



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

Overview of the Settlement Agents Code of Conduct 2016

CPD 2016

Participant Workbook – Distance Learning

Acknowledgment

The Australian Institute of Conveyancers Western Australia (AICWA), in association with Tom Morris and Sue Morris, developed this educational material for the Consumer Protection Division of the Department of Commerce. It has been developed to satisfy the prescribed educational activity requirements of the 2016 Compulsory Professional Development Program (CPD) for licensed settlement agents in Western Australia.

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1. Background

The purpose of this Compulsory Professional Development module is to outline and discuss the key changes that have been made to the *Settlement Agents Code of Conduct 1982* (1982 Code). The new code, the Settlement Agents Code of Conduct 2016 (the Code) has replaced the 1982 Code and implements feedback that the Department of Commerce (the Department) received from the industry during a review in 2013.

1.1. Session Objectives

By the end of this session participants will have:

- ✓ considered the principles and reasons behind the amendments that have been made to the Code;
- ✓ explored the implications and risks applicable to the work of a licensed settlement agent; and
- ✓ discussed specific strategies and techniques to manage the identified risks.

1.2. Review of the Code of Conduct

The submissions received by the Department from the review in 2013 indicated that there was general support for the Code to provide greater detail and clarity on matters relating to the duties of licensed Settlement Agents. The Code has also been amended to mirror where appropriate rules in the Code of Conduct for Real Estate and Business Agents and Sales Representatives 2016 (REBA Code), and the Licensed Valuers' Code of Conduct (LV Code).

While some of the rules have been redrafted in line with modern legislative requirements and to ensure consistency with the other property codes and the *Settlement Agents Act 1981* (SA Act), the overriding duties and best practice standards of licensed settlement agents and their employees remain the same.

The principles underpinning the review (and subsequent amendments) of the Code aim to:

- protect the interests of consumers and clients who deal with licensed settlement agents;
- promote public confidence in the work carried out by licensed settlement agents;
- achieve a competitive market with fair trading practices;
- provide guidance to the industry on regulatory requirements and acceptable conduct; and
- provide DOC with tools to effectively hold licensees to account for their actions.

As part of this process, the DOC considered:

- whether the existing codes are achieving fairness and protecting consumers
- how to achieve 'best practice' regulation without regulation being excessive;
- avoiding and/or rectifying technical issues such as ambiguity and inconsistencies e.g. between the SA Act, the REBA Act, other property codes and the Australian Consumer Law (ACL); and
- whether the Code unnecessarily duplicates provisions in other laws.

1.3. Timing

The new Code was gazetted on the 4th October 2016 and took effect on 5th October 2016. This new Code replaces the 1982 Code. Settlement agents will have a two month transition period to become familiar with the new Code.

1.4. The Code and Act interact with other laws

The Code sits under the SA Act and sets out the standard of conduct that settlement agents are required to meet. If there was an inconsistency between the SA Act and the Code, the SA Act would always prevail over the Regulations and Code.

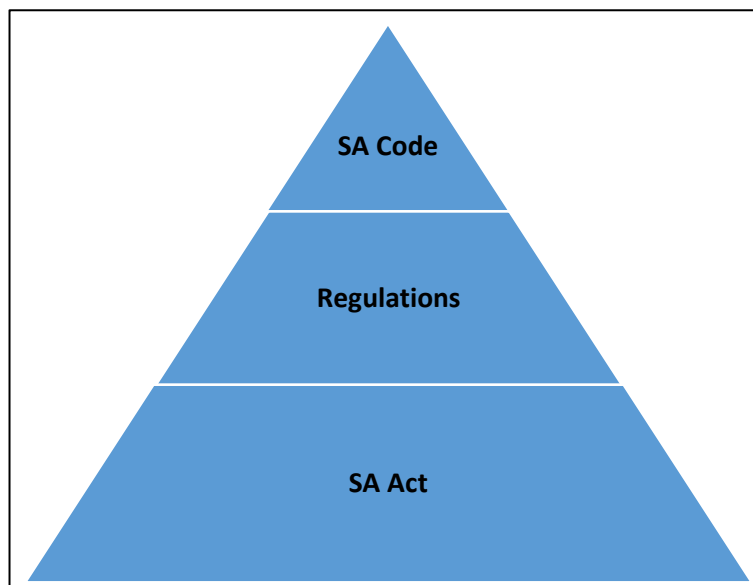


Table 1: Legislative hierarchy for settlement agents

Generally speaking Acts, Regulations and Codes are written to stand alone and to not affect other laws, but a law may refer to another law, for instance explaining which takes precedence on a particular point or to refer the reader to definitions it shares with another law.

The *Interpretation Act 1984* (the Interpretation Act) provides guidance on how to interpret all WA laws, regulations and codes (unless otherwise specified). It provides that words in subsidiary legislation like the Code have the same meaning as in the Acts they operate under (s. 44). The Interpretation Act also provides that if 'may' appears, discretion is allowed, but that 'shall' in the Code means an action must be performed. Terms that are not defined have their usual ordinary meaning, taking into account matters such as the intention of the law.

Where a conflict exists between WA law and federal law, Commonwealth law prevails, unless stated otherwise.

Legislation (WA or Commonwealth) generally prevails over common law ('case law' made by courts) yet the rules courts use to interpret Acts often come from case law. Understanding how the courts have interpreted legislation can be complex and agents must seek advice where required.

If there seems to be a conflict between any two WA Acts (or pieces of WA subsidiary legislation) and there is no clarifying statement about which prevails, legal advice may be needed.

One important interaction between the SA Act and other laws is that the SA Act not only empowers the Regulator to take action for a breach of the SA Act, Regulations and Code, but also provides for action where settlement agents breach any other law – for instance the ACL, which has higher penalties. A serious breach may attract disciplinary action which may result in a range of penalties including fines and/or suspension or disqualification of an agent's licence.

The ACL is not changing at this time, but as there is some overlap between the Code and ACL provisions, the amended Code has been scrutinised to make sure it addresses specific issues needed to protect consumers. It also reinforces the principles provided for in the ACL.

1.5. Provisions that have been amended in the Code

The key changes to the Code include:

- Removal of trust account matters already covered in the SA Act.
- Increased consistency across related legislation.
- Fee deregulation.
- Clarification of the application of the rules to licensed settlement agents as well as to the licensee of the Business.
- A new rule that highlights the fiduciary duty of settlement agents to their clients.
- Amendments to 'conflict of interest' rules.
- Alignment of 'honesty' rules with the REBA Code.
- Further clarification of the rules in respect to referrals - particularly referrals from and to licensed real estate agents and sales representatives.

