



Western Australia

Settlement Agents Act 1981

Settlement Agents' Code of Conduct 1982

As at 18 Jul 2003

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Western Australia

Settlement Agents' Code of Conduct 1982

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Western Australia

Settlement Agents Act 1981

Settlement Agents' Code of Conduct 1982

1. Citation

These rules may be cited as the *Settlement Agents' Code of Conduct 1982*¹.

2. Commencement

These rules shall come into operation on the day on which they are published in the *Government Gazette*¹.

3. Interpretation

In these rules, unless the context otherwise requires —

agent means a person who is an agent within the meaning of the *Real Estate and Business Agents Act 1978*;

developer means a person who is a developer within the meaning of the *Real Estate and Business Agents Act 1978*;

real estate sales representative means a person who is a real estate sales representative within the meaning of the *Real Estate and Business Agents Act 1978*;

the Act means the *Settlement Agents Act 1981*.

4. Knowledge of Act, regulations and Code

A licensee shall ensure that he has at all times a complete knowledge of the Act, the regulations thereunder and this Code of Conduct as amended from time to time and the duties and obligations imposed upon him by the Act, the regulations and the Code of Conduct and shall duly comply with all requirements thereof.

5. Knowledge of legal and equitable duties

A licensee shall have a knowledge of his duties both at law and in equity to the party to the transaction by whom the licensee was appointed (the *client*) and in particular a licensee shall be aware that his obligation to his client is one of the utmost good faith which requires him not to put his duty to his client in conflict or in likelihood of conflict with his own interests or that of any other person.

6. Disclosure of interests

A licensee shall at all times make a full and frank disclosure to his client of any interest he may have in any transaction in which he is concerned and if such interest is adverse to that of his client he shall terminate his appointment.

6A. Appointment to act

- (1) An appointment to act as a settlement agent required under section 43 of the Act (whether contained in a separate appointment document or in an offer to purchase or a contract for sale) is to be in the form of, or contain the information set forth in, Form 1 in the Schedule.
- (2) As soon as practicable after receipt of the appointment referred to in subrule (1) the appointed settlement agent shall either —
 - (a) if he or she is unable to accept the appointment, notify the vendor or purchaser, as the case requires, of that inability to act; or

- (b) if he or she is able to act, sign the appointment and forward a true copy of the appointment document to his or her client.

[Rule 6A inserted in Gazette 26 May 2000 p. 2526.]

7. When licensee may act for both parties

Subject to section 46 of the Act and to rule 5 a licensee may sometimes act for both parties. The test to apply is to consider whether in the interest of one he should withhold some information or advice from the other. If he should, then he should inform both clients that he is embarrassed and, subject to the following, should cease to act for both. He may continue to act for one of them in the same matter, however, unless he has received some confidential information from the other which it would be improper to use against him yet which should be used in the interest of the selected client.

8. Disclosure of interest to potential client

- (1) Where a person proposes to appoint a licensee to act on his behalf in a transaction which has been negotiated —
 - (a) by an agent or developer in which —
 - (i) the licensee;
 - (ii) if the licensee is a firm, any of the persons who are partners in the firm;
 - (iii) if the licensee is a body corporate, any of the shareholders or directors of the body corporate or;
 - (iv) if the business of the licensee is conducted by a Trustee for a Trust, any unitholder or person or entity named as a beneficiary whether or not upon any contingency of the Trust,have any interest; or
 - (b) by —
 - (i) an agent;
 - (ii) a developer;

r. 8

- (iii) a real estate sales representative; or
- (iv) a real estate sales representative employed by an agent or developer,
who has any interest in the licensee,

then, before the appointment to act as a settlement agent required under section 43 of the Act is signed, the licensee shall give or cause to be given to that person a notice in writing in the form of Form 2 in the Schedule (*disclosure notice*).

(1a) Where —

- (a) a licensee has been appointed by a signed appointment under section 43 of the Act to act on behalf of a person (*the client*) in a transaction which has been negotiated by a person referred to in subrule (1)(a) or (b); and
- (b) the licensee is not the person who obtained the signature of the client referred to in paragraph (a) to the document in which the appointment is contained,

the licensee shall, before acting on behalf of the client in the transaction, ensure that the disclosure notice was given in accordance with subrule (1) before the appointment was signed by the client.

