

Queensland



Subordinate Legislation 2001 No. 119

Property Agents and Motor Dealers Act 2000

PROPERTY AGENTS AND MOTOR DEALERS (COMMERCIAL AGENCY PRACTICE CODE OF CONDUCT) REGULATION 2001

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1 Short title

This regulation may be cited as the *Property Agents and Motor Dealers (Commercial Agency Practice Code of Conduct) Regulation 2001*.

2 Commencement

This regulation commences on 1 August 2001.

3 Code of conduct

The code of conduct in the schedule is the code of conduct about commercial agency practice prescribed for the Act, section 348.¹

¹ Act, section 348 (Code of conduct)

SCHEDULE

COMMERCIAL AGENCY PRACTICE CODE OF CONDUCT

section 3

PART 1—PRELIMINARY

1 Title

This code of conduct may be cited as the *Commercial Agency Practice Code of Conduct*.

2 Object

(1) The object of this code is to increase the accountability of commercial agents for their actions in carrying on the business of a commercial agent.

(2) The object is to be achieved by—

- (a) setting conduct standards for commercial agents; and
- (b) establishing principles for fair trading in commercial agency practice; and
- (c) providing for a system of complaint resolution for complaints about commercial agency practice.

3 Definitions

In this code—

“**client**” means a person who appoints a commercial agent to perform an activity mentioned in the Act, section 339.²

² Act, section 339 (What a commercial agent’s licence authorises)

SCHEDULE (continued)

“commercial agent” includes an employed licensee and a commercial subagent.

“communicate” with a person, means to communicate with the person by telephone, mobile telephone, fax, e-mail, letter or telegram, and includes to visit the person.

“customer” means a person with whom a commercial agent deals on behalf of a client.

“third party” means a person other than a client or a customer, but does not include the customer’s representative.

“workplace”, of a customer, means the place where the customer carries out work, whether the work is carried out voluntarily or for financial reward.

4 Compliance with code

(1) This code contains provisions with which a commercial agent must comply.³

(2) This code overrides an instruction or request that does not comply with the code from a client or, if the agent is an employee, from the agent’s employer.

PART 2—GENERAL RULES OF CONDUCT

5 Knowledge of Act and code

A commercial agent must have a reasonable knowledge and understanding of the Act and this code.

3 Contravention of this code is a ground for—

- starting disciplinary proceedings under the Act, section 496
- obtaining an injunction under the Act, section 565
- seeking an undertaking under the Act, section 569.

SCHEDULE (continued)

6 Fiduciary obligations

A commercial agent must comply with a fiduciary obligation incurred as an agent.

7 Honesty, fairness and professionalism

(1) A commercial agent must act honestly, fairly and professionally in the conduct of a commercial agency practice.

(2) Without limiting subsection (1), an agent must treat a customer honestly and fairly.

8 Skill, care and diligence

(1) A commercial agent must exercise reasonable skill, care and diligence in the conduct of a commercial agency practice.

(2) An agent must complete all work for a client as soon as is reasonably practicable.

9 Agent to act in client's best interest

A commercial agent must act in a client's best interests unless it is unlawful or unreasonable to do so.

10 Agent to act in accordance with client's instructions

A commercial agent must act in accordance with a client's instructions unless it is contrary to this code or otherwise unlawful to do so.

11 Agent to keep client informed of developments

A commercial agent must keep a client informed of any significant development or issue in relation to an activity performed for the client.

SCHEDULE (continued)

12 Agent to ensure employees comply with Act and code

(1) A commercial agent who is a principal licensee must take reasonable steps to ensure a registered employee of the agent complies with the Act and this code in relation to the agent's business.

Example—

A commercial agent in whose business the supervisor to employee ratio is so low that supervisors can have little knowledge of what staff are doing or how they are performing their work may need to employ more supervisors.

(2) An agent who is an employed licensee in charge of an agent's business at a place of business must take reasonable steps to ensure a registered employee at the place complies with the Act and this code in relation to the business.

(3) This section applies only to the extent that the Act, section 340(1)⁴ does not already require an agent to take the steps mentioned in the section.

13 Representations by employees

(1) This section applies to a commercial agent who is a principal licensee or an employed licensee.