The previous 1982 Code duplicated provisions in the SA Act about **trust accounts**. The amended Code has removed trust account provisions that are duplicated in the SA Act (section 49). It should be noted that these changes are not intended to modify the trust account obligations of licensed settlement agents.

Appendix A provides an overview of the new structure of the Code and the provisions that have been amended.

Quick Check Exercise #1 – Similar rules across the property industries

As noted above, one objective of the amendments was to achieve greater consistency between the Code, the REBA Code, and the LV Code.

(a) What rules should be consistent across the property industry Codes of Conduct?

(b) What are the advantages of such consistency and are there any disadvantages?

2. Fee Deregulation and new disclosure requirements

Under new rule 22 of the Code, a settlement agent must disclose to their client in writing, the maximum amount they will be charging for their services before being appointed to act. The new fee disclosure provisions are intended to ensure that consumers can make an informed choice when selecting a settlement agent.

Settlement agents must make this disclosure before the client signs the Form 1 appointment to act. The Form 1, **Appointment of Settlement Agent**, at the back of the new Code has also been modified to remove the reference to a maximum scale of fees.

Rule 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 –*
 - i. *an agent as defined in the Real Estate and Business Agents Act 1978 section 4(1); or*
 - ii. *a developer as defined in the Real Estate and Business Agents Act 1978 section 4(1); or*
 - iii. *any other third party.*

Settlement agents have the option (should they wish to) of charging less than the service amount disclosed. For example if the settlement agent wants to charge a fee based on a per hour rate they would need to provide the client with a capped maximum service amount. The total amount charged to the client could be less than this, based on the hours actually worked.

How settlement agents choose to set out the maximum amount is up to them. The intention is that the client knows upfront the total amount that they will be required to pay the settlement agent for their services.

Other costs paid on the client's behalf

The maximum disclosed amount relates to the provision of the services that the licensee has agreed to provide and should not include costs paid on the client's behalf by the settlement agent to effect settlement. These costs include:

- duty chargeable under the *Duties Act 2008*;
- any other tax, duty, fee, levy or charge under a written law;
- fees payable to financial institutions;
- commissions chargeable by an agent, developer or any other third party.

Note: Please be aware this differs to the previous fee structure where general office disbursement fees and costs were recovered separately to the scale of maximum fees for the settlement agent's services. General office disbursements may include telephone calls, facsimiles, photocopying, postage, courier fees and stationery.

Whilst it is not a legislative requirement to disclose these costs associated with effecting settlement, the Department encourages settlement agents to provide their clients with an outline of the likely statutory charges, duties and any other expenses involved in executing settlement. Settlement agents can choose to outline these in the same document as the maximum service amount or separately. Many settlement agents already provide their clients with an outline of these costs and the Department would encourage agents to continue to do this as best practice.

New rule 23 prohibits a settlement agent from receiving payment for a service that exceeds the service amount for that service disclosed in the costs disclosure unless:

- a) there has been an unforeseen significant change in the scope of the work required to provide the service; and
- 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.

Rule 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 23 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*
 - 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.*

Quick Check Exercise #2 - What constitutes an 'unforeseen significant change in the scope?'

In the space below, detail a couple of scenarios that may constitute an unforeseen significant change in the scope of a settlement.

Activity #1 – Fees, Costs and Charges

(The scenario below assumes that fee deregulation has not yet taken effect.)

Case study scenario

In preparation for the deregulation of fees, the manager of **Bona Fide Settlements (BFS)** has allocated a member of staff, Pat Searcher, the task of preparing advice on how much the agency should charge and how they should deal with their disclosure requirements.

Pat has come back to her manager with the recommendation that there are three types of fees and charges that need to be considered.

1. Conveyancing service fees (including GST)

Covering: document preparation, inquiries, verification, follow up, lodging, reporting on progress, settlement attendance, disbursement of funds, preparation of settlement statement, and for buyers a 6-week confirmation of registration.

2. General Office Disbursement costs

Including: postage, couriers, photocopies, telephone/fax, printing/photocopies.

3. Statutory charges and other costs paid on the clients behalf to effect settlement

Including: search cost for copy of Certificate of Title search, check search, registration search, lodgment fees, EAS (Electronic Advice of Sale), State Government Transfer Duty, bank cheque fees (as per Joint Form GC - up to 3 at the buyer's expense) and the real estate agents' commission.

Conveyancing Service Fee and General Office Disbursements

Pat concluded that it would be possible to create a standard quote for conveyancing service fees and general office disbursement fees. Pat calculates that it would cost \$1000 in wages and overheads and \$100 in office expenses (stationary, photocopying and phone calls) to process a normal settlement. She was not able to determine to what extent, if at all, the fee charged should vary with the value of the property. She did, however, provide information for her manager to assist her to decide. Pat suggests that BFS charge clients \$1200 as their settlement fee and inform clients that they could be charged up to a maximum of \$200 for general office disbursements. BFS would need to tell clients that the maximum service amount would be \$1400.

Pat's manager asked her what the consequences would be if the settlement proves to be much more complicated and takes more time than they originally thought.

Please note this is a 'fictitious-scenario' for discussion purposes only - it does not represent a sufficient explanation of the requirements of the Code – it is not a model answer.

Pat suggests that it will be OK to charge the client a higher price as long as the quote sets out clearly what is included using a Service Level Agreement and the client is provided with clear information about the nature of potential additional costs and charges.

In respect to Statutory Charges Pat suggested to her manager that it is important to make it clear to clients that the estimate for Statutory Charges will include: for the buyer, two searches and the check search. And for the seller a minimum of one search. However, it will also be important to make it clear to clients that should additional searches be required these be will charged at a cost of \$24.60 each. And that the search cost estimate will be reviewed as soon as the initial Title Search

has occurred. Pat thinks it will also be useful to make it clear that the Statutory Charges will ONLY be charged on a cost recovery basis.

Reflecting on Pat's suggested response to her manager

What do you like about Pat's suggested approach?

What do you think is wrong with Pat's approach?

What do you think would be the next steps in this scenario?