(1b) Where a person proposes to appoint a licensee to act on his or her behalf in a transaction in relation to which the finance has been provided or is proposed to be provided by a financial institution —

- (a) which is the same legal entity as the licensee;
- (b) in which the licensee has an interest, whether as a partner, director, substantial shareholder, unitholder or beneficiary of a trust; or
- (c) which has an interest, whether as a partner, director, substantial shareholder, unitholder or beneficiary of a trust, in the licensee,

then, before the appointment to act as a settlement agent required under section 43 of the Act is signed by that person, the

licensee shall give or cause to be given to the person a notice in writing in the form of Form 2 in the Schedule.

- (1c) A licensee shall retain a copy of the disclosure notice for 6 years after the date of acknowledgement of receipt of the notice by the vendor or purchaser, as the case requires.
- (2) In subrule (1) the term ***shareholders of a body corporate*** does not include shareholders of a body corporate which is —
- (a) a body corporate, shares in which are quoted on a prescribed financial market in Australia;
 - (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) a body corporate authorised by the law of any State, or of a Territory, 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.

- (3) In this rule —

prescribed financial market has the meaning given by section 9 of the *Corporations Act 2001* of the Commonwealth²;

substantial shareholder means a person who has a substantial holding, as defined in section 9 of the *Corporations Act 2001* of the Commonwealth, in a body corporate, as if the percentage in paragraph (a) of that definition were 20% rather than 5%.

[Rule 8 amended in Gazette 10 Feb 1989 p. 423; 26 May 2000 p. 2527-8; 31 May 2002 p. 2659; 4 Jul 2003 p. 2689-90.]

9. Conflict of interest

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.

10. Licensees duties in arranging a settlement

When acting for a person in arranging a settlement a licensee shall —

- (a) as soon as practicable after receiving instructions to act for that person cause searches and enquiries to be made at such offices and authorities as may be necessary in regard to the transaction; and
- (b) as soon as practicable forward a settlement statement to the person by whom he was appointed to arrange a settlement and shall forward amended settlement statements from time to time as may be necessary.

11. Recommending legal advice

Whenever it is necessary or prudent to do so, a licensee shall recommend to his client that the client seek the advice of a solicitor in respect of the transaction or any aspect thereof.

12. Discouraging seeking of legal advice

A licensee shall not, whether directly or indirectly, dissuade or attempt to dissuade or discourage or impede his client from seeking legal advice or representation.

13. Supervision and control of employees

A licensee shall be responsible for the supervision and control of the work of unlicensed persons engaged in assisting in the conduct of his business, and for that purpose —

- (a) where the licensee of the business is a natural person —
 - (i) he shall give substantial attendance at his registered office and shall ensure that the managers of all branch offices of the business respectively give substantial attendance at the respective branch offices; and
 - (ii) the manager of a branch office of the business shall give substantial attendance at that office;

and

- (b) where the licensee of the business is a firm or a body corporate —
 - (i) the partners of the firm or the directors of the body corporate, as the case requires, shall ensure that the person in *bona fide* control of the business gives substantial attendance at the registered office of the business;
 - (ii) the person in *bona fide* control of the business shall give substantial attendance at the registered office of the business;
 - (iii) the partners of the firm or the directors of the body corporate, as the case requires, and the person in *bona fide* control of the business shall ensure that the managers of all branch offices of the business respectively give substantial attendance at the respective branch offices; and
 - (iv) the manager of a branch office of the business shall give substantial attendance at that office.

14. Confidentiality

Subject to any statutory provisions to the contrary and save as he may be otherwise instructed by his client a licensee shall not disclose any information which has come to him in his capacity as licensee for the client and in the legitimate course of his appointment as a settlement agent by such client.

15. Deception and misleading representatives

A licensee shall carry out all services efficiently, honestly and without concealment or any form of deception or misleading representation.

16. Client to be fully informed

A licensee shall ascertain and communicate to his client (when requested by the client or when it is necessary or prudent to do

so), all available pertinent facts concerning any service or transaction he undertakes as a settlement agent so that in providing the service and handling the transaction he will avoid error, deception or mis-representation.

17. Licensee responsible for employees

A licensee is at all times responsible for his actions, and those of his employees in business relations with other settlement agents, solicitors, clients and the public.

18. Work to be completed expeditiously

A licensee shall at all times use his best endeavours to complete any work on behalf of his client as soon as is reasonably possible.