(2) The agent must take reasonable steps to ensure an employee of the agent—

- (a) if the employee does not hold a commercial agent's licence, does not falsely represent that the employee is the holder of a licence for the agent's business, or falsely use a title that suggests the employee is the holder of a licence; or
- (b) whether licensed under the Act or not, does not represent that the employee is the person in effective control of the agent's business, or use a title that suggests the employee is the person in effective control of the business.

4 Act, section 340 (Responsibility for acts and omissions of commercial subagent)

SCHEDULE (continued)

14 Fraudulent or misleading conduct

A commercial agent must not engage in conduct that is fraudulent or misleading in the conduct of a commercial agency practice.⁵

Examples—

1. Using documents resembling court or official documents to mislead a customer.
2. Misrepresenting to a customer the consequences of not paying a debt.
3. Serving unissued originating processes.
4. Impersonating a law enforcement agent.

15 High pressure tactics, harassment or unconscionable conduct

A commercial agent must not engage in high pressure tactics, harassment or unconscionable conduct in the conduct of a commercial agency practice.

Examples of harassment—

1. Using, or getting a third party to use, threatening or intimidating language or behaviour towards a client or customer.
2. Engaging in conduct that would make an ordinary person feel unwillingly compelled to comply with an agent's request or demand.

Examples of unconscionable conduct—

1. Taking unfair advantage of an agent's superior bargaining position relative to a client or customer.
2. Requiring a client or customer to comply with conditions that are not reasonably necessary for the protection of an agent's legitimate interests.
3. If it is reasonably apparent that a client or customer can not understand relevant documents, taking unfair advantage of the client's or customer's lack of understanding.
4. Exerting undue influence or pressure on, or using unfair tactics against, a client or customer or a person acting for a client or customer.

⁵ Engaging in conduct of this nature or other unlawful conduct could lead to a prosecution under the Act, e.g. see section 361 (Misrepresentation).

SCHEDULE (continued)

16 Claiming membership or endorsement

A commercial agent must not falsely claim to be a member of, or endorsed by, an organisation or association.

17 Conflict of duty or interest

(1) A commercial agent must not accept an appointment to act, or continue to act, as a commercial agent for a client if doing so will place the agent's duty or interests in conflict with the client's interests.

(2) However, subsection (1) does not apply if the agent discloses the conflict to the client in writing before accepting the appointment or continuing to act.

18 Soliciting through false or misleading advertisements or communications

A commercial agent must not solicit clients or customers through false or misleading advertisements or other communications the agent knows are false or misleading.

PART 3—RULES SPECIFIC TO COMMERCIAL AGENTS

Division 1—General

19 Opportunity to obtain independent advice or representation

A commercial agent must give a client a genuine opportunity to obtain relevant independent professional advice or representation before the client appoints the agent.

SCHEDULE (continued)

20 Finding out or verifying material facts

(1) A commercial agent appointed by a client to perform 1 or more of the activities in the Act, section 339(1)⁶ must take reasonable steps to find out or verify the facts material to the activity that a prudent commercial agent would have found out or verified to avoid error, omission, exaggeration or misrepresentation.

(2) The steps must be taken at the time of appointment and afterwards as the occasion arises.

21 Disclosure to customer

A commercial agent must tell the customer the following—

- (a) the agent's name;
- (b) if the agent is an employed licensee or registered employee, the name of the agent's employer;
- (c) the name of the agent's client;
- (d) if the client alleges the customer owes a debt to the client, the particulars of the debt.

22 Misrepresentation to customer

(1) A commercial agent must not represent to a customer that the agent is acting in a capacity other than as a commercial agent for a client.

Example—

An agent must not state or imply by words or actions that the agent is working for the government to enforce a judgment debt.

(2) An agent must not misrepresent to a customer—

- (a) the powers of an agent; or
- (b) the rights or obligations of the following—
 - (i) the agent;
 - (ii) the commercial agency;

⁶ Act, section 339 (What a commercial agent's licence authorises)

SCHEDULE (continued)

- (iii) the client;
- (iv) the customer.

23 Referral to service provider

(1) A commercial agent who refers a client or customer to a service provider must not falsely represent to the client or customer that the service provider is independent of the agent.

(2) For subsection (1), a service provider is **“independent”** of an agent if—

- (a) the agent receives no rebate, discount, commission or benefit for referring a client or customer to the service provider; and
- (b) the agent does not have a personal or commercial relationship with the service provider.