3. Application of the code: 'licensee' and 'licensed settlement agent'

This next section looks at an interesting case study that has implications for the application of the amended Code to licensed settlement agents as opposed to the licensee of the agency.

The case study follows a real complaint brought to the Settlement Agents Supervisory Board (SASB) against Mrs Watson [2011]. The complaint alleged that Mrs Watson had not acted efficiently as required by rule 15 of the 1982 Code.

In this section, we will unpack and explore the implications of the case in the context of the amended Code. The approach we will follow involves four steps:

- 1) Confirm our use and understanding of some key terms;
- 2) Unpack rule 15 using the five whiskies and a hotel planning checklist;
- 3) Clarify the timeline and development of issues in the case;
- 4) Explore the implications of this case for the amended Code and agency policy and procedures.

Quick Check Exercise #3 – Some Key Terminology

Before we look at rule 15 and the case of SASB vs Watson, it will be useful to our discussion to review our understanding and use of the following terms. Type the meaning of the following terms in the space below.

Term	Meaning
Settlement Agent	
Settlement Clerk	
Conveyancer	
Licensee	
Bona Fide control	
Principal	

Activity #2 – Unpacking rule 15

Rule 15. Deception and misleading representatives [1982 Code]

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

Using the six planning questions (whiskies and a hotel; who, what, where, when, why, how) as a guide, tease out an answer to each of the following questions in respect to rule 15 (see above).

Who is this rule directed at?
What is the rule saying?
Where does this rule apply?
When does the rule apply?
Why?
How?

The Watson Case

The settlement issue in this case is that while the intent was for Lot 1 and Lot 2 of a Strata Block to be transferred; ONLY Lot 1 of that Strata Block was actually transferred at settlement. The error developed in two phases:

Phase One

In the first phase of the case, Mrs Watson is employed by Able Settlements as a conveyancer.

- She is the conveyancer allocated to the transaction.
- She is not in bona fide control of the settlement agency.
- Only **Lot 1** of two lots is transferred to the incoming proprietor.

Phase Two

The second phase of the case commences in **August 2006** when Mrs Watson is made aware of the error that had been made back in December 2005.

- Prompt action is taken by Mrs Watson to redress the error.
- However, the relevant file is archived before the transfer had been finalised.
- It is not until **February 2007**, (six months later) that it becomes known that the transfer of **Lot 2** to the incoming proprietor is still not completed.

Mrs Watson's employment status:

During phase one, Mrs Watson was employed as a conveyancer. One month after becoming aware that Lot 2 has not yet been transferred to the incoming proprietor, in September 2006, Mrs Watson became the person in Bona Fide Control of the business. She held this role until she resigned two years later in September 2008.

In summary

The error regarding the non-inclusion of Lot 2 in the original transfer of ownership to the new proprietor came to the attention of Mrs Watson in August 2006. This occurred when a real estate agent (Ray White Karratha) sought clarification as to the name of the registered proprietor.

The process to rectify the issue and provide for the transfer of Lot 2 to the rightful incoming proprietor commenced from this time in August 2006. Three months later in **November 2006**, the required discharge of mortgage is lodged by the ANZ bank. However, the file was prematurely archived despite the transfer of Lot 2 still not having been completed.

At the time of the original failure to transfer Lot 2 with Lot 1 on the Strata, Mrs Watson worked for Able Settlements as a licensed settlement agent – conveyancer; however she was not in bona fide control of the business.

In **September 2006**, Mrs Watson was appointed by the directors of the Pty Limited Company trading as Able Settlements to be the person in bona fide control of the business. A position she held when she was notified on **14 August 2008** by a firm of solicitors that Lot 2 had not been transferred to the incoming proprietor. Mrs Watson resigned from Able Settlements one month later, in **September 2008**.

Progress of the Case		Employment history	
Phase 1		In 2000	Employed as a conveyancer
		Sept 2004	Obtained SA Licence
Dec 2005	Lot 1 only transferred		
Phase 2			
Aug 2006	SA notified Lot 2 missed		
		Sept 2006	Nominated bona fide control
28 Nov 2006	ANZ bank discharge mortgage over Lot 2		
7 Feb 2007	File archived before Lot 2 is transferred.		
14 Aug 2008	Again SA notified Lot 2 not transferred.		
		Sept 2008	Resigned with 33 years' experience.

State Administrative Tribunal Decision

Mrs Watson argued that rule 13 of the 1982 Code imposed an obligation on the licensee who had been engaged to act on the settlement, in this case, her employer.

She argued that it did not apply to her personally and that she was not exercising any function as a licensee for the purpose of the clause.

The Tribunal agreed Mrs Watson's contention and this application was dismissed.

Supervision and control of employees

Rule 13 of the 1982 Code set out the licensee's supervision and control responsibilities for sole traders and firms or body corporates. (This was discussed at some length in the 2015 CPD, Duties of Settlement Agents).

Where the licensee is a firm or body corporate, the rule sets out the responsibilities of partners or directors to ensure that the person in bona fide control of the business gives substantial attendance at the registered office of the business to provide the required supervision and control. Subsections of the rule talk about branch managers.

Rule 13. Supervision and control of employees [1982 Code]

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.

Activity #3 - Implications of the case

What do you see to be the implications of the SAT decision in this case? Consider the implications for the licensee, conveyancers and the person in bona fide control.

3.1. Implications of the Watson case for the amended Code

It is the Department's understanding that before the Watson case, the former SASB adopted the approach that:

- some clauses referring to the 'licensee,' applied to both the licensed settlement agency as a business and employed licensed settlement agents; while
- other clauses only applied to the licensed settlement agency and had no application to the employee.

In the Watson case, SAT diverged from this interpretation and determined that the reference to 'licensee' in the Code is restricted to the licensed settlement 'agency' – as a business entity. The reference to 'licensee' does not necessarily apply to the person employed by that agency, even if that person is licensed and dealing with the client directly on the agency's behalf.

Under the amended Code, certain rules such as those referring to the supervision and control of the business (rule 16) continue to only apply to the licensee carrying on the business.

However, the rules referring to general duties in the amended Code, such as the requirement to carry out work with due skill, care and diligence (rule 7), and the duty to avoid a conflict of interest (rule 17), now apply to all licensed settlement agents.

