

Code of Conduct

Amendment Consultation 2021 Rationale

Purpose

This paper outlines proposed amendments to the Code of Conduct and the rationale contributing to the amendment.

Preamble

The Property Agents Board (the Board) is an independent statutory authority and is the regulatory authority of all property agents licensed in Tasmania.

The Board administers the *Property Agents and Land Transactions Act 2016* (the Act). The functions of the Board are prescribed under Section 6 of the Act. Amongst other things, the Board is to develop and ensure compliance with a Code of Conduct for property agents.

Section 84 of the Act provides that the Board must establish and keep under review a Code of Conduct for property agents to regulate their professional practice, conduct and discipline.

The Code of Conduct may relate to provisions of this Act in respect of –

- the licensing of property agents; and
- the qualifications required for each class of property agent; and
- the cancellation or suspension of, or the imposition of conditions on, property agents licences; and
- the reasons for prohibiting a person from undertaking certain activities within the property agents industry; and
- the supervision of trust accounts, including the keeping, inspection and auditing of records relating to money received, held or paid on behalf of clients; and
- prohibiting or regulating advertisements by property agents, including the form and content of advertisements and the manner in which advertisements may be published or displayed.

A requirement of the Code may be made so as to apply –

- differently according to factors, limitations or restrictions specified in the Code; or
- to a particular property agent or a defined class of property agents.

Feedback/Submissions

In drawing up the Code of Conduct or any amendment to it, the Board is required to consult with each body that it considers represents the interests of property agents and relevant consumers.

The Board invites feedback and submissions about these proposed amendments. A person may make a written submission, preferably via the Board's website and the Code of Conduct consultation page or email to board@propertyagentsboard.com.au. Alternatively, written submissions can be mailed to Property Agents Board, Level 1, 15 Victoria Street, Hobart 7000.

Consultation Period

Submissions can be made until close of business **Thursday 10 June 2021**.

Rationale

For the purpose of this consultation paper, suggested clauses are provided but are subject to amendment, both in drafting and location within the Code of Conduct.

A marked-up copy of the Code of Conduct includes the proposed amendments.

The below information provides the rationale behind a proposed amendment with reference being made to an existing clause and/or as marked-up in the Code of Conduct.

Proposed Amendment 1 title/holding out/advertising

Issue

There is a considerable amount of conversation around what people are calling themselves in the industry and how they are promoting themselves.

There are the protected titles under the Act being real estate agent, property manager, general auctioneer, property representative and property agent.

People are using different terms, for example "Estate Agent". This is not a protected title under the Act and therefore is being used by licence holders who do not hold a real estate agent licence.

Solution

Add definition of protected title

Add guidance to referencing titles and include false and misleading statements.

Proposed amendment in marked-up version

1. Definitions

protected title, in relation to a licence means a real estate agent, a property manager, a general auctioneer and a property representative;

19. Professionalism in the Property Agents Industry

(2) A property agent -

- (a) must not refer to themselves by using a protected titled or a name that is not shown on their licence;**
and
- (b) must not hold themselves out to have a licence they do not have; and**
- (c) must not represent in any way to someone else anything that the agent knows is false or misleading in relation to prospecting for business.**

Proposed Amendment 2 Conduct Complaints notification

Issue

There has been some concern raised by property agents who are required to diligently supervise that the Board does not make them aware when a complaint has been made against one of their employees.

The Act provides that the Board is to only notify “the property agent who is the subject of a conduct complaint”. The Act does not provide for the Board to make the managing property agent aware of conduct complaints (confidentiality).

The concept of support should also be considered that a managing agent can provide counsel in how to respond and how to use the information to improve performance.

Solution

Add requirement for the property agent that is subject to a conduct complaint to advise the property agent authorised to manage the business within set period.

Proposed amendment in marked-up version (added at Clause 6 but could be changed to Clause 19)

6. Supervision of employees and persons engaged by property agent

- (2) A property agent is to notify the real estate agent, property manager or general auctioneer who manages the property agents’ business within 7 days of notification by the Board that a conduct complaint has been made against them.

Proposed Amendment 3 Matters affecting a licence

Issue

A property agent is required to provide information to the Board about being fit and proper at the time of applying to the Board for a licence or upon renewal of a licence. There is no legislative requirement to advise the Board of matters that arise during the licence year.