Examples of relationships for paragraph (b)—

1. A family relationship.
2. A business relationship other than a casual business relationship.
3. A fiduciary relationship.
4. A relationship in which 1 person is accustomed, or obliged, to act in accordance with the directions, instructions or wishes of the other person.

(3) If the service provider is not independent of the agent, the agent must disclose to the client or customer—

- (a) the nature of any relationship, whether personal or commercial, the agent has with the service provider; and
- (b) the nature and value of any rebate, discount, commission or benefit the agent may receive, or expects to receive, by referring the client or customer to the service provider.

(4) In this section—

“client” includes a prospective client.

“service provider” means a provider of professional services associated with the activities of a commercial agent.

SCHEDULE (continued)

Division 2—Communication with customer

24 Communication

(1) A commercial agent may communicate with a customer, representative or third party to help the agent perform an activity mentioned in the Act, section 339(1).⁷

(2) However, an agent must not harass the customer, representative or third party.

Example—

An agent must not communicate with a customer late at night or in the early hours of the morning unless the customer authorises it.

25 Communication with customer away from customer's workplace

(1) A commercial agent must not communicate with a customer by visiting the customer's dwelling as the initial step in communicating with the customer.

(2) However, an agent may communicate with the customer by visiting the customer's dwelling as the initial step, if it is reasonable and appropriate for the activity the agent is performing.

Examples of when it is reasonable and appropriate to visit the customer's dwelling as the initial step—

1. Service of court documents.
2. Repossession of a chattel.

(3) An agent must not communicate with a customer by visiting the customer's dwelling if another means of communication is available and effective for communicating with the customer.

Example of other means of communication—

The customer has provided the agent with a contact telephone number at the customer's workplace.

⁷ Act, section 339 (What a commercial agent's licence authorises)

SCHEDULE (continued)

(4) If an agent communicates with a customer by visiting the customer's dwelling, the agent must respect the customer's and the dwelling's privacy and security.

(5) An agent must not communicate with a customer at a time or a place that the agent knows or should know would be unreasonable or substantially inconvenient to the customer.

(6) In this section—

“dwelling” has the meaning given by the Criminal Code.⁸

26 Communication with customer at customer's workplace

(1) A commercial agent must not communicate with a customer at the customer's workplace.

(2) However, an agent may communicate with a customer at the customer's workplace if—

- (a) the agent has attempted to communicate with the customer away from the workplace; and
- (b) either—
 - (i) the customer has informed the agent that the agent may communicate with the customer at the workplace; or
 - (ii) the customer has not given the agent an alternative and effective means for the agent to communicate with the customer away from the workplace.

⁸ The Criminal Code, section 1 provides—

“dwelling” includes any building or structure, or part of a building or structure, which is for the time being kept by the owner or occupier for the residence therein of himself or herself, his or her family, or servants, or any of them, and it is immaterial that it is from time to time uninhabited.

A building or structure adjacent to, and occupied with, a dwelling is deemed to be part of the dwelling if there is a communication between such building or structure and the dwelling, either immediate or by means of a covered and enclosed passage leading from the one to the other, but not otherwise.

SCHEDULE (continued)

(3) If an agent communicates with a customer at the customer's workplace, the agent must not communicate or attempt to communicate with the customer in a way that—

- (a) is likely to inform a third party of the existence of a debt; or
- (b) discloses to a third party more than the agent's name, the agent's contact details and, if specifically asked by the third party, the agent's business name.

27 Arrangements between agent and customer for repayment of a debt

(1) This section applies if there is an arrangement between a commercial agent and a customer in relation to the payment of a debt owing to the agent's client.

(2) The agent must—

- (a) make a record of the arrangement and its terms; and
- (b) advise the client of the arrangement and its terms; and
- (c) provide a copy of the record to the client.

(3) If there is a term in the arrangement to review the arrangement, the record must also specify—

- (a) when the review can happen; and
- (b) the circumstances for a review to happen.

Example for paragraph (b) of a circumstance for a review to happen—

The arrangement allows for a review if the customer's income changes significantly.

(4) The arrangement can not be reviewed more than once every 3 months.

