

Advice Note

Conflicts of interest, rights and responsibilities



The Property Agents Board (the Board) acts as the regulatory authority for property agents in Tasmania.

This advice note is provided to assist property agents to understand clause 12 in the Code of Conduct.

Please note the following information is intended only to provide a general overview and may be subject to change.

Clause in the Code of Conduct -

12. Conflicts of interest, rights and responsibilities

- (1) A property agent must take all reasonable steps to ascertain whether or not a prospective client is the current client of another property agent for the sale or lease of a property or business.
- (2) Subject to subclause(3), a property agent must not agree to act for a prospective client who the property agent knows, or should have known, is the client of another property agent for the sale or lease of a property or business.
- (3) A property agent must obtain an acknowledgement in writing, from a person who is the client of another property agent for the sale or lease of a property or business, that the person may have to pay either or both of the following if the property or business is sold or leased –
 - (a) commission to each property agent;
 - (b) damages for breach of contract to the first-appointed property agent.
- (4) Before a prospective client enters into a contract to become the client of a property agent, the property agent must clearly explain the prospective client's rights and responsibilities under that contract.
- (5) A property agent –
 - (a) must not accept an appointment to act, or continue to act, for a client or prospective client where to do so would place the property agent's interests in conflict with the interests of the client or prospective client; or
 - (b) must not have as clients both vendor and purchaser, or both lessor and lessee, in respect of the same property or business.
- (6) If a property agent has not obtained written permission from a client stating that the client will accept from the property agent oral notice that an offer to purchase the client's property or business has been made, the property agent must, as soon as practicable after an offer is made, inform the client, in writing, that an offer has been made to purchase the client's property or business by a person whose name is provided to the client by the property agent.
- (7) If a property agent has obtained written permission from a client stating that the client will accept from the property agent oral notice that an offer to purchase the client's property or business has been made, the property agent must, as soon as practicable after an offer is made, inform the client, orally, that an offer has been made to purchase the client's property or business by a person whose name is provided to the client by the property agent.

- (8) If a property agent is not going to present an offer to purchase a client's property or business to the client, the property agent must inform the person who made the offer that the offer will not be presented to the client.
- (9) When a property agent presents a prospective purchaser's offer to a client, the property agent must, as soon as practicable, inform the prospective purchaser whether or not the client has accepted or rejected the offer.
- (10) A property agent must not disclose, to a prospective purchaser of a property or business, particulars of any other offers that have been made by any other person to purchase the property or business, unless the disclosed offer has already been rejected by the client.
- (11) A property agent must not initially advertise a property at a price lower than the property agent knows the client will consider as an acceptable offer.
- (12) When a property agent receives more than one offer on a property, the property agent then should commence the multiple offer process, unless the client instructs otherwise. The process is as follows -
 - (a) When a second offer is made on a property for sale, that second offeror must be advised that there is already an offer on the property and that the terms and/or conditions that the second offeror is submitting should be their best terms and conditions, this process should be duplicated for any subsequent offer received.
 - (b) The first offeror should then be advised that another offer has been made on the property and be given the opportunity to amend the price offered and or conditions of their initial offer to purchase.
 - (c) The property agent should advise the offerors when the offers are going to be presented to the client, and that it will be the client's decision whether they accept an offer or make a counteroffer to any or all of the purchasers or reject them all.
- (13) A property agent must disclose to a customer or client that the property agent or the property agent's business has an interest in a service/contractor business that is going to be used by the customer or client.

Rationale

Please note the following information is intended only to provide a general overview and may be subject to change.

The Conflict of Interest Rights, and Responsibilities clause in the Code of Conduct is designed to ensure that the property agent acts and continues to act in the best interests of their client or prospective client, and where necessary, when to remove themselves from the transaction due to conflicts.

The clause is also designed to ensure that the property agent is providing appropriate advice and disclosures as required.

Sub Clauses (1)-(3) relate to ensuring that a prospective client is not already a client of another agency in the sale or lease of a property or business. The consequences of having a vendor/landlord enter into a second agency agreement can lead to the vendor/landlord paying two commissions and/or being sued for breach of contract.

Sub Clauses (4)-(5) require the property agent to explain the agreement to the prospective client before the document is signed. The property agent should ensure that the prospective client knows their rights and responsibilities of entering into the agreement. The Property Agent should not accept an appointment to act if it places the property agent's interests in conflict with the interest of the client.

Sub Clauses (6)-(9) relates to dealing with offers. A property agent may agree with their vendor to notify the vendor in writing or verbally of offers. A property agent is to advise the prospective purchaser whether or not the client (vendor) accepted or rejected the offer as soon as practicable.

Sub Clause 10 advises that if an offer has been rejected by the vendor then the property agent can disclose the terms and conditions of that offer. A property agent must not disclose details of a purchaser's offer that has not been rejected by the vendor.

Sub Clause 11 relates to the advertising price of a property when it is initially advertised for sale. This clause is designed to ensure that the property agent will not "underquote" the property. The initial advertised price should be within a range that the client considers as an acceptable offer.

Anecdotally a vendor will initially say, "I won't sell for anything less than X dollars" or "I can't sell unless I get X dollars", and, depending on whether it is a buoyant market where properties sell easily or a soft market where properties are slower to sell, this position may change.

There is a difference between the price that a vendor will accept and the price that a vendor wants on a property. This amount can change depending on the vendor's priorities. This clause is designed to ensure that the initial advertised price on the property is set around a level which can commence negotiations between the vendor and potential purchasers regardless of a soft or buoyant market.

Sub Clause 12 describes the multiple offer process used in Tasmania

In a buoyant market there can be considerable competition between purchasers to secure ownership of a property. The multiple offer process has been developed by the property industry in Tasmania to deal with multiple purchasers competing for the same property.

The multiple offer process is not designed to stop the counter offer process between a vendor and purchasers but it is designed to ensure that all parties are aware that they are in competition and that they may or may not get another opportunity to amend the offer made.

It is the vendor who decides whether they wish to use a multiple offer process and if they wish to negotiate with one or more purchasers. It is important to remember that a purchaser's offers will not be disclosed to another purchaser.

When the property agent's client is the vendor, the property agent's duty is to obtain the best price and conditions possible for their client. At the same time the property agent must act in a fair, honest and reasonable manner towards the customers (in this scenario, purchasers).

Sometimes changes occur within the multiple offer process, that is one purchaser withdraws their offer leaving only one remaining offer. In these situations, the principle of acting in a fair, honest and reasonable manner should be considered, and it may be appropriate for the property agent to advise the remaining purchaser that they are no longer in competition, and a discussion regarding the offer (if it has not yet been presented to the vendor) may be required. The property agent should also consider the principles of acting in the client's best interest and obtaining the best price and conditions through this change of process.

Sub Clause 13 provides that a property agent must disclose to a customer or a client that the property agent or the property agent's business has an interest in a service or contract that is going to be used by the customer or client. An example of this would be that an owner of a property management business is also an owner of a maintenance business which is used by the property management business. There is no suggestion that the rates charged by the maintenance business would not be on commercial terms, but the disclosure provides for full transparency.

Case Study – Listing agent purchasing property marketed to sell (Tribunal Decision)