

Settlement Agents Code of Conduct 2016

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Settlement Agents Code of Conduct 2016

Made by the Commissioner with the approval of the Minister.

Part 1 — Preliminary

1. Citation

These rules are the *Settlement Agents Code of Conduct 2016*.

2. Commencement

These rules come into operation as follows —

- (a) rules 1 and 2 — on the day on which this code is published in the *Gazette*;
- (b) the rest of the rules — on the day after that day.

3. Terms used

- (1) In these rules —

Act means the *Settlement Agents Act 1981*;

appointment to act means an appointment to act as a settlement agent required under section 43 of the Act;

client, in relation to a licensee, includes —

- (a) where the context permits, a prospective client; and
- (b) a client of an employer, principal or partner of the licensee;

disclosure notice means a notice in writing in Form 2;

Form means a form in Schedule 1;

regulations means the *Settlement Agents Regulations 1982*.

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- (2) A term has the same meaning in these rules as it has in the Act unless the contrary intention appears in these rules.

4. Code applies to all licensees

- (1) Each licensee who is a settlement agent acting, directly or indirectly, for a client must comply with these rules.
- (2) Subrule (1) applies to, and in respect of, all licensees including where the licensee is a principal of a business or an employee of another licensee.

Consultation Draft

Part 2 — General duties

5. Knowledge of relevant law [Amends 1982 Code rule 4]

A licensee must have a complete knowledge of and comply with —

- (a) the Act, the regulations and these rules; and
- (b) the duties and obligations imposed on a licensee by the Act, the regulations and these rules.

6. Acting in best interests of client [New rule]

When acting as a settlement agent for a client a licensee must act in good faith in the best interests of the client.

7. Duty of care, diligence and skill [New rule]

When acting as a settlement agent for a client a licensee must exercise due care, diligence and skill.

8. Duty of honesty [New rule]

When acting as a settlement agent for a client a licensee must be honest in all dealings with the client, other settlement agents and other persons involved in a transaction.

9. Confidential information [Amends 1982 Code rule 14]

- (1) A licensee must treat as confidential information obtained while acting for a client that has not been made public and that —
 - (a) is by its nature confidential; or
 - (b) was specified as confidential by the person who supplied it; or
 - (c) is known by the licensee to be confidential.
- (2) Information to be treated as confidential under subrule (1) must not, directly or indirectly, be disclosed by a licensee to another person, unless —
 - (a) the disclosure of the information is required by law; or

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- (b) the client is fully informed of the proposed disclosure and agrees to it in writing.

10. Client's instructions [Amends 1982 Code rule 18]

When acting as a settlement agent for a client a licensee must —

- (a) provide each service relating to the client's instructions within a reasonable time after receiving the instructions; and
- (b) act in accordance with the client's reasonable instructions.

11. Client to be fully informed [Amends 1982 Code rule 16]

When acting as a settlement agent for a client a licensee must communicate regularly, and in a timely manner, with the client and keep the client well informed of matters relevant to the client's interests.

12. Misleading or deceptive conduct [Amends 1982 Code rule 15]

When acting as a settlement agent for a client a licensee must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive within the meaning of the *Australian Consumer Law (WA)* Part 2-1.

13. Unconscionable conduct [Amends 1982 Code rule 19]

When acting as a settlement agent for a client a licensee must not engage in unconscionable conduct within the meaning of the *Australian Consumer Law (WA)* Part 2-2.

14. Fiduciary obligations [New rule]

A licensee must comply with any obligation that may arise as a result of any fiduciary relationship between the licensee and a client.

Part 3 — Employees

15. Supervision and control of employees [Amends 1982 Code rule 13 and includes 1982 Code rule 17]

- (1) A licensee who carries on a business as a settlement agent must take all reasonable steps to ensure that every person employed in or engaged by the business whether paid or unpaid complies with —
 - (a) the provisions of the Act, the regulations and these rules as are applicable to the person; and
 - (b) any other law applicable to the business and the person.
- (2) A licensee who carries on a business as a settlement agent is responsible for the supervision and control of the work of every person employed in or engaged by the business whether paid or unpaid.

16. Sufficient supervision of settlement agent business

- (1) In this rule —

business means a business as a settlement agent carried on by a licensee;

professionally conducted, in relation to carrying on a business from a registered office or registered branch office, means that the business is conducted in accordance with the Act, the regulations, these rules and any other law relevant to the business.
- (2) If a licensee who carries on a business is an individual the licensee must —
 - (a) provide sufficient supervision to ensure that the business is professionally conducted; and
 - (b) ensure that each manager of a registered branch office of the business provides sufficient supervision to ensure that the business carried on from that office is professionally conducted.

