represent a service provider is independent.⁶⁹ They prescribe that where a service provider is not independent then the nature of the relationship and the nature of the value of any benefit the agent receives must be disclosed. Queensland also has a similarly worded provision.⁷⁰ New South Wales also prohibits an agent from demanding or accepting a fee or other valuable consideration for referring a client to a buyer's agent.⁷¹

The Northern Territory prohibits an agent having an interest or likely interest in a transaction entered into on behalf of their client if they fail to disclose the exact nature of the interest to their client.⁷² Another relevant provision in both the Northern Territory and the Australian Capital Territory prohibits an agent from accepting or demanding a fee or other payment from a person other than their client for a service performed by the agent when they are entitled to receive it from the client.⁷³

Settlement agents

The position of settlement agents is similar to that of a real estate agent in relation to referrals to service providers. The SA Act prohibits an agent from giving or receiving any reward for referring any business involving the performance of the functions of a settlement agent.⁷⁴ The code of conduct covers the same behaviour under more general provisions dealing with conflict of interest and misleading or deceptive conduct.⁷⁵

Examples from other jurisdictions

Victoria and New South Wales both stipulate in their rules that an agent must not falsely represent a service provider is independent. If not independent, they must disclose the nature of the relationship and details of the benefit the agent expects to receive from the referral.⁷⁶

Australian Consumer Law

There is an overlap with parts of the ACL provisions relating to misleading or deceptive conduct, unconscionable conduct, unfair contract terms, and unfair practices that will apply to the conduct of property industry participants.⁷⁷ Consideration, therefore, needs to be given to whether there is already sufficient coverage under the ACL.

⁶⁹ NSW *Property, Stock and Business Agents Act 2002* s47, Schedule 1 rule 12 – referral to service provider; ACT schedule 8, r8.13.

⁷⁰ Rule 26.

⁷¹ Schedule 2 r7 (general), schedule 4 r6 (business agent), schedule 5 r6 (buyers agent).

⁷² Section 65(1)(e).

⁷³ NT Section 65(1)(k); ACT regulations schedule 8 – r8.31, 8.46 and 8.62

⁷⁴ SA Act section 44(6) and (7) and (8).

⁷⁵ Rules 5, 6, 15 and 16; but note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73, paras 47-49

⁷⁶ Vic r13; NSW r15.

⁷⁷ See page 8 above.

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)?

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

3.2.3 Act in the best interest of the client

Land valuers

The Western Australian Licensed Valuers Code of Conduct does not specifically prescribe acting in the best interest of the client. The obligation is, however, inherent in other provisions: for example those relating to honesty and integrity and conflicts of interest.⁷⁸

Examples from other jurisdictions

New South Wales is similar to Western Australia and does not specifically prescribe the obligation. Queensland's code of professional conduct does. It provides that a registered valuer must act in the client's interest and must not do anything that benefits the valuer or another person without benefiting the client or disadvantage the client.⁷⁹

Real estate agents

The Western Australian Real Estate Code of Conduct prescribes that an agent must act in the best interests of their client except where it would be unreasonable or improper to do so.⁸⁰ That is, this obligation is circumscribed by other duties relating to honesty and fairness requirements.

Examples from other jurisdictions

The New South Wales rules provide that an agent must act in the client's best interest at all times unless it would be contrary to the Act or regulations under the Act or otherwise unlawful to do so.⁸¹ The requirements in the Australian Capital Territory are similar and the Queensland code provides that an agent must act in a client's best interest unless it is unlawful or unreasonable to do so.⁸² The Victorian provision uses the same words, but also includes prohibitions on acting where there is a conflict of interest and misleading or deceptive conduct.⁸³

Queensland's code also states the agent is to ensure that the customer is aware the agent is acting for the client and prohibits an agent inducing a customer to believe that the agent is acting for the customer. The agent is obliged to warn a customer,

⁷⁸ Rules 1.3 and 2.4.

⁷⁹ Valuers Registration Regulation 2003, Rule 3.

⁸⁰ Article 4 – general duty to principal.

⁸¹ Schedule 1 Rule 6 – to act in client's best interest.

⁸² ACT Schedule 8, r8.7 – to act in client's best interests; Qld r9 – agent to act in client's best interests.

⁸³ Reg 7.

as soon as possible, that any information disclosed to the agent may be disclosed to the agent's client.⁸⁴

The Northern Territory rules of conduct are contained in the Agents Licensing Act⁸⁵ but do not specifically refer to acting in the client's best interest. Instead it provides for other more specific matters such as full disclosure of material facts, perform duties and carry out lawful instructions, and confidentiality. Another rule provides that an agent must inform their client if a price or other consideration which they are prepared to accept on the sale of any property may be less than the fair market value.⁸⁶

The Tasmanian code uses different wording and combines best interest with honesty and fairness. It provides that an agent must at all times accept that their first responsibility is service to the client whom they represent and, while serving those interests must act fairly, honestly and in a reasonable manner towards all other persons in connection with the client's business.⁸⁷ The Tasmanian code also includes not acting in the best interests of a client as an example of behaviour that might constitute unsatisfactory professional conduct.⁸⁸

Settlement agents

The Western Australian Settlement Agents' Code of Conduct has no specific provision stipulating that an agent must act in the client's best interest. Other provisions deal with the obligation; for example the requirement to have knowledge of legal and equitable duties, and disclosure of interests.⁸⁹

Prescribed forms for the appointment of a settlement agent and disclosure of interest are included in the schedule of the code of conduct.

Examples from other jurisdictions

In Victoria, the relevant rule stipulates that an agent must act in the client's best interest and according to the client's instructions at all times unless it would be contrary to the Act, regulations or otherwise unlawful to do so.⁹⁰

The New South Wales rules include a provision that an agent must act in the client's best interest unless unlawful.⁹¹ In the Northern Territory an agent is required to perform their duties in a diligent and conscientious manner with proper regard to the relationship of client and agent due to the client.⁹²

Tasmania has no specific provision but other conduct provisions require an agent to at all times serve clients to the best of their ability and to discharge their legal and professional obligations to the client.⁹³ Other provisions dealing with avoiding conflicts of interest also deal with the best interest of the client obligation.

⁸⁴ Qld Rules specific to real estate agents, r25 – disclosure to customer that agent is the client's agent.

⁸⁵ Section 65 – rules of conduct.

⁸⁶ Section 65 (1)(g).

⁸⁷ Schedule 2 r6 – responsibility of property agent to client.

⁸⁸ Schedule 2 r12(b).

⁸⁹ Rule 6, 6A and 8.

⁹⁰ Rule 6.

⁹¹ Rule 7.

⁹² Schedule 4 Part 2 r2.

⁹³ Practice of conveyancing rules 1 and 2.

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

3.2.4 Act with honesty and fairness

This part covers conduct such as honesty and fairness, misleading or deceptive conduct, and high pressure tactics, harassment or harsh or unconscionable conduct.

Land valuers

The Western Australian Licensed Valuers Code of Conduct prescribes that a licensed valuer shall act at all times with honesty and integrity.⁹⁴ It also goes on to prohibit an agent from advertising their services, skills or experience in a manner that is false or misleading.⁹⁵ There is a further prohibition on accepting instructions where the result or finding is predetermined.⁹⁶

Examples from other jurisdictions

The relevant provision in New South Wales requires a valuer to act honestly, fairly and professionally in the course of practice as a valuer.⁹⁷ Queensland's code similarly provides for high standards of competence, honesty, loyalty, integrity and fairness at all times. Queensland also prohibits predetermined results of valuations.⁹⁸

Real estate agents

All jurisdictions' codes and rules include an honesty and fairness provision. Provisions dealing with advertising, disclosures and transaction details also fit within this component as they generally deal with fairness and honesty issues such as false, or misleading or deceptive conduct.

The Western Australian Real Estate Code of Conduct prescribes that an agent must act fairly and honestly.⁹⁹ The same provision provides that an agent must not knowingly mislead or deceive, or engage in harsh or unconscionable conduct. In conjunction with the ACL, Article 10 is also relevant to acting honestly and fairly as it requires mandatory disclosure of material facts.