19. Harsh or unconscionable conduct

A licensee shall not engage in any harsh or unconscionable conduct discreditable to him or likely to bring settlement agents into disrepute.

20. Ignorance no excuse

Neither a settlement agent nor any of his employees shall be excused for non-observance of the terms of this Code by reason of any claimed ignorance of the terms of the Code.

21. Proper accounts to be kept

It is the duty of a licensee to keep proper accounts evidencing his dealings with clients' money and to keep such records intact and available for inspection by the client, the Board and its authorised officers at any time.

22. Trust account

It is the duty of a licensee to pay all clients' money received by him promptly to the client or as the client may direct into a trust account as provided for in the Act. As far as practicable it is

desirable for him to preserve records of payment by drawing cross-cheques on his trust account and if he holds a client's money in a savings bank trust account or a building society trust account it is desirable that he place it in his trust account current with a trading bank before finally disposing of it so as to preserve a record of its destination.

23. Trust account to be kept with positive balance

If a licensee finds that his trust account is deficient it is his duty to either balance it by his own money or by money placed at his disposal by someone knowing fully his financial position and to immediately inform all persons who could be affected by the deficiency.

24. Trust account not to be used if deficient

A licensee shall not pay his clients' money into his trust account which he knows to be deficient.

25. Notification of receipt of money, documents, etc.

A licensee shall notify his client promptly of the receipt by him of moneys, documents of title or securities on behalf of the client and whenever asked by the client or another settlement agent or solicitor instructed by the client for a cash account or for the payment of moneys or for the delivery of securities or the client's papers the licensee shall comply promptly and willingly.

26. Bill of costs

A licensee shall render a bill of costs, promptly at any time if requested by his client so to do but he need not render an itemised bill unless the client requests it provided he has satisfied himself that his lump charge is fair and proper.

27. Unnecessary work to be avoided

A licensee shall not take unnecessary steps or do his work in such a manner as to increase his proper normal cost to the client. Nevertheless, he should not refrain from taking any steps that he considers advisable in the client's interest.

28. Change of settlement agents

A licensee should recognize that a client is entitled to change his settlement agent or instruct a solicitor to act for him at any time without giving a reason. A licensee will best maintain his own dignity and the dignity of settlement agents by accepting the client's decision in good part and facilitating the change in a friendly and helpful manner.

Schedule

Form 1

[r. 6A]

Appointment of Settlement Agent

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

Your rights

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

Should you wish to change your settlement agent prior to the settlement date, your first appointed settlement agent must accept your decision and is obliged to assist you with this change.

A settlement agent may act for both the vendor and the purchaser where —

- both parties acknowledge in writing that they are aware the settlement agent proposes to do this;
- both parties give prior consent to the settlement agent so acting; and
- the settlement agent is able to provide all information and advice to both parties.

If a conflict of interest arises your settlement agent must not continue to act for you, and you should then appoint an unrelated settlement agent (or a solicitor) to represent you.

There is a maximum scale of fees. You may negotiate a fee lower than the prescribed maximum before making an appointment of a settlement agent.

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 later settlement agent (or solicitor) should be reduced on account of reduced work being required.

Disclosure of interest

Where a settlement agent has a business or financial relationship with a real estate agent, real estate sales representative, developer or financial institution the settlement agent is required to inform a prospective client of that relationship because a conflict of interest may arise during the course of the settlement. When a settlement agent is so required to give this information it is to be contained in a Disclosure of Interest form.

Schedule

A Disclosure of Interest form in the prescribed form: (1)* Is not required (2)* Has been given to you
Appointment
Property/Business:
Vendor(s):
Purchaser(s):
To: [Name and address of settlement agent]
I/We* being the vendor(s)/purchaser(s)* named above appoint you to represent me/us* in the settlement of the property referred to above and: (1) I/We* agree to pay the maximum prescribed fee or a lesser fee negotiated with you and all disbursements incurred by you. (2)* You may also act for each other party to the transaction if you advise me immediately should any conflict of interest arise between the parties. OR (3)* You may not act for any other party to the transaction.
Acknowledgement of receipt of appointment form I/We* hereby acknowledge and confirm that a true copy of this document was received. Dated the day of (year)
Signature of vendor(s)/ purchaser(s)*:
Acceptance of appointment I accept the appointment to act as your settlement agent on the terms set out in this appointment. Dated the day of (year)
Signature of Settlement Agent
* Please delete where not applicable