28 Communication with customer when arrangement exists for repayment of a debt

(1) A commercial agent must not communicate with a customer if—

SCHEDULE (continued)

- (a) there is an arrangement between the agent and the customer in relation to the payment of a debt owing to the agent's client; and
- (b) the customer is complying with the arrangement.

(2) However, an agent may communicate with the customer in the following circumstances—

- (a) at the customer's request;
- (b) to confirm the terms of the arrangement;
- (c) to advise the customer of the consequences of not complying with the arrangement;
- (d) to provide a statement of the customer's account;
- (e) if the agent intends to seek a legal remedy against the customer, to advise of the remedy's nature;
- (f) if the agent offers to change the arrangement to the customer's benefit, to advise the proposed terms of the offer;
- (g) if there is a term in the arrangement to review the arrangement, to review the arrangement.

29 Communication when legal processes exist

(1) A commercial agent must not communicate with a customer if the customer—

- (a) either—
 - (i) in writing, has denied liability for the debt; or
 - (ii) has stated an intention to defend any legal proceeding brought against the customer; and
- (b) has asked the agent not to make any further communication with the customer.

(2) However, an agent may communicate with the customer in the following circumstances—

- (a) to advise the customer in writing of the steps the agent intends to take in relation to a legal proceeding;
- (b) to make a genuine written attempt to settle the matter;

SCHEDULE (continued)

- (c) in relation to any part of the debt that is not denied;
- (d) if a judgment for the debt has been obtained against the customer and the judgment has not been set aside;
- (e) if the customer has authorised the agent to communicate with the customer at a later time.

30 Communication if customer is insolvent under administration

(1) This section applies if a commercial agent becomes aware that a customer has become an insolvent under administration.

(2) The agent must not communicate with the customer or a third party in relation to a debt unless the communication is in accordance with the *Bankruptcy Act 1966* (Cwlth).

(3) In this section—

“**insolvent under administration**” means a person—

- (a) who is an undischarged bankrupt; or
- (b) for whom a debt agreement has been made under the *Bankruptcy Act 1966* (Cwlth), part X or the corresponding provisions of the law of another jurisdiction, if the debt agreement has not ended or has not been terminated; or
- (c) who has executed a deed of arrangement under the *Bankruptcy Act 1966* (Cwlth), part X or the corresponding provisions of the law of another jurisdiction, if the terms of the deed have not been fully complied with; or
- (d) whose creditors have accepted a composition under the *Bankruptcy Act 1966* (Cwlth), part X or the corresponding provisions of the law of another jurisdiction, if a final payment has not been made under the composition.

31 Frequency of communication with customer

(1) A commercial agent may communicate with a customer as often as necessary for the agent to perform an activity for the client.

SCHEDULE (continued)

(2) However, an agent must not make unsolicited communication with the customer more frequently than is reasonable in the circumstances and, in any case, not more than twice a week.

(3) Whether the frequency of communication is reasonable in the circumstances depends on the purpose of the communication.

32 Communication with customer's representative

(1) If a customer appoints a representative to advocate or act on the customer's behalf, a commercial agent must communicate with the customer's representative and not the customer.

(2) However, an agent may communicate with the customer if—

- (a) the customer's representative is acting unreasonably; or
- (b) it is reasonable in the circumstances for the agent to communicate with the customer; or
- (c) the customer specifically authorises the agent to communicate directly with the customer.

33 Communication with third party

(1) A commercial agent may communicate with a third party to help the agent perform an activity mentioned in the Act, section 339(1).⁹

Example—

The agent may communicate with a customer's family member to find out the customer's whereabouts or to leave a message for the customer.

(2) However, an agent must not make an unsolicited communication with a third party more frequently than is reasonable in the circumstances.

(3) Whether the frequency of communication is reasonable in the circumstances depends on the purpose of the communication.

(4) Also, an agent must not communicate with a customer's child unless—

⁹ Act, section 339 (What a commercial agent's licence authorises)

SCHEDULE (continued)

- (a) the customer specifically authorises the agent to communicate with the child; or
- (b) the customer asks the child to act as a translator for the customer.

34 Coercion

A commercial agent must not use coercive behaviour or unconscionable conduct to intimidate a customer, representative or third party or to pressure the customer, representative or third party into undertaking to do something.