Examples from other jurisdictions

In Victoria, the relevant provision prescribes that an agent must at all times, in the conduct of his or her profession, act fairly and honestly and to the best of his or her knowledge and ability.¹⁰⁰

⁹⁴ Rule 1.3(b).

⁹⁵ Rule 2.2

⁹⁶ Rule 2.3.

⁹⁷ Regulation 6 – honesty, fairness and professionalism.

⁹⁸ API rules of conduct , r1 – professional and personal conduct; r8.

⁹⁹ Article 7 – duty to behave fairly.

¹⁰⁰ Regulation 6 – fairness and honesty.

New South Wales, Queensland and the Australian Capital Territory have similar provisions. New South Wales and the Australian Capital Territory provide an agent must act honestly, fairly and professionally with all parties in a transaction and must not mislead or deceive any parties in negotiations or a transaction.¹⁰¹ Queensland says an agent must act honestly, fairly and professionally in the conduct of a real estate agency practice and to treat customers honestly and fairly.¹⁰² These jurisdictions also have provisions prohibiting high pressure tactics, harassment or unconscionable conduct, and soliciting through false or misleading advertisements or communications.¹⁰³

In the Northern Territory, the Act prohibits false or misleading or deceptive conduct in advertising.¹⁰⁴ The rules of conduct also cover fairness and honesty generally by prescribing that an agent must have due regard to the rules of real estate practice of the REI of the Northern Territory and guidelines concerning fair trading practices issued by the Trade Practices Commission (as it was then called, but now the Australian Competition and Consumer Commission).¹⁰⁵

In Tasmania, the rules provide that an agent must not, in respect of any transaction undertaken for a client, knowingly convey an impression that is false or misleading or knowingly make a false representation, and must not engage in harsh or unconscionable conduct.¹⁰⁶ Tasmania includes not acting honestly or acting fraudulently as an example of professional misconduct.¹⁰⁷ It also includes a property agent engaging in high pressure tactics or harassment in the conduct of their agency business as an example of unsatisfactory professional conduct.¹⁰⁸

Other examples of unsatisfactory professional conduct fall within the category of dishonesty; such as misrepresenting a prospective purchaser's intention to obtain a renewal of an agency agreement.

Settlement agents

All jurisdictions' codes and rules include honesty and fairness provisions. Provisions generally deal with fairness and honesty issues such as false, or misleading or deceptive conduct.

The Western Australian Settlement Agents' Code of Conducts has two relevant provisions.¹⁰⁹ The first provides that an agent must carry out all services efficiently, honestly and without concealment or any form of deception or misleading representation. The second prohibits an agent from engaging in any harsh or unconscionable conduct discreditable to him or likely to bring settlement agents into disrepute.

Examples from other jurisdictions

In New South Wales, Victoria and Tasmania the rules state that a licensee must act honestly, fairly and professionally with all parties in a transaction.¹¹⁰ Victoria's includes that an agent must not misinform or otherwise mislead or deceive any parties in negotiations or a transaction. Tasmania's provision includes not engaging in conduct designed to mislead, deceive or intimidate.

¹⁰¹ NSW Schedule 1 rule 3 – honesty, fairness and professionalism; ACT Schedule 8, 8.4; see also the Guidelines issued by the Commissioner for Fair Trading in July 2008 in relation to misrepresentation offences.

¹⁰² Schedule Real Estate Agency Practice Code of Conduct r7 – honesty, fairness and professionalism.

¹⁰³ NSW Schedule 1 general rules, r5; and r15; Qld General rules of conduct, regulations 14, 15 and 18; ACT schedule 8, rules 8.6, 8.16.

¹⁰⁴ Section 65 (1)(i) and (j).

¹⁰⁵ Schedule 4 – general rules, r5.

¹⁰⁶ Rule 7(g) and (h), see also rule 9 regarding advertising and marketing.

¹⁰⁷ Schedule 2, r13(e).

¹⁰⁸ Schedule 2, r12(g).

¹⁰⁹ Rules 15 and 19; but note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73, paras 47-49.

¹¹⁰ NSW r2; Vic r1; Tas rules of conduct – duty to act with honesty, fairness, courtesy and professionalism.

The Northern Territory wording differs in that it requires an agent to strictly observe promises and duties to their client and be aware that their obligation is one of the utmost good faith that requires the agent not to put their own or anyone else's interests in conflict with the client.¹¹¹

Tasmania's rules also cover advertising.¹¹² This provision prohibits false, misleading or deceptive advertisements and that they must also not make comparisons with another agent or of a nature to bring the profession into disrepute. Another provision covers an agent's duty to maintain professional standards, which includes acting in accordance with legal requirements and to protect the profession's integrity.¹¹³

Victoria and New South Wales both include a provision that prohibits false or misleading advertisements or communications.¹¹⁴

Australian Consumer Law

There is an overlap with the parts of the ACL in relation to acting fairly and honestly. Unfair business practices cover misleading or deceptive conduct, false or misleading representations, unconscionable conduct, and harassment and coercion.¹¹⁵ For example, under sections 18 and 19 of the ACL misleading and deceptive conduct, a business can break the law by failing to disclose relevant facts to a customer. Consideration, therefore, needs to be given to whether there is already sufficient coverage under the ACL regarding communicating facts ascertained to relevant persons so that it is unnecessary to duplicate it in the codes of conduct.

The High Court of Australia has found remaining silent can be considered misleading or deceptive in certain circumstances.¹¹⁶ Whether silence is misleading or deceptive is a complex matter and will depend on the circumstances of each case.¹¹⁷ The ACL guide on unfair business practices outlines when silence can be considered as misleading and deceptive, including:

- one person fails to alert another to facts known only to them, and the facts are relevant to the decision;
- important details a persons should know are not conveyed to them; or
- a change in circumstance meant information already provided was incorrect.

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?

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

¹¹¹ Schedule 4 Part 2 r1.

¹¹² Rules of conduct – advertising.

¹¹³ Rules of conduct – duty to maintain professional standards.

¹¹⁴ Vic rule 14; NSW rule 17.

¹¹⁵ See page 9 above.

¹¹⁶ *Explanatory Memorandum, Fair Trading Bill 2010, p.44*

¹¹⁷ *A guide for businesses and legal practitioners* developed by consumer protection agencies – one of six guides to the ACL - *Avoiding unfair business practices: A guide for businesses and legal practitioners.*

3.2.5 Exercise skill, care and diligence

Land valuers

The Western Australian Licensed Valuers Code of Conduct prescribes that a licensed valuer shall carry out valuation work with diligence and competence in accordance with the accepted principles and practices of valuation.¹¹⁸ It also proscribes that a licensed valuer must not accept instructions, or continues, to perform a valuation beyond their competence unless they engage another licensed valuer with the competency to assist and is with the client's prior written consent.¹¹⁹

Examples from other jurisdictions

The New South Wales rules of conduct prescribe that a valuer must exercise reasonable skill, care and diligence in the course of practice as a valuer.¹²⁰

Real estate agents

The conduct rules in all jurisdictions specify that an agent must exercise due skill, care and diligence.

The Western Australian Real Estate Code of Conduct simply prescribes that an agent must exercise due skill, care and diligence.¹²¹ It does not distinguish between the client and any other person. Nor does it elaborate so as to give guidance on what is meant.

Other articles do, however, provide some further skill, care and diligence requirements. For example, an agent must make all reasonable efforts to ascertain or verify facts material to the transaction and must promptly communicate them to any person who may be affected.¹²²

An agent must also promptly obtain a copy of the certificate of title, and undertake reasonable identity verification steps so as to minimise the risk of property fraud.¹²³ Further, an agent must communicate all written offers to their client as soon as practicable.¹²⁴

Examples from other jurisdictions

All jurisdictions have provisions falling within the skill, care and diligence component. The rules in New South Wales and the Australian Capital Territory simply say that an agent must exercise reasonable skill, care and diligence.¹²⁵

The Northern Territory rules of conduct provide that an agent breaches the rules of conduct if they fail to exercise due skill, care or diligence in carrying out their duties on behalf of his principal or when dealing with any person whomsoever in the course of conducting business as an agent.¹²⁶ Falling within this component is a rule that prescribes full disclosure of all material facts and circumstances and of everything known to the agent regarding the matter they are acting as agent for.¹²⁷

Victoria and Queensland both provide that an agent must exercise skill, care and diligence in the conduct of his or her profession; and must complete all work on

¹¹⁸ 1.3(a).