Form 2

[r. 8]

Disclosure of Interest [Please read this document before appointing a settlement agent to act for you.]
Name of proposed settlement agent:
Name of associated body or person:
Role of associated body or person: (e.g. Real estate agent, real estate sales representative, developer, financial institution.)
Property:
Vendor(s):
Purchaser(s):
<p>Take notice that there is a business or financial relationship between the proposed settlement agent and the associated body or person named. As a result the associated body or person may receive a financial benefit (by way of commission, interest, additional business etc.) if settlement of this transaction is effected.</p> <p>Because the associated body or person will generally only receive financial benefit if settlement of the transaction is effected, it is possible that the proposed settlement agent may be faced with a conflict of interest if, for instance, you choose to terminate the transaction before settlement or to seek advice about your right to do so.</p>
<u>Your settlement agent's responsibility to you</u> The relationship between your settlement agent and you, as a client, must be one of utmost good faith. Your settlement agent must not put his/her duty to you in conflict, or likelihood of conflict, with his/her own interests or the interests of any other person or organization.

Schedule

What is a conflict of interest?

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

1. When a settlement agent has a business or financial association with a person or body (e.g. a real estate agent, real estate sales representative, developer or financial institution) and therefore more than his or her interest as a settlement agent in the settlement being effected.
2. When a person or body (e.g. a real estate agent, real estate sales representative, developer or financial institution) has a business or financial association with a settlement agency and therefore an interest in settlement being effected.
3. When a settlement agent is acting for both the vendor and the purchaser of a real estate transaction or a business transaction.
The Settlement Agents Act 1981 and the Settlement Agents' Code of Conduct 1982 provide that a settlement agent may not act for both parties (i.e. the vendor and the purchaser) unless —
 - both parties acknowledge in writing that they are aware the settlement agent proposes to do this;
 - both parties give prior consent to the settlement agent acting for the vendor and the purchaser; and
 - the settlement agent is able to provide all information and advice to both parties.

If a conflict of interest arises each party must then become separately represented.

Your rights

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

If a conflict of interest arises your settlement agent must not continue to act for you, and you should then appoint an unrelated settlement agent (or a solicitor) to represent you.

Should you wish to change your settlement agent prior to the settlement date, your first appointed settlement agent must accept your decision and is obliged to assist you with 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 later settlement agent (or solicitor) should be reduced on account of reduced work being required.

Acknowledgement of receipt of disclosure statement

I/We* hereby acknowledge and confirm that a signed original of this document was received and that I/we* have read and understood the document prior to appointing a settlement agent to act for me/us* on the

..... day of (year)

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

* Please delete where not applicable.

[Schedule amended in Gazette 26 May 2000 p. 2528-31.]

Notes

- ¹ This reprint is a compilation as at 18 July 2003 of the *Settlement Agents' Code of Conduct 1982* and includes the amendments made by the other written laws referred to in the following table. The table also contains information about any reprint.

Compilation table

Citation	Gazettal	Commencement
<i>Settlement Agents' Code of Conduct 1982</i>	15 Oct 1982 p. 4064-6	15 Oct 1982 (see r. 2)
Untitled rules	10 Feb 1989 p. 423	10 Feb 1989
<i>Settlement Agents' Code of Conduct Amendment Rules 2000</i>	26 May 2000 p. 2526-31	26 Aug 2000 (see r. 2)
<i>Settlement Agents' Code of Conduct Amendment Rules 2002</i>	31 May 2002 p. 2658-9	31 May 2002
<i>Settlement Agents' Code of Conduct Amendment Rules 2003</i> ²	4 July 2003 p. 2689-90	11 Mar 2002 (see r. 2 and Cwlth <i>Gazette</i> 24 Oct 2001 No. GN42)
Reprint 1: The <i>Settlement Agents' Code of Conduct 1982</i> as at 18 Jul 2003 (includes amendments listed above)		

- ² A definition of “prescribed financial market” is deemed to have been inserted into rule 8(3) on 11 March 2002 by *Settlement Agents' Code of Conduct Amendment Rules 2003*. On 31 May 2002 rule 8(3) was replaced by a new rule 8(3) which only included a definition of “substantial shareholder”, see *Settlement Agents' Code of Conduct Amendment Rules 2002*. The likely result is that rule 8(3) does not include a definition of “prescribed financial market”, and did not on and from 31 May 2002.