3.2. New definitions – ‘client’ and ‘licensed settlement agent’

The new definitions of ‘client’ and ‘licensed settlement agent’ were considered necessary in the amended Code as a result of the SAT’s consideration of the meaning of the term ‘licensee’ in the Watson case. In the 1982 Code, it is likely that in circumstances similar to those in the Watson case, where a licensed settlement agent is employed by another licensee, a court or tribunal would consider that the employed licensed agent does not have any clients of their own but only performs functions for the licensee that is carrying on the business and that any clients are clients of the employer.

The new definition of ‘client’ in the Code has been drafted so that it is consistent with the new definition of ‘client’ in the REBA Code. In relation to this new definition, the Code provides that a reference to a licensed settlement agents’ client includes a client of a licensed settlement agent by whom the first-mentioned agent is employed or engaged.

Rule 3 – Terms used

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; and*
- c) *a client of a person employed in or engaged by the licensee;*

New rule 4 of the amended Code clarifies that the Code applies to all licensees including the licensed settlement agency and the licensee employed by the licensed settlement agency. The Code has also been amended to replace ‘licensee’ with ‘licensed settlement agents’ where it would be appropriate for the provision to apply to all licensed settlement agents and not only the person who is the licensee of the business or in a direct contractual relationship with the client.

However, certain rules, such as those referring to the supervision and control of the business, continue to **only** apply to the licensee carrying on the business.

Rule 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.*

4. Acting with Authority and instructions

4.1. Appointment to Act

Previously, rule 6A of the 1982 Code stated:

Rule 6A. Appointment to act [1982 Code]

- 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 sub-rule (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 26 in the amended Code still requires licensees to obtain written authority to act and this authority needs to contain the information set out in Form 1. However, Rule 26 also has an additional provision that requires licensed settlement agents to obtain written confirmation of any alteration to a term of their original appointment to act agreement or any other significant matter. Requiring confirmation in writing of verbal instructions provides clarification and protection for clients and agents and reduces the risk of misunderstandings and disputes. Under section 9 of the *Electronic Transactions Act 2011*, the requirement to provide confirmation in writing is met by a licensee sending an email to text message.

This amendment is consistent with the changes made to the REBA Code and LV Code, however given the different nature of the industries, the wording is slightly different in each of those Codes.

Rule 26. Appointment to act [Amends rule 6A in the 1982 Code]

- 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) *A licensee who is unable to accept an appointment to act must notify the person who sought to make the appointment as soon as practicable.*
- 3) *Any change made to the appointment to act must be in writing and may be made by way of amendment to the original document that appointed the settlement agent.*

4.2. Client's instructions

Rule 10 amends rule 18 in the 1982 code which required licensed settlement agents to ensure work is done quickly and well. The due care and skill component of this provision has been retained however it forms part of a new provision which will be covered later in the session.

The former rule 18 stated that:

Rule 18. Work to be done quickly and well [1982 Code]

A licensee shall make all reasonable efforts to complete work for the client as soon as is reasonably practicable and shall use due care and skill.

Rule 10 in the amended Code requires all licensed settlement agents to act within a reasonable time and in accordance with their client's instructions unless it is unreasonable or improper to do so, as is shown on the next page.

Rule 10. Client's instructions [amends rule 18 in the 1982 Code]

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) In accordance with the client's reasonable instructions.*

4.3. Best interest of the client

A new rule has been included in the Code that requires licensees and all licensed settlement agents to act in the best interest of the client unless it is unreasonable or improper to do so. This new rule is consistent with the best interest provision rules in the REBA Code and the LV Code.

Prior to the amendments, there was no specific requirement that licensed settlement agents act in the best interest of the client, although this may have been implied in other provisions in the Code. For clarity and consistency with the other property industry codes, it was considered important to have such a requirement clearly stated.

Rule 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.

5. Due care, skill and diligence

Rule 10 of the 1982 Code outlined a licensee's duties in arranging a settlement as outlined below.

Rule 10. Licensees duties in arranging a settlement [1982 Code]

1. *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.*
2. *Without limiting the generality of subrule (1), a licensee must, as soon as practicable after receiving instructions to act for a person in arranging a settlement and before settlement takes place, make all reasonable efforts 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, as the case requires.*

In the amended Code, a general provision requiring that licensed settlement agents' exercise due diligence and due care and skill has been included as shown below. The new rule 7 is consistent with the due care and skill and due diligence provisions in the LV Code and the REBA Code.

It is important to note that a settlement agent's duty to act with due skill, care and diligence arises at common law out of their obligations as an agent. This standard has been repeated in the amended Code to remind licensees of their obligations. Consumers may also be unaware of their settlement agent's obligations to them and the Code may be the first port of call for a consumer if a dispute arises.

The new rule 7 is consistent with section 208 and section 60 of the ACL and it applies to all licensed settlement agents.

Rule 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.

6. Honesty

The redrafted Code has amended rule 15 and the guidance provided in respect to deception and misleading conduct.

Rule 15 of the 1982 Code is shown below.

Rule 15. Deception and misleading representatives [1982 Code]

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

In the amended Code, a new rule has been introduced requiring licensees and settlement agents act honestly with all parties engaged in a transaction. The new rule 8 has been drafted so that it is consistent with the honesty provisions in the LV Code and the REBA Code.

Rule 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.

7. Misleading and deceptive Conduct

The former rule 15, applicable in the Watson case has been amended by rule 12 in the new Code. There is little change to the existing provisions relating to deception and misleading behaviour. However, as some of the elements of this duty are already covered in other Codes and by the ACL, the new provisions have been redrafted for greater consistency.

The requirement that a licensee must carry out all services efficiently has also been removed in the Code. The content of the former rule 15 has been retained, however the format has changed so that it now appears as two separate rules; 12 and 8 and is clear that both provisions apply to all licensed settlement agents.

Rule 12 requires that a licensed settlement agent must not make misleading or deceptive representations and the wording that has been used in this provision is consistent with section 18 of the ACL.

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

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.

8. Supervision and control of employees in the amended Code

Rule 15 in the Code amends rule 13 and includes rule 17 in the 1982 Code. The requirement that a licensee is responsible for the supervision and control of the work of all persons engaged in assisting in the conduct of their business has been retained in the amended Code.

However, the provision has been redrafted to require that licensees who operate a business take all reasonable steps to ensure that their employees (both licensed and unlicensed) or anyone else engaged by them comply with the SA Act, Regulations, the Code and any other relevant law. This requirement has been included to ensure there is a consistent standard across the Codes as well as ensuring that employees are properly supervised. Under similar provisions in the REBA Code, an agent must properly supervise the agency business carried on by the agent and take reasonable steps to ensure that other employees comply with the provisions of the SA Act, the Code and other relevant statutes.