¹¹⁹ 2.7.

¹²⁰ Rules of conduct r7.

¹²¹ Article 9 – standard of service.

¹²² Article 10.

¹²³ Article 10; see also the Department's guidance notes 1-3.

¹²⁴ Article 14.

¹²⁵ NSW Schedule 1 r4 – skill care and diligence; ACT schedule 8, r8.5.

¹²⁶ Section 65(1)(d) and (da).

¹²⁷ Section 65(1)(f).

behalf of a client as soon as reasonably possible.¹²⁸ The Victorian provisions also require an agent to make reasonable enquiry to ascertain relevant information, to communicate all offers as soon as possible, and to inform the client in writing if the time has passed without the deposit being received.¹²⁹

Another requirement falling within this component in Queensland, similar to Western Australia, is that, before listing a property, an agent must take reasonable steps to find out or verify the property ownership and description and finding out or verifying material facts.¹³⁰

Under its information disclosure provision, Tasmania prescribes that an agent must exercise due skill, care and diligence in carrying out their duties for a client, and must ascertain all pertinent facts concerning a transaction and disclose to the client as soon as practicable.¹³¹ The Tasmanian code provides that an agent consistently or substantially failing to reach reasonable standards of competence and diligence constitutes professional misconduct.

Provisions in New South Wales, Victoria, Tasmania and the Australian Capital Territory all prescribe that an agent must communicate all written offers to their client as soon as practicable/possible (unless instructed otherwise).¹³² The New South Wales provision also states that if an agent is not going to inform the client of an offer, the agent must inform the person who made the offer that the offer will not be submitted to client.

In Tasmania the code of conduct further provides that the agent must inform the prospective purchaser whether the client has accepted or rejected the offer. The Tasmanian code also states that an agent must not disclose to a prospective purchaser particulars of any other offers to purchase the property.

The Queensland code of conduct requires agents to keep their client informed that, unless otherwise directed, they must immediately communicate to their client each EOI of interest, whether written or oral, about the sale, purchase, exchange or lease of property.¹³³

Settlement agents

The Western Australian Settlement Agents' Code of Conduct requires a licensee to keep a client fully informed about all available pertinent facts concerning any service or transaction,¹³⁴ and for work to be done quickly and well, which includes using due care and skill.¹³⁵ But note the construction given to 'a licensee' by the State Administrative Tribunal in *Settlement Agents Supervisory Board v Dawn Lorraine Watson* [2011] WASAT 73.

The requirements about recommending a client seek legal advice also fall within the category of skill care and diligence.¹³⁶ The requirement is also incorporated into other provisions. For example, the code of conduct provides that an agent must carry out certain duties as soon as reasonably practicable after receiving instructions.¹³⁷ Included in this provision is the requirement for an agent to make all reasonable efforts to verify the identity of the person seeking to dispose of the property.

¹²⁸ Vic Regulation 11 – good estate agency practice; Qld general rules of conduct r8.

¹²⁹ Reg 15, 18 and 31.

¹³⁰ Rule 22 and 23.

¹³¹ Rule 7 (d) and (f).

¹³² NSW Schedule 2 r2; Vic r18; Tas r10(d), (e) and (f); ACT Schedule 8 8.22.

¹³³ Rule 11.

¹³⁴ Rule 16.

¹³⁵ Rule 18.

¹³⁶ Rules 11 and 12.

¹³⁷ Rule 10.

Examples from other jurisdictions

The New South Wales' rule simply states that an agent must exercise reasonable skill, care and diligence.¹³⁸ It does, however, also prescribe that an agent must only undertake work within their competence, and to perform work promptly.¹³⁹

Victoria's rules prescribe that an agent must exercise reasonable skill, care and diligence in the performance of conveyancing work or carrying on a conveyancing business.¹⁴⁰ It also provides that an agent must only accept instructions to perform work they are competent to perform and only if they reasonably expect to be able to carry out the work reasonably promptly,¹⁴¹ and unnecessary work to be avoided.¹⁴²

The relevant rule in the Northern Territory requires that an agent complies with good conveyancing practice guidelines issued by the Board and the relevant professional conduct rules issued by the Law Society Northern Territory.¹⁴³

Tasmania has a similar provision to the Northern Territory that, while not referring to skill care and diligence, stipulates an agent's duty to maintain professional standards. It also has a rule of conduct on practice of conveyancing that includes: completing work in a competent and timely manner, only undertake work competent to perform, and to keep clients fully informed.¹⁴⁴

Australian Consumer Law

There is clear overlap with the ACL provisions under the consumer guarantees applying to services. Consumer guarantees applying to services includes a requirement of providing services with due care and skill and within a reasonable time (when no time is set). Consideration needs to be given to whether there is an unnecessary duplication of the ACL in the codes of conduct or whether industry specific regulation is needed.

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?

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

¹³⁸ Rule 3.

¹³⁹ Rules 5 and 6.

¹⁴⁰ Rule 2.

¹⁴¹ Rule 4 and 5.

¹⁴² Rule 27.

¹⁴³ Schedule 4 Part 2 r4.

¹⁴⁴ Schedule 4 Part 2 – practice of conveyancing.

3.2.6 Maintain confidentiality of information gained from the agency relationship

Confidentiality is a component of the loyalty obligation. An agent's fiduciary duty of confidentiality means that they must not disclose anything that they learn about their client, their business, financial or personal affairs or motivations without their express consent. This duty survives closing and lasts forever.

Land valuers

The Western Australian Licensed Valuers Code of Conduct has two provisions dealing with confidentiality.¹⁴⁵ The first prescribes that a licensed valuer must hold any valuation as confidential unless the client otherwise agrees in writing or unless required by law to disclose it. The second prohibits use of confidential information obtained in the course of making the valuation to the benefit of any other person besides the client.

Examples from other jurisdictions

In New South Wales, the rules of conduct deal directly with confidentiality by prohibiting disclosure of confidential information obtained while acting for a client unless it is authorised by the client or is permitted or compelled by the law to do so.¹⁴⁶

In Queensland, a registered valuer must not disclose details of a valuation or make use of the information contained in the valuation other than for the client's benefit.¹⁴⁷

Real estate agents

In Western Australia, an agent must not at any time use or disclose any confidential information obtained while acting on behalf of their client, except for information that an agent is required by law to disclose.¹⁴⁸

Examples from other jurisdictions

In the Northern Territory, an agent is prohibited from using any material or information, acquired in the course of acting for the client, in a manner that is prejudicial to the client without consent.¹⁴⁹ They must also not disclose information relating to the affairs of the client without their consent.¹⁵⁰

The rules in New South Wales prohibit an agent from using or disclosing any confidential information obtained while acting for a client or dealing with a customer unless authorised by the client or customer or allowed by law.¹⁵¹ Queensland, Victoria and the Australian Capital Territory each have a similarly worded provision.¹⁵²

The Tasmanian code of conduct incorporates various provisions about use of information into its information disclosure provision.¹⁵³ In particular, an agent must not: disclose information without consent or allowed by law; or use it in a manner prejudicial to the client without written consent.

¹⁴⁵ 1.7 and 2.5.

¹⁴⁶ Rules of conduct, r9.

¹⁴⁷ Code of professional conduct, r4; API Rules of Conduct r3 - client relationships.

¹⁴⁸ Article 13.

¹⁴⁹ Section 65(1)(b).

¹⁵⁰ Section 65(1)(h).

¹⁵¹ Schedule 1 general rules, Rule 7.

¹⁵² Qld rule 40, Vic reg 19, ACT schedule 8 r8.8.

¹⁵³ Rule 7 (under duties to client) (a) and (b).