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- (3) If a licensee who carries on a business is a firm or a body corporate —
- (a) each partner of the firm, or each director of the body corporate, who is a settlement agent must —
 - (i) ensure that each person in bona fide control of the business provides sufficient supervision to ensure that the business is professionally conducted; and
 - (ii) ensure that each manager of a registered branch office of the business provides sufficient supervision to ensure that the business carried on from that office is professionally conducted;

and

 - (b) each person in bona fide control of the business who is a settlement agent must —
 - (i) provide sufficient supervision to ensure that the business is professionally conducted; and
 - (ii) ensure that each manager of a registered branch office of the business provides sufficient supervision to ensure that the business carried on from that office is professionally conducted.
- (4) A manager of a registered branch office of a business who is a settlement agent must provide sufficient supervision to ensure that the business carried on from that office is professionally conducted.

Part 4 — Conflict of interest

Division 1 — General

17. Conflict of interest [Amends 1982 Code rule 9]

A licensee must not act, or continue to act, as a settlement agent for a client if a conflict of interest or potential conflict of interest exists between the interests of the licensee and the interests of the client, unless —

- (a) the licensee fully informs the client, in a disclosure notice, of the conflict or potential conflict; and
- (b) the client agrees in writing to the licensee acting, or continuing to act, as a settlement agent for the client.

18. When licensee may act for more than one party [Amends 1982 Code rule 7]

- (1) If a licensee proposes to act for more than one party (the *parties*) to a transaction then before each of the parties gives consent in accordance with the requirements set out in section 46(3) or 47(3) of the Act, the licensee must complete a disclosure notice and give it to each party.
- (2) Having started to act for more than one party to a transaction in accordance with section 46(3) or 47(3) of the Act, a licensee must not continue to act for any of the parties if —
 - (a) there is a real possibility that the licensee would be required, in order to comply with the Act, the regulations and these rules, to act contrary to the interests of a party; or
 - (b) the interests of one party require withholding information or advice from another party.

19. Disclosure of interests [Amends 1982 Code rule 6]

- (1) A licensee must not act, or continue to act, as a settlement agent for a client if the licensee has an interest in the client's

transaction, including if the licensee is a party to the transaction or may benefit, directly or indirectly, from the transaction, unless —

- (a) the licensee fully informs the client, in a disclosure notice, of the interest; and
 - (b) the client agrees in writing to the licensee acting, or continuing to act, as a settlement agent for the client.
- (2) Subrule (1) does not apply in relation to an interest that the licensee has because the licensee is acting as a settlement agent in the client's transaction.

Division 2 — Specific

[Amends 1982 Code rule 8]

20. Terms used

In this Division —

beneficiary, in relation to a trust, means an individual who is a beneficiary under the trust (whether the beneficiary has a vested share or is contingently entitled or is a potential beneficiary under a discretionary trust);

developer has the meaning given in the *Real Estate and Business Agents Act 1978* section 4(1);

listed has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9;

prescribed financial market has the meaning given in the *Corporations Act 2001* (Commonwealth) section 9;

principal, of a licensee, means —

- (a) if the licensee is an individual, the licensee;
- (b) if the licensee is a firm, a person who is a partner in the firm;
- (c) if the licensee is a body corporate, a security holder or director of the body corporate;

- (d) if a business is conducted by the licensee as trustee for a trust, any unitholder or beneficiary of that trust;

real estate or business agent means an agent as defined in the *Real Estate and Business Agents Act 1978* section 4(1);

real estate or business sales representative means a sales representative as defined in the *Real Estate and Business Agents Act 1978* section 4(1);

security holder, of a body corporate, does not include a security holder of a body corporate that is —

- (a) listed on a prescribed financial market;
- (b) a bank authorised under any law of the Commonwealth or the State to carry on banking business;
- (c) a building society authorised to act under any law of the State;
- (d) authorised by the law of another State, of a Territory or of the Commonwealth to apply for and obtain, in its own name, a grant of probate or of letters of administration of the estate of a deceased person;

substantial holder, in relation to a financial institution that is a body corporate or listed registered managed investment scheme, means a person who has a substantial holding, as defined in *Corporations Act 2001* (Commonwealth) section 9, in the body corporate or listed registered managed investment scheme, as if the percentage in paragraph (a) of that definition were 20% rather than 5%.