Rule 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.*

9. Fiduciary obligations

The amended Code includes a new rule that requires licensed agents to comply with the fiduciary obligations arising as an agent. While settlement agents have always had fiduciary obligations, the new provision is intended to remind agents of these obligations.

Rule 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.

The inclusion of this provision in the Code serves to remind agents that they are required to act with good faith for the benefit of their client and that they are not permitted to profit from their position as an agent or to put themselves in a position where their duty to their client and their personal interests may conflict.

While there is no absolute definition of a fiduciary relationship, over the years four key elements of fiduciary relationships have been elucidated in court findings:

- an undertaking is given to carry out duties
- control of property (or a material outcome) is entrusted to the person giving the undertaking
- the party giving control relies on and trusts the other or is entitled to do so
- one party has power to affect the interests of the other (who is therefore vulnerable to them).

Legal sources agree that not all of these characteristics will be found in every fiduciary relationship as the concept has always been a flexible one covering a variety of relationships.

Case law has established some relationships that are now assumed to be fiduciary by default:

- a trustee is a fiduciary to any beneficiaries of the trust;
- an agent is a fiduciary to their principals;
- a director is a fiduciary to their company;
- a partner is a fiduciary to their partner(s);
- a broker is a fiduciary to their clients;
- a legal practitioner (or accountant) is a fiduciary to their clients; and
- an employee is a fiduciary to their employer *if they are in a position of trust*.

9.1 How fiduciary roles come about

Fiduciary relationships come into existence whenever a person undertakes to act in one of the roles listed as being recognised as fiduciary or agrees to carry out a fiduciary duty.

Fiduciary relationships can also be created by agreement in a contract (for example a loan agreement where a lender may owe a fiduciary duty to a borrower).

A relationship may be deemed fiduciary by a court, based on their interpretation of circumstances and facts.

A written law can state that a certain type of relationship or duty will be fiduciary. A fiduciary relationship can also *be implied* in law where one party relies on another to act for them – proper evidence of a basis for dependency and undertaking to act, advise or protect is needed.

Knowing when you are acting as a fiduciary is not always simple, but it is important, as it impacts on how you must conduct yourself. It can also be useful to know when you are not acting as a fiduciary.

Activity #5 – What is a fiduciary duty?

Review the questions below – the answers may be True, False, or ‘Maybe’

	T, F or M
1) A fiduciary must be loyal to their principal at all times and must keep their confidences	
2) As a licensed settlement agent, if your interest conflict with your client’s interests, you breach fiduciary duty.	
3) You become a fiduciary when you sign a client and the fiduciary relationship ends when the transaction is final	
4) If a client signs a form that says that they are giving informed consent to a conflict, you no longer need to put their interests first.	
5) Consumers enjoy the same protection as clients under fiduciary duty	

The amended Code does not include a definition of fiduciary duties because it is considered too prescriptive and there is a risk that some aspects of the common law fiduciary duties could be missed.

However, for training purposes, the table on the next page provides a **general guide** to the fiduciary duties of settlement agents.

General fiduciary duties of settlement agents

Loyalty	<ul style="list-style-type: none"> • Owes undivided loyalty to the client and must put the client's interest above their own. • Should 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.

Source: PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER DOC 2013

10. Conflict of interest

In the 1982 Code, rule 9 prohibited a licensee from acting or continuing to act in the settlement of a transaction if a conflict of interest arose, or if a conflict of interest foreseeably could arise, between the licensee and his client.

Rule 9. Conflict of interest [1982 Code]

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.

Some other rules in the 1982 Code are relevant to this issue. Rule 5 referred to the obligation of the licensee being one of *'utmost good faith that requires him not to put his duty to his client in conflict or in the likelihood of conflict with his interests or that of any other person.'*

Rule 5. Knowledge of legal and equitable duties [1982 Code]

*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.*

Rule 7 requires that a licensee must cease to act for both parties if ‘in the interest of one he should withhold some information or advice from the other.’

Rule 7. When licensee may act for both parties [1982 Code]

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.

Section 46 of the SA Act (shown below), clearly allows settlement agents to act for both parties as long as each of the parties acknowledges this intent and gives consent in writing – Form 2 in the Appendix of the Code provides for this disclosure of interest.

SA Act 1981

Section 46. Real estate settlement agents, functions of

- (3) *A licensee who holds a current triennial certificate may act for either the vendor, the purchaser, or the mortgagee, in a settlement referred to in subsection (1) but may not act for more than one party to the real estate transaction in that settlement unless each of the parties for whom he is to act, in writing –*
- a) acknowledges that he is aware that the licensee proposes to act; and*
 - b) gives his prior consent to the licensee so acting.*

In the 1982 Code, there is an issue relating to rule 7. Part of rule 7 in the 1982 Code requires that a licensee must ‘cease to act for both’ parties ‘if in the interest of one he should withhold some information or advice from the other.’

This suggests that the settlement agent would cease to act for both parties.

However, in the second part (see the underlined last sentence in rule 7 above) it is stated that the settlement agent may continue to act for one of the parties ‘*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.*’ Not an easy sentence, but it may be seen to say that the settlement agent may act for the party that is not disadvantaged by the information the settlement agent has acquired from the other.

We will have a look at the possibilities from two perspectives.

First, the situation where the settlement agent has learnt of something from the seller that if disclosed to the buyer, would put the buyer off proceeding with the deal.

- In this situation, it could be argued that the information provided by the seller was confidential, and it would be improper to use it against the seller. If the settlement agent continued to act as agent for the buyer, then they would need to disclose this information to the buyer. The remedy suggested by this clause is to cease acting for the buyer, but that it is OK to continue to act for the seller.

The alternative situation could also occur. The settlement agent could have acquired some confidential information from the buyer: For example that the buyer will be delaying settlement due to finance issues.

- In this situation, the 'confidential' information would be of interest to the seller so that they may take pre-emptive legal advice and action, thereby disadvantaging the buyer. The remedy suggested by this clause is to cease acting for the seller, but that it would be OK to continue to act for the buyer.

It has been recognised that there are essentially two different, and potentially conflicting, tests for determining when a settlement agent should cease to act for both parties embedded in rule 7.