Settlement agents

In Western Australia, a licensee is prohibited from disclosing *any* information which comes to them in their capacity as licensee for the client and in the legitimate course of that appointment.¹⁵⁴ The prohibition is subject to the client's instructions and any statutory provisions to the contrary.

Examples from other jurisdictions

The relevant New South Wales rule limits the prohibition to use or disclosure of *any confidential* information obtained while acting on behalf of a client unless authorised by the client or permitted or compelled by law.¹⁵⁵ In Tasmania an agent is required to protect confidentiality of clients and information relating to clients except in the same general circumstances as New South Wales.¹⁵⁶

In Victoria there is a rule that prohibits an agent from using or disclosing *any confidential* information obtained while acting on behalf of a client unless it is authorised by the client or the law.¹⁵⁷

Australian Consumer Law

There is no specific provision prohibiting disclosure of confidential information in the ACL. Potentially the unconscionable conduct provision may cover confidential information disclosure.

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.

3.2.7 Acting within authority and instructions

This part deals with the duty of agents operating in the property occupations to fulfil their agency obligations. Generally an agent must carry out instructions and act within their authority. It is possible that if an agent goes beyond or acts contrary to these instructions, and then causes loss, they may be liable to cover that loss.

Acting within authority and instructions is fundamental to agency practice. The risk to consumers from failure of an agent to do so can be significant and cause irreparable harm. The objective of prescribing this fiduciary obligation is to enable disciplinary action to be taken for non-compliance rather than the consumer's only redress being reliance on the common law.

¹⁵⁴ Rule 14; note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73, paras 47-49.

¹⁵⁵ Rule 13.

¹⁵⁶ Practice of Conveyancing - Rule 9.

¹⁵⁷ Rule 11.

Existing arrangements

Land valuers

The Western Australian Licensed Valuers Code of Conduct simply provides that an agent must obtain or confirm in writing all instructions of the client or the client's representative.¹⁵⁸

Examples from other jurisdictions

Neither New South Wales nor Queensland has provisions that prescribe acting within authority and instruction.

Real estate agents

All jurisdictions provide that an agent must act within authority and instruction.

The relevant provisions in Western Australia prohibit an agent from acting as an agent or representing themselves as acting as such on behalf of a person without written authority.¹⁵⁹ The same provisions require an agent to act in accordance with the instructions of their client except where it would be unreasonable or improper to do so.

An associated provision relates to the duty of an agent to supervise the agency business and take reasonable steps to ensure that sales representatives and other employees of the agency comply with all relevant legislation, rules and the code of conduct.¹⁶⁰

Examples from other jurisdictions

The Northern Territory rules of conduct in its enabling Act provide that an agent who fails to perform their duties to their client or to carry out the lawful instructions of the client breaches the rules of conduct for agents.¹⁶¹

The provisions in New South Wales, Victoria, and the Australian Capital Territory prescribe the same requirements as in Western Australia.¹⁶² The New South Wales' rule prescribes that an agency agreement must include a term containing particulars of the extent of the authority of the licensee to act in providing services.¹⁶³ The Tasmanian rule provides that marketing or advertising or offering a property at a price or on different terms from that authorised by the client as an example of unsatisfactory professional conduct.¹⁶⁴

The code of conduct in Queensland prescribes that an agent must act in accordance with a client's instructions unless it is contrary to the code or otherwise unlawful to do so.¹⁶⁵ Examples given in the Queensland code replicate the Tasmanian provision.

These other jurisdictions also prescribe supervision of employees and other people engaged by an agent.

Settlement agents

In Western Australia, the Settlement Agents' Code of Conduct does not specifically prescribe that an agent must act within authority and instructions. It is inherent in the

¹⁵⁸ r1.9.

¹⁵⁹ Article 6, see also REBA Act s60-61 and regulation 6BA – appointment to act.

¹⁶⁰ Article 8, see also REBA Act s62 – advertising, ACL section 84.

¹⁶¹ Agents Licensing Act s65(1)(c).

¹⁶² Vic r12; NSW r8 and 9; ACT r8.9 and 8.10.

¹⁶³ Rules of conduct, r19 – agency agreement must comply with regulations, and Regulations schedule 7, r5.

¹⁶⁴ Rule 12(c) and (d).

¹⁶⁵ General rules of conduct r10.

SA Act provision that requires a settlement agent to have a valid appointment to act, which must be in writing.¹⁶⁶

An associated provision in the code of conduct relates to the duty of a licensee to supervise and control the work of unlicensed persons engaged in assisting in the conduct of the business.¹⁶⁷

Examples from other jurisdictions

The requirements in New South Wales and Victoria both clearly specify the licensee must act in accordance with client's instruction unless unlawful to do so.¹⁶⁸ Both jurisdictions also require an agent to regularly communicate with the client and to confirm instructions in writing.¹⁶⁹

The rules of conduct in Tasmania prescribe that an agent must discharge their legal and professional obligations to the client.¹⁷⁰

Australian Consumer Law

Section 84 of the ACL provides that any conduct engaged in on behalf of a body corporate by a director, employee or agent within the scope of the person's actual or apparent authority shall be deemed to have been engaged in also by the body corporate.

Where a person is employed to carry out the acts of another, the state of mind of directors, employees or agents is deemed to be that of the body corporate and, similarly, conduct engaged in by such persons is also taken to have been engaged in by the relevant body corporate. Similar rules apply to servants or agents of persons other than a body corporate. This helps to ensure that a body corporate or person cannot use employees as a shield from liability under the ACL.

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?

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

3.2.8 Keep proper accounts

A further fiduciary duty is the duty to account for money received on behalf of the client. That is, an agent must account for all documents and funds in the transaction.

Accurate reporting of the whereabouts of all money pertaining to the transaction and their ultimate disposition is a fiduciary responsibility.

¹⁶⁶ SA Act s43.

¹⁶⁷ Rule 13; note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73, paras 47-49.

¹⁶⁸ NSW r 9; Vic r6.

¹⁶⁹ NSW r8 and 10; Vic r7 and 8.

¹⁷⁰ Practice of conveyancing rule 2.

Land valuers

Land valuers do not usually receive money on behalf of their client. There are, therefore, no provisions in any jurisdiction stipulating the duty of a licensed valuer to keep proper accounts.

Real estate agents

In Western Australia, the duty to keep proper accounts is contained in the REBA Act and regulations.¹⁷¹ There are no further provisions in the code of conduct.

Examples from other jurisdictions

Other jurisdictions also deal with an agent's duty to keep proper accounts in Acts rather than codes of conduct.

Settlement agents

Provisions regarding the duty to keep proper accounts are contained in the SA Act and regulations.¹⁷² The Settlement Agents' Code of Conduct also has several rules prescribing requirements for settlement agents to keep proper accounts, which in part duplicate the provisions in the Act and regulations.

The first prescribes a general duty that an agent has a duty to keep proper accounts evidencing their dealings with client's money and to keep such records intact and available for inspection.¹⁷³ This provision currently refers to the former Board.

The second provides that it is the duty of an agent to pay all client's money received promptly to the client, or as directed by the client, into a trust account as provided for in the SA Act.¹⁷⁴ The same provision deals with preserving records of payment and destination.

The third and fourth provisions deal with trust account deficits.¹⁷⁵ If an agent finds their trust account in deficit, the agent must either balance the trust account with their own money or by money placed at their disposal by someone knowing fully their financial position. The agent must also immediately inform all people who could be affected by the deficiency. Further, an agent must not pay his or her clients' money into a trust account which is known to be deficient.

The fifth provision requires that an agent must notify their client promptly of money, documents of title or securities received on behalf of the client.¹⁷⁶ And the final provision requires an agent to render a bill of costs promptly at any time requested by their client.¹⁷⁷

Examples from other jurisdictions

New South Wales has provisions in relation to accounts to be kept available for inspection by the client and the licensing authority at any time. Agents must keep written records of instructions, telephone conversations, and enquiries in the form of a file note to be retained for at least 6 years. Records may be maintained in an electronic form provided it can be produced in a permanent legible form in English. These requirements are set out in Part 6 of the *Conveyancers Licensing*

¹⁷¹ REBA Act sections 68-69; regulations 6D-6H

¹⁷² SA Act sections 49-50; regulations 6B-6F.