21. Disclosure notice to be given

- (1) A licensee must not act, or continue to act, as a settlement agent for a client in a related transaction, unless —
 - (a) the licensee fully informs the client, in a disclosure notice, of the nature of the related transaction; and
 - (b) the client agrees in writing to the licensee acting, or continuing to act, as a settlement agent for the client.

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Part 4 Conflict of interest

Division 2 Specific

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- (2) In subrule (1), a related transaction is a transaction in which a licensee is acting as a settlement agent and that —
- (a) has been negotiated by a real estate or business agent or developer in which a principal of the licensee has an interest; or
 - (b) has been negotiated by any of the following who have an interest in the licensee —
 - (i) a real estate or business agent;
 - (ii) a developer;
 - (iii) a real estate or business sales representative;or
 - (c) has been negotiated by a real estate or business sales representative employed by any of the following who have an interest in the licensee —
 - (i) a real estate or business agent;
 - (ii) developer;or
 - (d) in relation to which finance has been provided or is proposed to be provided by any of the following financial institutions —
 - (i) a financial institution that is the same legal entity as the licensee;
 - (ii) a financial institution in which the licensee is a partner, director or substantial holder or has an interest as a beneficiary or unitholder of a trust;
 - (iii) a financial institution that is a partner, director or substantial holder of the licensee or has an interest in the licensee as a beneficiary or unitholder of a trust.

Part 5 — Appointment of licensee and payment of fees

22. Costs disclosure [New rule]

- (1) Before being appointed to act as a settlement agent in relation to a transaction by a client as required under section 43 of the Act, a licensee must give a costs disclosure in writing to the client.
- (2) The costs disclosure must disclose the amount (*service amount*) that the client will be charged by the licensee to provide the services that the licensee has agreed to provide to the client in relation to the transaction.
- (3) The service amount must include all fees, commissions, charges and general office disbursements to be charged by the licensee to provide the services that the licensee has agreed to provide to the client in relation to the transaction.
- (4) The following may also be set out or estimated in the costs disclosure but must not be included in the service amount —
 - (a) duty chargeable under the *Duties Act 2008*;
 - (b) any other tax, duty, fee, levy or charge under a written law;
 - (c) fees payable to financial institutions;
 - (d) commissions chargeable by an agent, developer or any other third party.

23. Payment not to exceed service amount unless unforeseen significant change occurs [New rule]

- (1) A licensee is not entitled to receive payment for a service that exceeds the service amount for that service disclosed in a costs disclosure given under rule 22 unless subrule (2) applies.
- (2) A licensee may receive payment for a service that exceeds the service amount if —
 - (a) there is an unforeseen significant change in the scope of the work required to provide the service; and

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- (b) the licensee informs the client in writing of that change; and
- (c) the client agrees to the licensee continuing to provide the service; and
- (d) the amount by which the payment exceeds the service amount is reasonable having regard to that change.

24. Fees for referrals [New rule]

If a licensee reasonably believes that the licensee or a person nominated by the licensee will receive a fee or any other benefit as a result of the licensee referring a client to a person who provides another service, then the licensee must disclose in writing to the client the fee or benefit to be received at the time the referral is made.

25. Appointment to act [Amends 1982 Code rule 6A]

- (1) An appointment to act (whether contained in a separate appointment document, an offer to purchase or a contract for sale) is to be in Form 1, or contain the information in Form 1.
- (2) If a licensee receives an appointment to act and is unable to act in the capacity described in the appointment, as soon as practicable after receipt of the appointment the licensee must notify the person who signed the appointment of that inability.
- (3) A licensee must obtain the written agreement of the client that the licensee agreed to act for in an appointment to act before any change is made to the appointment to act.

26. Bill of costs [Amends 1982 Code rule 26]

- (1) A licensee is not required to provide an itemised bill unless requested to do so by a client.
- (2) When acting as a settlement agent for a client a licensee must, if requested to do so by the client, provide the client with an itemised bill that —

- (a) specifies how the price of the services was calculated;
and
 - (b) if applicable, includes the number of hours the licensee and any other person spent providing the services and the hourly rate for those services; and
 - (c) if applicable, includes the list of the materials used to supply the services and the amount charged for those materials.
- (3) When complying with subrule (2) a licensee must also comply with the *Australian Consumer Law (WA)* section 101.