The amended Code has endeavoured to resolve this inconsistency in a manner that is consistent with the common law fiduciary duties of settlement agents, without substantially changing the requirements or intention of the 1982 Code. Under the amended Code, the settlement agent must not continue to act for any of the parties if there is a real possibility that the agent would be required to act contrary to the interests of a party. The settlement agent must also cease to act for both parties if in the interests of one party they should withhold information or advice from another party. These changes are outlined in rules 17 and 18 of the amended Code below.

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

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.*

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

- 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.*

Activity #6 – Assessing risk

The purpose of this activity is to assess the risk of a breach of the Code and a settlement agent's fiduciary obligations arising in the 'scenarios' described below.

In developing your response, please be guided by the following rules in the amended Code:

- Rule 6 – Acting in the best interests of client
- Rule 7 – Duty of care, diligence and skill
- Rule 8 – Duty of honesty
- Rule 10 – Client's instructions
- Rule 11 – Client to be fully informed
- Rule 12 – Misleading or deceptive conduct
- Rule 14 – Fiduciary obligations

Three scenarios are described below.

1. Please consider each scenario and make your assessment of the Likelihood of the situation occurring and the Consequences if it did occur and was made public.
 - **Likelihood** is a measure of the probability of the described situation arising.
 - **Consequence** is a measure of the impact of the situation on the settlement agent and agency if the situation is not appropriately managed – it is a measure of the worst case consequences.
2. Then outline the risk management strategies and techniques that you consider appropriate in reducing the risk to an acceptable level.

Level	LIKELIHOOD
C	Common (Will happen at least once a year.)
P	Possible (Will probably happen at least once in a conveyancer's career.)
U	Highly unlikely (Unlikely to happen to a conveyancer in their working life.)

Level	CONSEQUENCE
H	Major impact
M	Moderate impact
L	Insignificant impact

Scenario 1 – buyer only

The settlement agent is acting for the buyer only. The SA is aware of facts that are highly likely to impact on the client's desire to purchase the property.

Risk considerations:

Likelihood of this situation arising: C P U

Consequences if the agent does nothing and their nondisclosure is made public: H M L

What risk management strategies and techniques might you employ in this scenario?

What if the settlement agent becomes aware of problem with the property that might affect their client's willingness to proceed to settlement that is not directly related to the settlement (i.e. the property was used as a former meth lab)?

Does it make a difference if the settlement agent directly assisted the buyer in drawing up the O&A?

Scenario 2 – seller only

The settlement agent is acting for the seller only and becomes aware of facts that are highly likely to impact on buyers desire to purchase the property.

Risk considerations:

Likelihood of this situation arising: C P U

Consequences if the agent does nothing and their nondisclosure is made public: H M L

Does the settlement agent have a duty to communicate the facts to the seller (or their real estate agent)?

Does the settlement agent have a duty to communicate the facts to the buyer (or their real estate agent or settlement agent)?

Does the settlement agent have a duty to advise the Department?

What risk management strategies and techniques might you employ in this scenario?

Scenario 3 – buyer and seller

The settlement agent is acting for both the buyer and seller and becomes aware of facts about the property that are highly likely to impact on a buyer's desire to purchase it.

Risk considerations:

Likelihood of this situation arising: C P U

Consequences if the agent proceeds as though they are not aware of the facts, and subsequently the SA's knowledge of the facts is made public [**The Department also notes 'ethics'**]: H M L

Should the settlement agent cease to act for both parties?

If the settlement agent chooses to withdraw from representing the buyer, are they obliged to tell the buyer why?

If the settlement agent advises the buyer of the issue and the buyer confirms they are willing to proceed to settlement, and then they will be seeking compensation, does the settlement agent need to advise the seller of the buyer's intent?

What risk management strategies and techniques might you employ in this scenario?

10.1. The Department's advice to settlement agents on disclosure

The Department provides useful advice with respect to disclosure and a wide range of other legislative and case law issues. The following section includes an extract from a *Settlement Industry e-Bulletin* and a full copy of a *Real Estate Industry e-Bulletin*.

The *Settlement Industry e-Bulletin*, December 2013 (Issue 35) outlines the nature of what was then (2013) Landgate's new Property Interest (PI) report. At that time, the PI report contained information on 51 of what was estimated to be 85 property interests in Western Australia (60%). Two years later (in November 2015) Landgate's website now indicates that the PI report contains information on 69 (or almost 70%) of the revised estimate of approximately 100 property interests. The Landgate website (landgate.wa.gov.au/property-reports) explains -

A Property Interest Report gives:

- all known property interests in one report;
- interests not shown on a Certificate of Title;
- information on land use restrictions that may affect a property;
- details on who to contact if you require more information; and
- confidence that you have done your research.

And that this information (which currently costing \$56) is useful for:

- property professionals to help inform their homebuyers;
- homebuyers to learn more about a property before they buy;
- reducing the need to contact each government department separately;
- knowing which government department to contact for more information.

In summary, the Department of Commerce believes that when and how a **settlement agent** uses a PI report will be a judgement call for individual agents at this stage of the PI report's evolution. Use of the PI report, and other sources of information, will need to have regard to the instructions of the principal and the particular characteristics of the property. The Department will continue to expect that the requirements of the **Code and Settlement Agents Act (1981)** are met in this context.

Source: Settlement Industry e-Bulletin, Department of Commerce, Consumer Protection, 9 December 2013

Over the page, you will find a copy of Issue 83 (2015) of the *Real Estate Industry e-Bulletin* presenting the Department's disclosure of material facts advice to Real Estate Agents. Read through this advice and consider its relevance to settlement agents. (You may find it useful to add to the **highlight** points of interest as you read through.)



Disclosure of material facts to buyers and tenants

Obtaining and communicating all available material facts to the parties in a transaction is an essential part of the real estate process. It is a direct requirement under the Code of Conduct for Agents and Sales Representatives 2011 (the Code). An agent must make reasonable efforts to ascertain or verify the facts which are material to that transaction which a prudent agent would have ascertained and communicate those facts to any person affected by it. Similarly the ACL has provisions that make it an offence to mislead or deceive parties to a contract - this can be by omission.

While there is no specific definition as to what constitutes a material fact, it could include what would be **important to a reasonable person** in deciding whether or not to proceed with a particular transaction. These are facts that are generally related to issues of market value and a person's decision on purchasing a property.