¹⁷³ Rule 21.

¹⁷⁴ Rule 22.

¹⁷⁵ Rules 23 and 24.

¹⁷⁶ Rule 25.

¹⁷⁷ Rule 26.

Regulation 2006. Victoria has similar provisions in its Act and regulations, although retention is 7 years.¹⁷⁸

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.

3.3 Other associated duties to clients

Other obligations associated with standards of professional conduct and client care

Inducements	<ul style="list-style-type: none">• Must not offer inducements – potential ethical concerns that may have coercive or exploitive effects and not in the best interest of the client
Supervision and control of the business	<ul style="list-style-type: none">• Must properly supervise those working for them – potentially critical to standards of professional competence and in protecting consumers in ensuring that the best interests of clients are served
Advise of market price	<ul style="list-style-type: none">• Must advise what they consider to be the current market price – potentially a component of ensuring the best interest of clients are served and not mislead clients
Reimbursement of expenses	<ul style="list-style-type: none">• Must provide all relevant information to enable the client to be satisfied of amount and that was properly incurred – relevant to accountability
Change of agent and termination of services	<ul style="list-style-type: none">• Must behave professionally and ethically towards clients – relevant to standards of professional conduct and client care
Confirmation of instructions	<ul style="list-style-type: none">• Must confirm instructions - relevant to agency practice, client care and acting in the best interests of the client
Receiving deposits	<ul style="list-style-type: none">• Must promptly notify their client about receipt or non-receipt of money – relevant to due care and skill, client care and acting in the best interests of the client
Property inspections	<ul style="list-style-type: none">• Must personally inspect the property
Professional responsibilities	<ul style="list-style-type: none">• Must take all reasonable steps to ascertain, verify and communicate material facts

3.3.1 Inducements

An inducement means offering an advantage, benefit or consideration that causes a party to enter into a binding agreement. It is anything that is offered or provided by an agent to a person who is, or could be, a party to a property transaction and is intended to assist, persuade or cause that person to enter into a particular transaction.

The prohibition on inducements has two functions. The first is expressed in terms of prohibitions on attempting to induce a person to breach a contract of sale and a

¹⁷⁸ Conveyancers (Professional Conduct and Trust Account and General) Regulations 2008, s32.

person paying more than one agent a commission. The second is in relation to gifts, favours or benefits to engage the services of the agent.

Land valuers

The Western Australian Licensed Valuers Code of Conduct does not deal with inducements.

Examples from other jurisdictions

The New South Wales' rules of conduct prohibit a valuer from offering to provide a person any gift, favour or benefit, whether monetary or otherwise, so that the person induces another person to engage the services of the valuer.¹⁷⁹

In Queensland, the API rules of conduct prohibit any direct or indirect undue pressure or influence on any person, whether by the offer or provision of any payment, gift or favour or otherwise, for the purpose of securing instructions for work.¹⁸⁰

Real estate agents

Five jurisdictions prohibit agents soliciting or inducing or attempting to induce people in relation to property transactions.

The Western Australian Real Estate Code of Conduct prohibits certain inducements.¹⁸¹ An agent must not knowingly induce or attempt to induce a person to breach a contract of sale, letting or agency. An agent must also not knowingly induce or attempt to induce a person to enter into an agency contract that would make the person liable to pay more than one commission.

Examples from other jurisdictions

The Victorian provision prohibits an agent inducing, or attempting to induce, a person to breach a contract of sale, letting or agency or a contract of any other kind.¹⁸² It also prohibits agents soliciting listings where aware another agent is engaged by the owner under a sole or exclusive agency.¹⁸³

New South Wales and the Australian Capital Territory both have rules that say that an agent must not offer to provide to any other person any gift, favour or benefit, whether monetary or otherwise, in order to induce a third party to engage the service of the agent as agent in respect of any matter.¹⁸⁴

In Tasmania, an agent who introduces a purchaser to a vendor with another agent must advise the vendor that they may incur a second commission.¹⁸⁵ Queensland also requires the agent to give a written statement to the client before a contract is signed that if they appoint a new agent the client may have to provide commission to each agent and damages for breach of a contract.

Other provisions in New South Wales, Queensland and the Australian Capital Territory prohibit an agent from soliciting clients or customers through advertisements or other communications the agent knows are false or misleading.¹⁸⁶

¹⁷⁹ Rules of conduct, r11.

¹⁸⁰ API Rules of conduct, r6 – Inducements for the introduction of clients.

¹⁸¹ Article 5 – certain inducements prohibited.

¹⁸² Estate Agents (Professional Conduct) Regulations 1997, r20.

¹⁸³ Regulation 21.

¹⁸⁴ NSW Schedule 1 general rules r14; ACT schedule 8, r8.15.

¹⁸⁵ Schedule 2 r11 – second commission.

¹⁸⁶ NSW r15; Qld r18; ACT 8.16.

Settlement agents

Only one jurisdiction specifically deals with inducements. New South Wales has a provision that prohibits a licensee providing to any other person gifts, favour or benefits to induce any third person to engage the services of the licensee.¹⁸⁷

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?

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

3.3.2 Supervision and control of the business

An agent's duty to properly supervise those working for them is critical to protecting consumers and an essential component in ensuring that the best interests of clients are served. Supervision and control by a licensee plays an important role in preventing and detecting misconduct. Mistakes or unlawful conduct by others engaged to carry out work in the business is more likely to be identified when a licensee is supervising and controlling the conduct of the business.

Is there a problem that requires the government to intervene?

There are two main problems that requiring supervision and control of an agency business is designed to overcome:

- the risks consumers face in the market arising from failure of an agent to supervise and control the business can be significant and cause irreparable harm; and
- poor supervision could leave the door open for some employees to adopt unethical practices in their dealings with consumers and can lead to negligence, misleading or deceptive conduct, or fraudulent use of consumer's money.

What is the main purpose of prescribing supervision and control requirements?

It is fundamental to business practice to know what is happening in your business. An agent must appropriately supervise and control an agency business so as to minimise risk of harm to consumers, and the business itself, when undertaking business transactions.

The objective of prescribing supervision and control requirements is to enable the regulator to identify who is responsible for the actions of employees and others in the agency business. Responsibility may otherwise be diffused among the staff making it harder to identify accountability for a specific breach. Of particular concern is that unlicensed staff would not be accountable to the regulator for non-compliance with the law.

¹⁸⁷ Rule 16.

Identifying a specific person to be in charge of the conduct of staff focuses responsibility and provides a strong incentive to effectively supervise the business. This involves developing appropriate policies and procedures to ensure compliance with the legislation by all staff.

What are the options to deal with the problem?

Option 1 – Specific prescription in enabling Act or regulations so that there is a general duty in the law under which an agent must conduct themselves to supervise and control an agency business.

Option 2 - Specific prescription in a code of conduct in addition to having it in the enabling Act. Further to the general duty, the code of conduct could prescribe appropriate and proportionate requirements for supervision and control of an agency business in more detail than the Act.

Option 3 – No specific prescription beyond the general duty in the Act and leave development of rules and guidance on supervision and control of an agency business to individual agents, franchise agencies, and industry associations to produce. Any misleading or deceptive, fraudulent or other unlawful conduct could be dealt with under other provisions.

Existing arrangements

Land valuers

The Western Australian Licensed Valuers Code of Conduct requires a licensed valuer to properly supervise and control the work of unlicensed persons engaged in assisting in the valuation work and to be responsible for work performed by unlicensed persons on behalf of the valuer.¹⁸⁸ The licensed valuer must ensure that any person assisting them complies with the duties and obligations imposed by the Act, regulations and code of conduct.¹⁸⁹

Examples from other jurisdictions

Other jurisdictions do not have provisions dealing with management and supervision of the business in enabling legislation, regulations or codes of conduct.

Real estate agents

It is a common requirement in jurisdictions that an agent must properly supervise an agency business and ensure representatives and employees comply with the Act, regulations, rules and codes of conduct.