Part 6 — Specific duties of licensee

27. Retaining copies of documents

A licensee who has acted as a settlement agent for a client must take all reasonable steps to ensure that a copy of each disclosure notice and Form 1 given to the client is retained by the licensee or on behalf of the licensee for a period of 6 years beginning on the day the document is given to the client.

28. Licensees duties in arranging a settlement [Amends 1982 Code rule 10]

- (1) A licensee must, when acting for a client in arranging a settlement, as soon as practicable after receiving instructions to act for the client —
 - (a) cause all necessary searches and inquiries to be made at the relevant offices and authorities; and
 - (b) forward a settlement statement to the client to arrange a settlement.
- (2) The licensee must also forward amended settlement statements to the client as may be necessary.
- (3) Without limiting subrule (1), a licensee must, as soon as practicable after receiving instructions to act in arranging a settlement and before the settlement takes place, take all reasonable steps to verify —
 - (a) the identity of each person who claims to be, or to act for, a person disposing of real estate in the real estate transaction being completed at the settlement; and
 - (b) each person's authority to dispose of the real estate, or to act for the person disposing of it.

29. Legal advice [Amends 1982 Code rule 11 and 12]

- (1) When acting as a settlement agent for a client a licensee must, if it is necessary or prudent, recommend to the client that the

client seek the advice of a lawyer in respect of a transaction or part of a transaction.

- (2) When acting as a settlement agent for a client a licensee must not, directly or indirectly, discourage, attempt to discourage or impede the client from seeking legal advice or representation.

30. Change of settlement agents [Amends 1982 Code rule 28]

- (1) A client is entitled to change the client's settlement agent or instruct a lawyer to act for the client at any time without giving a licensee a reason.
- (2) When acting as a settlement agent for a client a licensee must facilitate the client's change of settlement agent or instruction of a lawyer in a professional and helpful manner.

Part 7 — Money

31. Proper accounts to be kept [Amends 1982 Code rule 21]

- (1) When acting as a settlement agent for a client a licensee must take all reasonable steps to ensure that proper accounts are kept evidencing the licensee's dealings with the client's money.
- (2) When acting as a settlement agent for a client a licensee must make the accounts available for inspection —
 - (a) by the client, at the reasonable request of the client; and
 - (b) as required in accordance with the Act.

32. Money and documents held on client's behalf [Amends 1982 Code rule 25]

- (1) When acting as a settlement agent for a client a licensee must notify the client promptly if the licensee receives money, documents of title or securities on behalf of the client.
- (2) When acting as a settlement agent for a client a licensee must comply promptly with any direction given by the client or another settlement agent or lawyer instructed by the client to —
 - (a) provide a cash account; or
 - (b) provide for the payment of money held by the licensee on the client's behalf; or
 - (c) deliver documents of title, securities or other documents held by the licensee on the client's behalf.

Part 8 — Repeal and transitional

33. *Settlement Agents' Code of Conduct 1982 repealed*

The *Settlement Agents' Code of Conduct 1982* is repealed.

34. **Transitional**

(1) In this rule —

transitional period means the period of one month beginning on the day on which the *Settlement Agents Code of Conduct 2016* (other than rules 1 and 2) comes into operation.

(2) For the purpose of sections 34(1) and 84(2)(c)(iii) of the Act a licensee to whom this rule applies is to be taken not to have acted in breach of this code.

(3) This rule applies to a licensee who during the transitional period —

- (a) fails to comply with a provision of this code; but
- (b) complies with the provisions of the *Settlement Agents' Code of Conduct 1982*.

Schedule 1 — Forms

Form 1

[r. 25]

Appointment to act as Settlement Agent

Please read this document before appointing a settlement agent to act for you.

Your rights

Your settlement agent must make a costs disclosure to you in accordance with rule 22 of the *Settlement Agents Code of Conduct 2016* before you sign this appointment to act.

You have the right to appoint a settlement agent (or a lawyer) of your choice to act on your behalf and to change that appointment at any time before the settlement date.

Should you wish to appoint another settlement agent (or instruct a lawyer) before the settlement date, your first appointed settlement agent must accept your decision and facilitate this change. Please be aware that if you change your settlement agent, your first appointed settlement agent may in some circumstances be entitled to a portion of the fees based on the work the settlement agent has undertaken on your behalf. However, the fees payable to the new settlement agent (or lawyer) may, in some circumstances, be reduced if some work has already been completed to your satisfaction and the satisfaction of your new settlement agent (or lawyer).