Material facts may be known to an agent through their prior knowledge of the property or the area in which it is located. An agent should make their own enquiries about material facts which relate to the period where the seller was the owner and which may affect the transaction, especially for factors which may not be readily apparent. While these enquiries may not require the agent to undertake research of the property per se, it may include the agent discussing and seeking instructions from their principal (client) of any market-sensitive matters that could be the subject of statements or representations in marketing the property, as well as the existence of any material facts.

When determining the **types of things that may be material facts**, agents may wish to ascertain information about:

- building approvals (i.e., for sheds, pergolas, etc);
- the existence of non-visual damage or structural issues of the property;
- the recent history of use or activity in the dwelling, if that activity would be relevant to a purchaser's decision to proceed with a purchase (e.g., production of drugs and any residual effects that may affect the health of occupants);
- vehicular access;
- aspects of the area surrounding the property such as proposed developments (e.g., a mine site, high-rise building, major road infrastructure, airport changes); or
- the potential psychological stigma attached to the property that may be known only by those who live in the area or by **agents who specialise** in an area and may otherwise be something a prospective owner may not enquire about (e.g., a murder occurring in the house).

The agent will need to exercise their judgment in assessing individual circumstances as to the enquiries they make and when and how to communicate any material facts they identify.

Department of Commerce, REI Bulletin 33 continued ...

Facts of a non-sensitive nature such as the dimensions of the land for sale may form part of the standard marketing material whereas **facts of a sensitive nature** may be more appropriately disclosed when there are indications that the buyer is seriously considering purchasing the property or prior to the tenant signing the tenancy agreement.

Major factors, however, that are likely to be material to the purchaser should be disclosed early in the process or as soon as ascertained by the agent. If an agent's failure to disclose material facts causes loss or damage to be incurred, **civil action may be undertaken** by the affected party to recover losses or to seek termination of the contract.

An agent is required to act in the best interest of its principal except where it is unreasonable or improper to do so. However it is important to note that **an agent's obligation to act fairly and honestly and to inform other parties of the material facts to a transaction overrides any conflicting duty for the agent to act in their principal's best interests in circumstances where this might involve misleading or deceiving any party in negotiations or a transaction.**

For example if it is **commonly known** in the local area that there is a development or change being planned that would influence a prospective buyer's decision to buy, then an agent should actively consider if the buyer would know this and if not, disclose such information.

The Department may investigate a complaint regarding the failure to disclose material facts to determine whether a breach has occurred in relation to the agent's obligations under the REBA Act, the Code and the provisions of the ACL.

Agents may wish to **seek legal advice** if they are unsure about whether a material fact should be disclosed in certain circumstances.

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Quick Check Exercise #4 - Implications for settlement agents

What do you think are the key messages for settlement agents in the e-bulletin? Space has been provided below to record your thoughts and comments.

11. Fees for referrals

The Code has been amended to clarify that a settlement agent must disclose to their client if they will receive a benefit from a third party service provider for referring their client to that provider.

Rule 25. Fee 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.

The new rule 25 does not change the current provisions in the SA Act which also relate to rewards for referrals. In particular, section 44(7) of the SA Act currently provides that no third party can receive a reward from a licensed settlement agent for referring business to that settlement agent. Where it is proven that a reward has been given by a licensed settlement agent to a third party for referral of business, both parties are in breach of the legislation. Section 44(8) of the SA Act, likewise currently provides that a settlement agent can't give a reward to any person for referring a client to the settlement agency.

Therefore, there are three scenarios involving rewards for referrals which settlement agents will need to be aware of:

Party	Scenario	Allowed or prohibited
Settlement agent	Receives benefit from third party for referring their client to the third party	Allowed - under the new code provided the agent discloses the benefit in writing to their client
Third party provider	Receives a reward from a licensed settlement agent for referring business to that settlement agent	Prohibited – under current section 44(7) of the SA Act
Settlement agent	Settlement agent gives a reward to third party for referring a client to the settlement agent	Prohibited – under current section 44(8) of the SA Act

The current prohibitions in sections 44(7) and 44(8) of the SA Act apply to all licensed real estate agents, registrants and settlement agents and covers all types of rewards that could be received for referring business to a licensed settlement agent. These rewards include, but may not be limited to:

- Gifts of money, wine, tickets, travel, or 'payment in kind' e.g. free secretarial work, title searches, discounted rent, use of equipment.

- Profit sharing payments and/or income distributed via trust or other structures where there is a *direct relationship between the profit received and the business referred.*

It should be noted however, that there is nothing in the SA Act or the Code to prevent a real estate agent from owing an interest in a settlement agency and receiving profit from that settlement agency so long as there is no direct relationship between the interest or profit received and the referral of business. This is exemplified in the case of *Settlement Agents Supervisory Board and LJ Hooker Settlements Pty Ltd [2008] WASAT 27*, where the State Administrative Tribunal (SAT) determined, (and the Supreme Court upheld), that the unit trust business structure used by the subject settlement agency did not breach the SA Act because there was found to be an insufficient connection between the referral of business to the settlement agency and the issue of units or profit in the unit trust to give rise to a breach of the SA Act. (i.e. receipt of profit was not determined by the number of clients referred by the unit holder to the settlement).

In the case *Settlement Agents Supervisory Board and Strand Settlements Pty Ltd [2005] WASAT 350*, a unit trust business structure was also utilised, however the SAT determined that there was a direct relationship between distribution of profits to unit holders in the settlement agency and the unit holder's previous referrals of business to the agency. The conduct was found to amount to a reward for referral of settlement agent business (or a kickback) in breach of the SA Act.

The REBA Code has also been amended to reflect this restriction and provide that in the case of settlement agents, a real estate agent cannot refer a party to them in exchange for a referral fee, even if there is full disclosure.

The Code has been amended to cover the reverse situation, where a settlement agent is to receive a fee or any other benefit as a result of referring a client to a real estate agent, or any another service. **If this is the case, the licensee must disclose in writing to the client the fee or benefit to be received.**

Activity #7 – What benefits are allowed if disclosed?

Under what, if any circumstances can a settlement agent in carrying out their work be of benefit to a real estate agent and under what circumstances can a settlement agent benefit from referring work to a real estate agent?

12. Wrapping up

This material has looked at the motivation for, and the nature of, the amendments that have been made to the Code.