In Western Australia, the REBA Act prescribes that the work of unlicensed people engaged in assisting in the conduct of the business of a licensee must be *constantly supervised and controlled* by a licensee.¹⁹⁰ Where the licensee of the business is a firm or body corporate, there must be a person in bona fide control giving *substantial time and attention* to the business. Further, where a person in bona fide control will be absent from the business, the firm or body corporate must immediately notify the Commissioner and seek the necessary approval to carry on the business during a grace period.¹⁹¹

The Real Estate Code of Conduct tends to duplicate the requirements under the Act. It provides that an agent must properly supervise the agency business carried on by the agent and take reasonable steps to ensure that sales representatives and other

¹⁸⁸ Rule 1.13; there are no related provisions in the Act or regulations.

¹⁸⁹ Rule 1.1.

¹⁹⁰ Section 132.

¹⁹¹ Schedule Division 2 clause 6 – up to 3 months.

employees of the agency business comply with the provisions of the Act, code of conduct and other relevant laws.¹⁹² Where the agency business is carried on by a corporation or firm, a person must be in bona fide control and properly supervise.

Examples from other jurisdictions

New South Wales, Queensland, Tasmania and the Australian Capital Territory all have provisions that require an agent to supervise the agency business.¹⁹³ This includes taking *reasonable steps* to ensure other people employed in the business comply with the Act and regulations. The Northern Territory does not have a similar provision.

The relevant rule in Tasmania places an obligation on an agent in control of a business to *diligently supervise* the work of all other employees or people engaged to work at the premises.¹⁹⁴ It also provides that, while being permitted to delegate tasks to others employed or engaged to work at those premises, the agent must not delegate the responsibility for any aspect of the work undertaken at those premises.

Settlement agents

In Western Australia, a settlement agent is also at all times responsible for his or her actions and those of his or her employees in business relations with other settlement agents, solicitors, clients and the public.¹⁹⁵ Unlike for real estate agents, there is no provision concerning supervision and management in the SA Act.

The Settlement Agents' Code of Conduct requires the licensee or person in bona fide control of the business to give *substantial attendance* at the registered office and ensure managers of all branch offices of business give substantial attendance at respective branch office.¹⁹⁶ The regulations also prohibit a person in bona fide control of a business from being absent from that business for more than four continuous weeks without first getting approval from the Commissioner.¹⁹⁷

Examples from other jurisdictions

The Northern Territory is the only other jurisdiction with a relevant provision. It provides that an agent shall be responsible for the supervision and control of the persons, whether or not licensed conveyancing agents, engaged in the conduct of the agent's business.¹⁹⁸ The agent is required to spend sufficient time at the office where the business is transacted to enable supervision and ensure satisfactory completion of each transaction.

Substantial time and attention

Proper effective supervision is vital, particularly where large sums of money and trust accounts are involved. Proper supervision also helps promote ethical conduct in employees. The REBA Act and Real Estate Code of Conduct specify *substantial time and attention* must be given to a business and unlicensed people engaged in assisting in the conduct of the business must be *constantly supervised and controlled* by a licensee. The code of conduct for settlement agents requires *substantial attendance* and *responsibility for supervision and control* of employees by a licensee.

Due to improved technology there is now a diverse range of methods available to monitor business operations. Therefore, to satisfy the requirements for supervision

¹⁹² Article 8.

¹⁹³ NSW schedule 1 r10; Qld r12; Tas schedule 2 – r5; ACT schedule 8 - r8.11.

¹⁹⁴ Schedule 2 – r5.

¹⁹⁵ Rule 17; note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73.

¹⁹⁶ Rule 13; note the effect of *SASB v Dawn Lorraine Watson* [2011] WASAT 73.

¹⁹⁷ Regulation 14 – absence of licensee.

¹⁹⁸ Regulations schedule 4 Rules of conduct r9.

and control in a present-day or future office, it may not be necessary for a person to be physically present to the same degree as in the past. While it may not be necessary for a person to be in full-time actual attendance, most modern business models do, however, have a person in charge at each branch or outlet.

Consultation with stakeholders by the former Settlement Agents Supervisory Board found there were differing views about supervision and control provisions for settlement agents. Some respondents thought that the code of conduct adequately dealt with the requirements. Others believed that clearer and more comprehensive provisions were needed. It was also recognised that provision was needed for agents and staff working in remote offices. In contrast, other views expressed effective supervision and control could not be achieved through remote electronic means.

Generally, stakeholders were of the opinion that clearer definitions were required for terms such as ‘frequently attend’, and ‘substantial time and attention’. In effect, what are now sought are suggestions for defining effective supervision and control and the management responsibilities of a licensee.

Responsibilities of the licensee	Effective supervision
<p>The licensee holds full responsibility for the management of the business. Current regulatory practice in most jurisdictions is to have very prescriptive lists of these responsibilities incorporated into regulations or codes of conduct.</p>	<p>The following elements of effective supervision of the business have been identified from a review of current requirements across jurisdictions including codes of conduct and guidelines</p>
<p>The types of issues covered include: attendance in the office, supervision of employees, the establishment of procedures to ensure that the business is conducted in compliance with the laws and codes of conduct.</p>	<ul style="list-style-type: none"> • A clearly identified person responsible for the supervision of the business • Appropriate procedures in place to ensure that all staff are aware of the correct business processes to ensure compliance with all legal requirements, which should cover:
<p>The risks associated with ineffective management and supervision of an agency business include:</p> <ul style="list-style-type: none"> • Failure to acting in the clients best interest • Lack of quality service to clients • Incompetent and negligent conduct by employees • Misrepresentations • Inadequate supervision of staff in carrying out their responsibilities • Failure to comply with legislation through inconsistent business procedures • Failure to comply with guidelines issued by the regulator • Inappropriate management of trust accounts and fraud 	<ul style="list-style-type: none"> banking of trust money reviewing of trust account reconciliations substantiation of selling price estimates use of check lists for property sales advertising material management of conflicts of interest restrictions on obtaining beneficial interest complaints handling • Effective mechanisms in place to ensure compliance with the procedures • Appropriate supervision of staff • Monitoring mechanisms to review the effectiveness and ongoing appropriateness of procedures

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?

- 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.
- 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?

3.3.3 Duty to advise of market price

Real estate agents

In Western Australia, an agent must advise their client what the agent considers to be the current market price and, if requested, give reasons for their opinion.¹⁹⁹

Examples from other jurisdictions

Victoria has a similar provision to Western Australia.²⁰⁰ Queensland's code is much more prescriptive.²⁰¹ In Queensland an agent must not accept an appointment unless the agent has given the person a written statement of material facts that agent has taken into account in forming his opinion about the property market price or market rent. In addition to this, the agent must keep the client informed of the agent's opinion about the current market price or market rent. The agent must also tell the client if the agent considers the selling or purchase price expected by the client is substantially more or less than the market price. The Queensland code of conduct also prescribes that an agent must obtain the maximum sale price for a client's property.

The provisions in the Northern Territory and Tasmania provide that an agent is to inform their client if the selling price they are prepared to accept may be less than the fair market value of the property.²⁰² The Northern Territory provision is in its licensing Act. New South Wales and the Australian Capital Territory have separate provisions that require the agent to undertake a preliminary inspection and provide a sales inspection report.²⁰³

Australian Consumer Law

The ACL clearly covers false and misleading representations in relation to sale or grant of an interest in land and an agent not making false or misleading

¹⁹⁹ Article 11.

²⁰⁰ Rule 14.

²⁰¹ Rules 21 and 29.

²⁰² NT *Agents Licensing Act* section 65(1)(g); Tas rule 7.

²⁰³ NSW r schedule 2 – r2; ACT schedule 8 – r8.20.

representations about the price, location, characteristics or use that can be made of the land.

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.

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

3.3.4 Claiming reimbursement of expenses from a client

Land valuers

There are no jurisdictions with provisions in their rules or codes of conduct relating to claiming reimbursement of expenses from a client.