Some of these issues may put into question whether the person is fit and proper to hold the licence, impact on the person’s ability to hold a licence under legislative provisions, or on their ability to undertake regulated functions (for example, but not limited to criminal conviction, serious criminal charges, debt agreements, bankruptcy, serious medical conditions etc).

Specific example: a property agent lost their driver’s licence. The Board received a complaint with one of the grounds of complaint being that the property agent was not showing up for appointments/inspections. The Board was unaware that the property agent did not have a driver’s licence and therefore the weight placed on that ground of complaint was lower than it could have been.

Solution

Add clause that a property agent advises the Board of matters that affect their ability to work as a property agent or maintain their licence.

Proposed amendment in marked-up version

19. Professionalism in the Property Agents Industry

(m) must report to the Board in writing within one-month details of any matter which occurs and may affect their ability to work as a property agent or to maintain a property agent licence.

Proposed Amendment 4 Unsatisfactory professional conduct

Issue

There have been a number of complaints received where a property agent has delayed completion of work or not permitted work to be undertaken which relates to the customer (such as building inspections).

There is currently provision in clause 16 examples of behaviour that might constitute unsatisfactory professional conduct include, but are not limited to – *a property agent unreasonably delaying the completion of work for a client;*

Solution

Add clause relating to completion of work for a customer.

Proposed amendment in marked-up version

16. Unsatisfactory professional conduct

(h) *a property agent unreasonably delaying the completion of work for a customer or permitting work to be undertaken for a customer.*

Proposed Amendment 5 Marketing price

Issue

It has been claimed that some property agents are marketing property for sale at a price that the property agent knows the vendor will not accept and is a lower price that can be reasonably obtained. For example advertisement of “offers over \$450,000” when a similar property was sold by the same property agent for \$550,000 and “offers over \$450,000” when the vendor stated that they would not accept an offer under \$520,000.

The Act provides for false and misleading advertising in relation to the letting or sale of property.

“A property agent must not represent in someone else anything that the agent knows is false or misleading in relation to the letting or sale of property.”

There are provisions within the Code:

- *advising the client if the price that the client is prepared to accept on a property is lower than fair market value* [clause 9 (1)(e)]

- a property agent not publishing an advertisement as a price higher or lower than the price authorised by the client [clause 11(3)(c)];

An amendment should not be in conflict with achieving the best price and conditions for the client.

An additional clause must be applicable to either a buoyant or flat market.

Solution

Add clause which indicates that a property agent must not in the initial advertising, advertise a property at a price that the property agent knows the client will not consider.

Proposed amendment in marked-up version

12. Conflicts of interest, rights and responsibilities

(12) 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.

Proposed Amendment 6 Information disclosure

Issue

The Code currently provides that a property agent should not disclose information relating to the client or customer unless the consent is provided [Clauses 9 (1)(a) and 9 (2)(a)].

Property agents are generally compliant with these provisions while working for the client and interacting with the customer, until the matter has finalised. It is not suggested that a property agent cannot promote themselves or listings/sale etc achieved however it is considered that such information (colloquially known as gossip) should be de- identified.

Solution

Adding stronger words around talking about clients/customers after the professional relationship has concluded.

Proposed amendment in marked-up version

9. Information Disclosure

(1) A property agent –

- (a) must not disclose information relating to the affairs of a client obtained while acting for the client (and that obligation continues after the completion of the transaction) unless the client consents in writing to the disclosure or the property agent is required by law to make the disclosure; and

(2) A property agent –

- (a) must not disclose information relating to the affairs of a customer obtained in the course of the property agent's business that the customer requests to keep confidential (and that obligation continues after the completion of the transaction); and

Proposed Amendment 7 Supervision of employees and persons engaged by property agent – clarification

Issue

It is suggested that the term “they” could mean either the person understands and complies with the Act, the regulations and this Code of Conduct or that the managing agent understands and complies with the Act, the regulations and this Code of Conduct.