Motivation for change

The motivation for the amendments to the Code may be seen to be three-fold:

1. Format and structure

The 1982 Code was administered by the SASB and was gazetted in 1982. This Board no longer exists; regulation of settlement agents is now the responsibility of the Department of Commerce.

The amendments to the Code have been undertaken by Parliamentary Counsel's Office (PCO). They have sought to make the language clearer and less ambiguous and have been mindful of the hierarchy of legislation to ensure that the Code does not duplicate or restate what is already in the SA Act (e.g. some Trust Account provisions).

2. Inconsistencies

In redrafting the Code, PCO has also sought greater consistency across all real estate industry legislation. Following the decision in the *Watson verse SASB* case (2011), it has also sought to clarify the rules that apply only to the business's licensee and the rules that apply to all licensed settlement agents.

3. Fee deregulation

The other impetus to redraft the Code arose from the move to deregulate fees.

Nature of the changes

The intent behind the changes to the Code was to provide greater clarity and less ambiguity. It is prudent to note however, the amendments have not fundamentally changed the responsibilities and obligations of settlement agents imposed by the legislation or applicable under common/case law.

In summary the key areas in which amendments and clarifications have been made include:

- fees and fee disclosure requirements;
- fiduciary duties;
- conflict of interest;
- unauthorised profit;
- honesty;
- fees for referrals.

In summary

The risk management considerations for Settlement Agents, like any business, may be summarised as being dependent on the context and any precedents that have been established in case law.

The following questions may be a useful guide to your assessment of risk and the risk management strategies and techniques you consider necessary.

1. Your understanding of the functions and duties of a settlement agent as defined in law and equity, and case law precedent?

2. What is known by the settlement agent or what a reasonable person/client would expect a settlement agent to know or find out?
3. What is material in the specific risk context?
4. The nature of your relationship to the parties and the relationship between the parties?
5. Questions of injustice and the public interest.

If you would like to subscribe to Department of Commerce's e-Bulletins, update your email address or if you have any queries, please email: pinews@commerce.wa.gov.au

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Proposed Fee Deregulation for Settlement Agents and Land Valuers - Consultation Position Paper; Department of Commerce, Western Australia, May 2014, <https://www.commerce.wa.gov.au>.

Settlement Agents Supervisory Board and Watson (2011); State Administrative Tribunal; Western Australia, WASAT 73.

Appendix A - What has changed in the amended Code?

New rule	Previous section the new rule amends
Part 1: Preliminary	
<i>R 4: Code applies to all licensees (new rule)</i>	
Part 2: General Duties	
R 5: Knowledge of relevant law	R 4: Knowledge of Act, regulations and Code
<i>R 6: Acting in best interests of the client (new rule)</i>	
<i>R 7: Duty of care, diligence and skill (new rule)</i>	
<i>R 8: Duty of honesty (new rule)</i>	
R 9: Confidential information	R 14: Confidentiality
R 10: Client's instructions	R 18: Work to be done quickly and well
R 11: Client to be fully informed	R 16: Client to be fully informed
R 12: Misleading or deceptive conduct	R 15: Deception and misleading representatives
R 13: Unconscionable conduct	R 19: Harsh or unconscionable conduct
<i>R 14: Fiduciary obligations (new rule)</i>	
Part 3: Employees	
R 15: Supervision and control of employees	R 17: Licensee responsible for employees
<i>R 16: Sufficient supervision of settlement agent business (new rule)</i>	
Part 4: Conflict of Interest	
R 17: Conflict of interest	R 9: Conflict of interest
R 18: When licensee may act for more than one party	R 7: When licensee may act for both parties
R 19: When business may act for more than one party	R 7: When licensee may act for both parties
R 20: Disclosure of interests	R 6: Disclosure of interests
R 21 & R 22: Disclosure notice to be given	R 8: Disclosure of interests to potential client
Part 5: Appointment and payment of fees	
<i>R 23: Costs disclosure (new rule)</i>	
<i>R 24. Payment not to exceed service amount unless unforeseen significant change occurs (new rule)</i>	
<i>R 25. Fees for referrals (new rule)</i>	
R 26. Appointment to act	R 6A: Appointment to Act
R 27. Bill of costs	R 26: Bill of costs
Part 6: Specific duties of licensee	
<i>R 28. Retaining copies of documents (new rule)</i>	
R 29: Licensees duties in a arranging a settlement	R 10: Licensees duties in arranging a settlement
R 30: Legal advice	R 11: Recommending legal advice

	R 12: Discouraging seeking of legal advice
R 31: Change of settlement agents	R 28: Change of settlement agents
Part 7: Money	
R 32: Proper accounts to be kept	R 21: Proper accounts to be kept
R 33: Money and documents held on client's behalf	R 25: Notification of receipt of money, documents, etc.

Appendix B – Rewards for referrals e-bulletin

Settlement Industry e-bulletin

A bulletin from the Consumer Protection Division of the Department of Commerce

Issue 51, 2 October 2015.

Rewards for referrals

The Department of Commerce (the Department) would like to remind settlement agents about the legislative requirements in relation to rewards for referrals. Section 44(8) of the SA Act prohibits a licensed settlement agent from paying or giving any rewards, **whether directly or indirectly**, to a person in return for referrals of business involving the performance of the functions of a settlement agent.

A reward is not limited to a monetary payment. It can include any other benefit, examples include:

- distribution of income via company and **unit trust structures**, etc.;
- **free titles searches**;
- **gifts** (wine, football tickets, holidays etc);
- free **secretarial services**;
- free **office space and equipment**; or
- higher than market value paid to real estate agents for rental of office space

Breaches of this section of the Act can attract maximum fines of \$20,000.

In addition, settlement agents who are found guilty of a criminal offence under the provision may also face the possibility of the cancellation, disqualification or suspension of their licence.

A settlement agent who breaches this provision of the Act may find that they are also in breach of the Settlement Agents' Code of Conduct in relation to a conflict of interest, putting their interest ahead of their client and deceptive and misleading representation.

In addition section 44(7) of the Act prohibits any person, including a real estate agent or sales representative, from directly or indirectly demanding, receiving or holding any reward for referring business involving the performance of the functions of a settlement agent.

The real estate industry has been reminded of their obligations in regard to this section of the Act. Any allegations of agents engaging in the practice of rewards for referrals will be investigated by the Department and may result in enforcement action being taken.

Source: <https://www.commerce.wa.gov.au/publications/rewards-referrals-settlement-agents-bulletin-issue-51-october-2015>