Acting for more than one party

A settlement agent may act for more than one party to a transaction if —

- the settlement agent discloses their intention to act for more than one party in Form 2; and
- each of the parties that the settlement agent proposes to act for acknowledges in writing that the party is aware that the settlement agent proposes to act for more than one party; and
- each of the parties that the settlement agent proposes to act for gives their prior written consent.

A settlement agent must not continue to act for a party if —

- there is a real possibility that the settlement agent would be required, in order to comply with their obligations, to act contrary to the interests of

<p>one of the parties that the settlement agent acts for; or</p> <ul style="list-style-type: none"> • the interests of a party the settlement agent acts for require withholding information or advice from any other party the settlement agent acts for.
<p>A disclosure notice (Form 2):</p> <p><input type="checkbox"/> is not required; or</p> <p><input type="checkbox"/> has been given to you.</p>
Appointment
<p>Description of real estate/business* transaction:</p>
<p>Vendor(s):</p>
<p>Purchaser(s):</p>
<p>Mortgagee(s)*:</p>
<p>To:</p> <p>[Name and address of settlement agent]</p>
<p>I/We* being the vendor(s)/purchaser(s)/mortgagee(s)* named above appoint the settlement agent named above to act for me/us* in the settlement of the real estate or business transaction referred to above and:</p> <p>(1) I/We* agree to pay up to the service amount disclosed to me/us* under rule 22 of the <i>Settlement Agents Code of Conduct 2016</i>.</p> <p>(2)* I/We* acknowledge that I am/we are* aware that the settlement agent proposes to act for the following other parties to the transaction and give my/our* written consent to the settlement agent so acting:</p> <p>.....</p> <p style="text-align: center;">OR</p> <p>(3)* The settlement agent may not act for any other party to the transaction.</p>
<p>Acknowledgment of receipt of appointment form</p> <p>I/We* acknowledge and confirm that a copy of this document was received.</p> <p>Dated:</p>

Signature of vendor(s)/ purchaser(s)/ mortgagee(s)*:
Acceptance of appointment I accept the appointment to act as your settlement agent on the terms set out in this appointment. Dated:
Signature of settlement agent:
* Please delete where not applicable

Form 2

[r. 17, 18(1), 19(1) and 21(1)]

Disclosure Notice Please read this document before appointing a settlement agent to act for you.
Name of proposed settlement agent:
Description of real estate/business* transaction:
Vendor(s):
Purchaser(s):
Mortgagee(s)*:

<p>Please note that one or more of the following apply:</p> <ul style="list-style-type: none"><input type="checkbox"/> there is a relationship between the settlement agent and a related person;<input type="checkbox"/> the settlement agent proposes to act for more than one party to the transaction;<input type="checkbox"/> a conflict of interest or potential conflict of interest exists between your interests and the interests of the settlement agent;<input type="checkbox"/> the settlement agent has an interest in the transaction.
<p>Details of the nature of any related transaction (see rule 21(2) of the <i>Settlement Agents Code of Conduct 2016</i>) including the name and role of any related person (e.g. real estate or business agent, real estate or business sales representative, developer, financial institution):</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>As well as you, the settlement agent proposes to act for the following parties to the transaction:</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>Details of any conflict of interest or potential conflict of interest:</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>Details of any interest that the settlement agent has in the transaction (e.g. if the settlement agent is a party to the transaction or may benefit, directly or indirectly, from the transaction):</p> <p>.....</p> <p>.....</p> <p>.....</p>

What is a conflict of interest?

In general a conflict of interest may arise in 3 ways:

- When a settlement agent has an interest in a person or body associated with the transaction (e.g. a real estate or business agent, real estate or business sales representative, developer or financial institution) and therefore has an interest in the settlement being effected that is additional to the settlement agent's interest as a settlement agent.
- When a person or body associated with the transaction (e.g. a real estate or business agent, real estate or business sales representative, developer or financial institution) has an interest in a settlement agent and therefore the settlement agent has an additional interest in the settlement being effected that is additional to the settlement agent's interest as a settlement agent.
- When a settlement agent is acting for more than one party to a real estate transaction or a business transaction.

Acknowledgment of receipt of disclosure notice

I/We* acknowledge and confirm that this document was received and that I/we* have read and understood the document.

I/we* agree to the settlement agent acting/continuing to act* as a settlement agent for me/us*.

..... day of(month)..... (year)

Signature of vendor(s)/purchaser(s)/mortgagee(s)*:

.....
.....

* Please delete where not applicable.

Commissioner

Minister