The current wording in clause 6 is

A real estate agent, property manager, or general auctioneer, who manages a property agent's business –

- (a) is to diligently supervise the work of all other persons employed or engaged to work in that business and is to ensure that they understand and comply with the Act, the regulations and this Code of Conduct;*
- (b) while being permitted to delegate tasks to other persons employed or engaged to work in that business, must not delegate the responsibility for any aspect of the work undertaken in that business; and*
- (c) treat those under his or her supervision with respect, care and patience.*

Solution

Rewording of current provision to cover all persons working in a property agent's business

Proposed amendment in marked-up version

6. Supervision of employees and persons engaged by property agent

(1) A real estate agent, property manager, or general auctioneer, who manages a property agent's business –

- (a) is to diligently supervise the work of all other persons employed or engaged to work in that business and is to ensure that they and all other persons employed or engaged understand and comply with the Act, the regulations and this Code of Conduct;

Proposed Amendment 8 Multiple offer process

Issue

There is a lot of confusion regarding the multiple offer process, especially by customers who are new to the market or have purchased property interstate.

Solution – add clauses

Add clauses to explain the best Tasmanian Industry in simple terms. It must be noted that the client (vendor) is the decision maker.

Proposed amendment in marked-up version

12. Conflicts of interest, rights and responsibilities

- (12) When a property agent receives more than one offer on a property, the property agent should then 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.

Proposed Amendment 9 Property management records access and transfer

Issue

The current clause 14 in the Code of Conduct only provides for access and transfer of property management records from one property agent to another property agent. There have been some complaints received whereby the client is seeking to take over management of the property, or the property has been sold and the new owner requires information about the tenancy.

Solution

Add clauses to include client and new property owner

Proposed amendment in marked-up version

14. Records access and transfer

- (b) is advised by the client that another property agent is, or will be, managing the property or business for the client; or
 - (c) is advised by the client that the client or if having been sold, the new property owner is, or will be, managing the property or business.
- (1)** If a new property agent is engaged by a client to manage the client's property or business or if the client or new property owner is to take over management of the property or business, the current property agent must ensure that all records relating to the management of the property or business by the property agent are shared with the new property agent, client or new property owner to facilitate the transfer of the management of the property or business to the new property agent, client or property owner.

Proposed Amendment 10 Dispute resolution - 1

The current wording of the dispute resolution clause is as follows:

- (1) A property agent must have in the property agent's authorised place of business a written document outlining –
 - (a) the manner in which a customer or a client may make a complaint against –
 - (i) the conduct of the property agent; or
 - (ii) the operation of the property agent's business; and
 - (b) the procedure that will be undertaken by the property agent to resolve the complaint.
- (2) A property agent must provide a customer or client who has made a complaint, or who wishes to make such a complaint, against the property agent or the property agent's business, with a copy of the property agent's written document under subclause(1).
- (3) A property agent must make all reasonable efforts to resolve a complaint –
 - (a) within a reasonable time; and
 - (b) in accordance with the procedure set out in the document referred to under subclause(1)(b).

Issue

The wording when read together as “a property agent must have in the property agent's authorised place of business a written document outlining the manner in which a customer or a client may make a complaint against the conduct of **the** property agent” can be construed that a complaint can only be made against the business or the managing property agent;

Solution

Remove the word “the” and replace with “a”:

Proposed amendment in marked-up version

- (i) the conduct of a property agent; or

Proposed Amendment 11 Dispute resolution – 2

Issue

Some concerns have been raised that a property agent

- was not actually aware that the customer or client wished to make a complaint;
- that the property agent was dealing with the complaint (whether or not in accordance with the procedure set out in the document) and therefore the requirement to provide a copy of the written document was unnecessary;

The purpose of this clause is to ensure that there is a documentation process and a property agent makes all reasonable efforts to resolve a complaint within a reasonable time.

Proposed amendment in marked-up version

(2) A property agent must provide a customer or client with a copy of the property agent's written document under subclause(1) upon written request.

Proposed Amendment 12 Conflict – disclosure

Issue

There are circumstances (sometimes unavoidable and other times deliberate) where there is a “relationship” between a property agent (business or individual) and a contractor and the relationship is unknown to client or customer (such as photographers, carpet cleaners, cleaners, maintenance and building contractors etc).

For example

- agency uses an associated company to undertake maintenance or cleaning for rental properties without disclosure or without providing the client or customer with an alternative.
- A condition of lease is for carpets to be professionally cleaned and the only carpet cleaning business is owned by a family member.

Solution - add clause

Add a disclosure requirement

12. Conflicts of interest, rights and responsibilities

(13) A property agent must disclose to a customer or client that the property agent or a property agent’s business has an interest in a service/contractor business that is going to be used by the customer or client.