Examples of an agent's coercive behaviour or unconscionable conduct—

1. Carrying or displaying a dangerous weapon that may intimidate a customer.
2. Disclosing or threatening to disclose the customer's debt information to a third party.
3. Using threatening, abusive or obscene language or behaviour, including language or behaviour directed at a person's age, colour, disability, gender, health, marital status, nationality, race, religion or sexual preference.
4. Using, or threatening to use, physical force to a person or person's property.

Division 3—Use and disclosure of information

35 Confidentiality

(1) A commercial agent must not use or disclose confidential information about a client or a customer obtained while acting for the client or dealing with the customer.

(2) Subsection (1) does not apply to information—

- (a) used or disclosed for a purpose authorised in writing by the client or customer; or
- (b) that must be lawfully used or disclosed.

Example of when information must be lawfully used or disclosed—

To comply with legal process.

(3) In this section—

SCHEDULE (continued)

“client” includes a former client.

“commercial agent” includes a former commercial agent.

“customer” includes a former customer.

PART 4—PUBLICISING CODE

36 Publicity about code

(1) A commercial agent who is a principal licensee must prominently display a notice of the existence and availability of this code in the public area of each of the agent’s offices.

(2) If asked by a client or customer, an agent must promptly tell the client or customer where to obtain a copy of this code.¹⁰

PART 5—COMPLAINT RESOLUTION

37 Principal licensee to have complaint handling procedure

(1) This section applies to a commercial agent who is a principal licensee.

(2) The agent must have a reasonable, simple and easy to use procedure in place for handling complaints by clients or customers of the agent.

(3) The agent must have information readily available to inform clients and customers of the procedure.

(4) The information must include the following details—

(a) how a complaint is to be made;

¹⁰ This code may be purchased from Goprint or accessed at www.legislation.qld.gov.au.

SCHEDULE (continued)

- (b) when a complaint must be in writing and when it may be oral;
 - (c) the person who is to handle the complaint.
- (5) The agent must consider every complaint made by a client or customer and—
- (a) accept the complaint, whether wholly or partly; or
 - (b) reject the complaint in writing.
- (6) If the agent accepts the complaint, whether wholly or partly, and restitution is required to be made to the client or customer (the “**complainant**”), the agent must arrange for the restitution to be made—
- (a) within 7 days after accepting the complaint; or
 - (b) if the agent and the complainant agree, by a later day.
- (7) If the agent rejects the complaint, whether wholly or partly, the agent must give the complainant written reasons for the rejection.
- (8) The notice must be accompanied by a separate document containing—
- (a) a warning that there may be time restrictions on making a claim, including a claim against the fund under the Act; and
 - (b) a statement that the complainant should consider whether or not to seek legal advice; and
 - (c) a statement that the complainant—
 - (i) may seek mediation through the dispute resolution procedures of the Department of Justice and Attorney-General; or
 - (ii) may, depending on the nature and amount of the complaint, commence an action against the agent in a small claims tribunal or a court; or
 - (iii) may contact the Office of Fair Trading which may commence disciplinary proceedings, or take other action, under the Act.
- (9) The document may also include details about other ways available to the complainant to resolve the complaint.

Example of another way available to resolve the complaint—

SCHEDULE (continued)

An industry dispute resolution scheme may be available to the complainant because of the agent's membership of an organisation.

(10) However, the document must state that participation in an industry dispute resolution scheme is voluntary.

38 Client to be notified of complaint and outcome

(1) This section applies if a complaint is made by a commercial agent's customer and the complaint is dealt with under the complaint handling procedure mentioned in section 37.

(2) The agent must notify the relevant client of—

- (a) the complaint made by the customer; and
- (b) the final outcome of the complaint.

39 Compliance with complaint handling procedure

(1) A commercial agent must comply with the complaint handling procedure mentioned in section 37 and the final outcome of the complaint.

Examples of complying with final outcome of complaint—

1. If an agent accepts a complaint that requires a matter to be rectified, the agent must rectify the matter.
2. An agent must comply with an agreement reached through mediation about the subject matter of the complaint.
3. An agent must comply with a court decision about the subject matter of the complaint.

(2) This section applies subject to any stay granted by a court.

ENDNOTES

1. Made by the Governor in Council on 26 July 2001.
2. Notified in the gazette on 27 July 2001.
3. Laid before the Legislative Assembly on . . .
4. The administering agency is the Office of Fair Trading.

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