Real estate agents

Western Australia is the only jurisdiction where its code of conduct provides for claiming expenses from the client and is prescriptive in what is required.²⁰⁴ The Real Estate Code of Conduct requires that all relevant information must be provided to the client to enable them to be satisfied of the amount and that it was properly incurred. The provision prohibits an agent seeking or retaining reimbursement of an expense for advertising, sign boards, printed material and promotions unless there is agreement in writing and which specifies the maximum amount, which is also initialled by the client.

Previous real estate stakeholder consultations undertaken by the former Real Estate and Business Agents Supervisory Board identified that the term 'reimbursement' in Article 17 was considered to mean repayment of an expense incurred and in respect of which the agent has a tax invoice from a source outside the agent's office. Stakeholders said that the provision had in the past created difficulties for recouping expenses incurred in-house. Does the article need amending to give examples or define what can be reimbursed?

Reimbursement of expenses needing to be initialled by the seller/landlord in order to be a valid appointment has also previously been identified by stakeholders as an onerous imposition. This particularly relates to lengthy and complex appointments, such as in the commercial property sector. The problem is said to be compounded when agents are corresponding with sellers and landlords overseas.

Another issue identified during previous consultations is that commercial transactions should be distinguished from residential agency agreements. It was suggested that such clients are invariably commercially astute or properly advised.

²⁰⁴ Article 17.

Examples from other jurisdictions

New South Wales provides for reimbursement in its prescribed requirements for all agency agreements in schedule 7 of its *Property, Stock and Business Agents Regulation 2003*.²⁰⁵ The agency agreement must include a specific term that states the agent is entitled, describes the services, and that the terms cannot be varied except with agreement in writing.

Settlement agents

There are no jurisdictions with provisions in their codes of conduct in this area.

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?
- 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?

3.3.5 Change of agent and termination of services

Land valuers

There are no jurisdictions with provisions in their rules or codes of conduct relating to termination of services.

Real estate agents

There are no relevant provisions in Western Australia's Real Estate Code of Conduct.

Examples from other jurisdictions

New South Wales is the only jurisdiction with any provision relating to termination of services.²⁰⁶ This merely states that the agency agreement must say how and when it can be terminated.

Settlement agents

In Western Australia, the Settlement Agents' Code of Conduct provides that a licensee should recognise a client is entitled to change settlement agent or instruct a solicitor to act at any time without giving reasons.²⁰⁷ The provision states that the licensee should accept the client's decision and facilitate a change in a friendly and helpful manner.

²⁰⁵ Rule 8.

²⁰⁶ Schedule 7 rule 7.

²⁰⁷ Rule 28.

Examples from other jurisdictions

Tasmania's conveyancing rules of conduct have two relevant provisions.²⁰⁸ The first relates to an agent who proposes to transfer their conveyancing business to another conveyancer or legal practitioner. The second relates to where a client instructs another conveyancer or legal practitioner to take over. The rules provide for prompt transfer of all relevant documents, any necessary information to be provided, document retention until costs/payment secured, and the second person must help to secure payment for the first person.

New South Wales and Victoria both have similar provisions dealing with termination of services, transfer of work, and transfer of the business.²⁰⁹ These provide that a licensee must complete work accepted unless the client has agreed otherwise, or either the client or licensee terminate the services. The provisions prescribe when and how, and include dealing with money held on trust.

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.

3.3.6 Confirmation of instructions

Land valuers

The code of conduct for licensed valuers in Western Australia prescribes that a licensee must obtain or confirm all instructions in writing and attach them to the valuation report.²¹⁰ The valuation report and instructions must also be retained for a minimum of 6 years.

Examples from other jurisdictions

In New South Wales, a valuer must provide their client with written confirmation of instructions and disclosure of costs.²¹¹ In Queensland, a land valuer must comply with the API rules of conduct, which says that instructions/variations/extensions should preferably be accepted in writing and/or be confirmed in writing in sufficient detail to avoid any misinterpretation.²¹²

Real estate agents

There are no prescribed requirements in Western Australia regarding confirmation of instructions.

Examples from other jurisdictions

New South Wales and the Australian Capital Territory have various similar prescriptive provisions relating to property managers and confirmation of specific

²⁰⁸ Rules – duty on transfer of conveyancing business; instructions for another conveyancer or legal practitioner.

²⁰⁹ NSW rules 18, 19 and 20; Vic rules 15, 16 and 17.

²¹⁰ Rules 1.8 – 1.10.

²¹¹ Schedule 1 rule 4.

²¹² API rules of conduct 1.20.

instructions.²¹³ The agent must prepare for inclusion in the agency agreement written confirmation of the extent of the agent's authority to undertake the list of duties in the provisions, and any limitations. These include obtaining references from prospective tenants, entering into and signing a tenancy agreement, undertaking the initial inspection, collecting initial rent payment, receiving and disbursing rental bond money, and advertising the property for lease.

Settlement agents

There are no prescribed requirements in Western Australia regarding confirmation of instructions.

Examples from other jurisdictions

Victoria is the only other jurisdiction with relevant provisions.²¹⁴ These two provisions prescribe that an agent must confirm their client's oral instructions in writing as soon as possible except those of a trivial nature. Victoria and New South Wales both have a general provision requiring a licensee to make a written record of communications, which includes all instructions.²¹⁵

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.

3.3.7 Receiving deposits

Land valuers

In all jurisdictions, the rules and codes of conduct for licensed valuers do not regulate receiving deposits.

Real estate agents

In Western Australia, there are no specific prescribed requirements for taking deposits in the Real Estate Code of Conduct. Other fiduciary duties tend to cover this area; for example, skill care and diligence, and acting in the best interests of the client. Requirements for agents dealing with transaction money are in the REBA Act.²¹⁶

Examples from other jurisdictions

New South Wales and the Australian Capital Territory both have similar provisions in their codes of conduct prescribing requirements for when agent receives an expression of interest deposit made prior to exchange of contracts.²¹⁷ In New South

²¹³ NSW schedule 6 r5 and 6 – strata, community, residential and other property managers; ACT rules Division 8.42 and rule 8.60 for business agents.

²¹⁴ Schedule 1 rule 8 and 12.

²¹⁵ Vic schedule 1 rule 12; NSW schedule 3 rule 14.

²¹⁶ REBA Act sections 68 and 68A.

²¹⁷ NSW schedule 4 rule 5; ACT schedule 8 rule 8.23.

Wales this relates to business agents while in the Australian Capital Territory it covers all agents.

Queensland is the only jurisdiction that has a provision that specifically prescribes obligations on an agent where a failure in receiving deposits.²¹⁸

Settlement agents

The Settlement Agents' Code of Conduct requires a settlement agent to promptly notify their client when money is received.²¹⁹

Examples from other jurisdictions

In New South Wales, there is a general provision in its rules of conduct that requires a licensee to communicate regularly with their client to ensure they are kept up to date with the progress of the matter.²²⁰

Under the ACL there is an obligation on traders to provide consumers with receipts for purchases of goods or services over \$75 and a right for consumers to request a receipt (within a reasonable timeframe) for goods or services less than \$75.

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.

3.3.8 Property inspections

Land valuers

In Western Australia, a licensed valuer is required to personally inspect the property to be valued, unless they have written agreement of the client.²²¹

Real estate agents

In Western Australia, there are no specific prescribed requirements for undertaking property inspections. Other fiduciary duties tend to cover this area; for example, skill care and diligence, and acting in the best interests of the client.

Examples from other jurisdictions

New South Wales and the Australian Capital Territory have separate provisions that require the agent to undertake a preliminary inspection and provide a sales inspection report.²²² In New South Wales an agent cannot act unless they have undertaken a preliminary inspection of the property. Once completed the inspection they must give the client a sales inspection report which must include prescribed details.

²¹⁸ Rule 31.

²¹⁹ Rule 25.

²²⁰ Schedule 3 rule 8.

²²¹ Rule 1.5.

²²² NSW schedule 2 – r2; ACT schedule 8 – r8.20, 8.43-44, .8.47-48

Settlement agents

There are no requirements for settlement agents to undertake inspections as it would not be relevant to their functions.

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.

3.3.9 Professional responsibilities when undertaking functions

Land valuers

In Western Australia, the Licensed Valuers Code of Conduct prescribes certain responsibilities that a land valuer must comply with in providing a valuation report.²²³ The requirements appear to be linked to the fiduciary obligation of skill, care and diligence. They include taking all reasonable steps to do the following:

- gather sufficient relevant data and explain the basis on which the opinion was formed;
- ascertain and verify relevant facts and information as prudent to provide a professional valuation, and disclose if not obtained; and
- except with written agreement of the client, personally inspect the property, and disclose partial or non-inspection.

The Licensed Valuers Code of Conduct also has a prescriptive list of what must be included in a valuation report. There is also a prescriptive list of what a licensed valuer must not do. A valuer is prohibited from predicting future value but may forecast income or outgoings using economic price prediction modelling or making properly qualified forecasts.

Examples from other jurisdictions

The relevant New South Wales rule simply provides that in making a written valuation or report a valuer must: sign the valuation or report; disclose any relevant limitations or qualifications; and state their registration number and any registration conditions.²²⁴

In Queensland, the code has a general conduct provision requiring a registered valuer to comply with the code of professional conduct, including taking all necessary steps to obtain and verify factual data that affect the valuation.²²⁵ The code of conduct also prescribes basic requirements for a valuation report.²²⁶ These include the valuer's qualifications relevant to the valuation, registration number, date of property inspections, date the valuation is made, and the valuer must sign and date the report.

²²³ Rules 1.4 and 1.5.

²²⁴ Schedule 1 r3.

²²⁵ Rule 7A.

²²⁶ Rule 10.

The Australian and New Zealand Valuation and Property Standards rules of conduct provide further detailed requirements for members in relation to instructions, inspections and reports.

Real estate agents

In Western Australia, prescribed requirements are of a general nature and are mostly contained in the provision dealing with duties regarding details of the transaction.²²⁷ The duties tend to deal with ascertaining, verifying and communicating facts. There are no prescriptive requirements dealing with all the tasks an agent must undertake when performing their duties to their client. Other fiduciary duties also tend to cover this area; for example, skill care and diligence, and to behave fairly.

Examples from other jurisdictions

The relevant provision in Victoria simply provides that an agent must have a working knowledge of the duties and obligations of an agent towards their client, and ascertain relevant information.²²⁸ Queensland and New South Wales have several provisions specifically relating to property management.²²⁹ Other jurisdictions have similar general provisions relating to finding out and verifying material facts.

Settlement agents

In Western Australia, specific provisions dealing with functions of a settlement agent are in the Act.²³⁰ There are no further specific requirements dealt with in the Settlement Agents' Code of Conduct.

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

²²⁷ Article 10.

²²⁸ Rules 8 and 15.

²²⁹ Qld rules 32, 33 and 34; NSW schedule 2 rules 10-17

²³⁰ Sections 46 and 47 and schedule 2.

4. OTHER PROVISIONS FOR CONSIDERATION

4.1 Land valuers, real estate and settlement agents

4.1.1 Agent to publicise the code of conduct

In Queensland, an agent who is a principal licensee must prominently display a notice of the existence and availability of the code in the public area of each of the agent's offices and if asked by a customer must tell where the client can obtain a copy.²³¹

Discussion Q 21

Do you support a similar provision in Western Australia?

4.1.2 Complaint system

One of the recognised objectives of a code of conduct is to provide for an internal system of complaint resolution for complaints about agency practice. Western Australia does not prescribe a system, but does have publications dealing with the issue for real estate and settlement agencies.²³²

Queensland is one jurisdiction that does prescribe a system for complaint resolution. It provides that real estate agents must have a complaint resolution system in place.²³³ It requires a principal licensee to have a reasonable, simple and easy to use procedure in place for handling complaints by clients or customers of the agent.

Discussion Q 22

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

4.1.3 Additional guidance

Discussion Q 23

- 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.
- 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.

²³¹ Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001, r42;

²³² Complaint handling guidelines issued by the former REBA and SASB.

²³³ Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulation 2001 Schedule Part 5 rule 43-45.

4.1.4 Provisions that duplicate the ACL

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?
- 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.

4.1.5 Correction of any anomalies?

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.

4.2 Real estate agents only

4.2.1 Conjunction sales

Other jurisdictions prescribe requirements for agents when dealing with a sale conducted in conjunction with other agents; for example Queensland's rule 20. The former Real Estate and Business Agents Supervisory Board recommended that provisions relating to conjunction sales be included in the code of conduct.

Question Q 26

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

4.2.2 Notifying managing agent

New South Wales, Victoria, Queensland and the Australian Capital Territory codes all state if an agent accepts an appointment to sell a property that is tenanted, the agent must immediately give written notice of appointment to any agent responsible for managing property.

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?

4.3 Settlement agents only

4.3.1 Electronic conveyancing

Neither the Real Estate nor the Settlement Agents' Code of Conduct makes reference to the *Electronic Transactions Act 2003*.

Question Q 28

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

4.3.2 Mutual recognition

Previous stakeholder consultation by the former Settlement Agents Supervisory Board identified support for amending the Settlement Agents Act, Regulations and Code to meet the requirements of mutual recognition legislation.

Question Q 29

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

5. DISCUSSION QUESTIONS

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<p>Question 1 – Meaning of terms ‘principal’ and ‘client’ and others</p> <p>a) Should the Real Estate Code of Conduct be amended to clarify the meaning of ‘agent’ and ‘principal’? Please provide suggestions on how.</p> <p>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.</p> <p>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?</p> <p>d) Are there other terms that you think should be used and defined?</p> <p>For example:</p> <ul style="list-style-type: none"> 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. 	16
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<p>Question 3 - General questions about all fiduciary obligations</p> <p>a) Licensees must comply with their fiduciary duty to their client.</p> <ol style="list-style-type: none"> i. Should the codes of conduct simply prescribe that ‘an agent must comply with their fiduciary duties? Please comment on why or why not. 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. <p>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?</p> <p>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.</p>	23

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<p>Question 4 - Avoid conflicts of interest (without informed consent)</p> <p>a) Is there unnecessary duplication or inconsistency of the relevant enabling Act in its code of conduct?</p> <p>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).</p> <p>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.</p> <p>d) Please consider whether additional guidance is needed, for example:</p> <ol style="list-style-type: none"> 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)? <p>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.</p> <p>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.</p> <p>g) Are there any changes you feel are necessary to the Settlement Agents' Code of Conduct Schedule Forms 1 and 2?</p> <p>h) Are there any other changes to the conflict of interest conduct requirements you think need to be made?</p>	28
<p>Question 5 - Not accept secret commissions; third party referrals and benefits</p> <p>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.</p> <p>If so, how detailed should the provision be (please provide suggested examples where possible)?</p> <p>b) Are there any other changes to the third party fees and commissions conduct requirements you think need to be made?</p>	31
<p>Question 6 - Act in the best interest of the client</p> <p>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.</p> <p>If so, how detailed should the provision be (please provide suggested examples where possible)?</p> <p>b) Are there any other changes to the best interest of the client conduct provisions you think need to be made?</p>	33

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<p>Question 7 - Act with honesty and fairness</p> <p>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.</p> <p>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?</p> <p>b) Are there any other changes to the honesty and fairness conduct provisions, or associated provisions, you think need to be made?</p>	35
<p>Question 8 - Exercise skill, care and diligence</p> <p>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.</p> <p>If you consider that the codes of conduct should provide more detail, how detailed should the provision be? Please provide examples where possible.</p> <p>b) Are there any other changes to the skill, care and diligence conduct requirements you think need to be made?</p>	38
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<p>Question 10 - Acting within authority and instructions</p> <p>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.</p> <p>If so, how detailed should the provision be and please provide suggested examples where possible?</p> <p>b) Are there any other changes to the carry out instructions and act within their authority conduct rules you think need to be made?</p>	42
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<p>examples where possible?</p> <p>b) Are there any other changes to the inducements conduct provisions you think need to be made?</p>	
<p>Question 13 - Supervision and control of the business</p> <p>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)?</p> <p>Please provide comment on why it should be in the codes of conduct or why not.</p> <p>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?</p> <p>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.</p> <p>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?</p>	50
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