

## Disclosures – Education Memo

### Who is this information meant for?

You our valued client / consumer and our staff. To inform and educate, to meet our code of conduct responsibilities and adhere to proper business principles. To be compliant with consumer laws.

### What is this?

This document outlines the responsibility and proper conduct of a property agent when doing business as a property agent in regard to disclosure. In the process of doing business we have third party relationships and business alliances that help bring the business offering together for you the consumer/ client.

### Who do we do business with in serving you the client / consumer?

We talk to and have agreements with property developers, property agents, finance brokers, accountants etc, but in doing so Property In a Box Pty Ltd may receive a benefit in terms of a relationship we need to declare to the buyer / consumer or a financial benefit we may receive in the process of a transaction with you that a third party may provide us to service your property enquiry.

### Why we do this ?

In saying this, it is important to note that the model we operate uses the benefit of this business network to provide a superior service and up to date information for you the consumer / client . And it's no surprise we need to be remunerated for our services as we don't get paid by you the buyer / investor, but from the owner of the property, developer or conjuncting agent .

### Disclosure basics

Real estate agents are often asked by vendors and purchasers to refer them to other service providers – such as a local solicitor, conveyancer, building inspector or mortgage broker – to assist them with the process of buying or selling land.

However, agents must remember that they have a fiduciary relationship with their clients, and their dealings with their clients must be free of any conflict between their own interests and that of their clients. While the referral and acceptance of a fee or benefit from the service provider for the referral may seem innocent, agents need to pay particular attention to their legal obligations of disclosure under the

To whom must disclosure be made;

Selling agents must make a disclosure to their client (the vendor(s)) and to prospective buyers. A prospective buyer as “a person who there are reasonable grounds to believe is a potential or likely buyer of land (whether or not the person has made an offer to buy the land)”.

A buyers’ agent must make a disclosure to their client (the buyer).

### **What must be disclosed**

There are three separate matters that must be disclosed:

#### **1. Relationships**

Requires a disclosure of “any relationship, and the nature of the relationship (whether personal or commercial), the agent has with anyone to whom the agent refers the client or a prospective buyer for professional services associated with the sale or purchase”.

Regardless of whether any referral fee, commission or benefit is received by the agent, the following relationships between an agent and a service provider that must be disclosed:

- (a) a family relationship;
- (b) a business relationship, other than a casual business relationship;
- (c) a fiduciary relationship;
- (d) a relationship in which one person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of the other.

For example, a family relationship may be a referral to your brother who acts as a mortgage broker or financial advisor, while an ongoing relationship with a local solicitor, conveyancer or pest inspector would be considered a business relationship.

The list above is not exhaustive.

#### **2. Consideration)**

Requires disclosure of “whether the agent derives or expects to derive any consideration, whether monetary or otherwise, from a person to whom the agent has referred the client or a prospective buyer and, if so, the amount or value of the consideration”.

This is the amount of money or benefit that the agent receives as a result of the referral. Benefit is defined to mean “monetary or other benefit”. If your agency

receives any payment, discount, free service or other benefit from a service provider in return for a referral then details of those payments, discounts or benefits must be disclosed.

If a relationship itself must be disclosed, but you do not receive any payments, discounts or benefits, then you would simply disclose the consideration as “Nil”, but you must still disclose the relationship.

### **3. Benefit to the Service Provider**

Whilst compliance with the first two obligations is fairly straightforward, being able to comply with the third requirement may be more difficult as you must also disclose:

“the amount, value or nature of any benefit that you know the service provider will receive or expects to receive in connection with the sale or for providing a service in connection with the sale”

This does not relate to the professional fees charged by the service provider to the consumer – these are negotiated between the service provider and the consumer directly. However, if you are aware that the service provider will receive a fee, commission or other monetary benefit as a result of a successful sale or purchase, and you are aware what the amount is, then you must disclose those amounts.

A list of some of the persons who may receive a benefit from a referral from an agent and these include:

- seller
- finance broker
- financial adviser
- financier
- property valuer
- Australian legal practitioner
- real estate agent

## When and how must disclosure be made?

Disclosure by an agent is only effective if it is:

- given to the person in a form of a written notice; and
- it is acknowledged by the person in writing on the form; and
- it is given and acknowledged at the time the agent refers the client or prospective buyer to a person for professional services associated with the sale or purchase of land and before a contract for the sale of the residential property is entered into.

As always, if ever in doubt about your obligations to disclose, err on the side of caution to protect yourself, as over-disclosure will prove far safer than under-disclosure or no disclosure at all.

## Penalties for non disclosure

As can be seen from the above, disclosure is not optional, but mandatory. Agents who choose not to comply with their obligations do so at their own peril. Licensees-in-charge should ensure that appropriate policies and procedures are in place to ensure compliance by all staff

### Other restrictions on referrals

While this article relates to obligations upon agents involved in the buying or selling of land, agents should also appreciate that there are other provisions governing referrals contained in the Estate Agents ACT 1980 VIC

For example:

- A buyers' agent must not demand or accept a fee or other valuable consideration for referring a principal to a selling agent and a selling agent, stock and station agent or business agent must not demand or accept a fee for referring a principal to a buyers' agent.
- An agent, except in certain circumstances, must not recommend that a principal or prospect engage the services of a solicitor or licensed conveyancer, if the agent knows that the solicitor or licensed conveyancer acts, or will be acting, for the other party to the transaction.
- All agents must make similar disclosure to clients when referring clients to service providers that are not independent of the agent. An example might be a property manager referring a principal to a financial planner in circumstances where the agent has a personal or commercial relationship with the financial planner or receives a rebate, discount, commission or benefit from the financial planner.
- Agents cannot offer gifts, favours or benefits whether monetary or otherwise (so called 'spotter's fees') to anyone to induce third parties such as family, friends or colleagues to engage the services of the agent.

## Victoria Legislation

You will find the full transcript of the ACT at

<http://www.consumer.vic.gov.au/CA256EB5000644CE/page/Listing-Resource-Legislation>

[\*Estate Agents Act 1980\*](#)

### **51 Statement concerning finance only to be given if finance promised**

(1) This section applies if an estate agent or auctioneer (or any employee or person acting on behalf of an estate agent or auctioneer) makes any promise to a person with respect to the obtaining of a loan of money to defray some or all of the cost of the purchase price of any real estate or business.

(1A) Before obtaining any signature from the person (or any agent of the person) on any document that legally binds, or that is intended to legally bind the person in respect of the purchase of the real estate or business, the estate agent or auctioneer must—

(a) give to the person, or to any other person signing the document on behalf of that person, a statement in writing as provided for in this section; and (b) obtain from the person to whom the statement is given an acknowledgement in writing of the receipt of that statement.

### **48C Treatment of non-monetary rebates**

(1) For the purposes of sections 48A and 48B, if a rebate is, or is to be, obtained as a benefit rather than as a payment of money, a reference in those sections to the amount of the rebate is to be read as a reference to the value of the rebate.

(2) The dollar amount that is to be attributed to the value of the rebate is a reasonable estimate of the value of the rebate in dollars to the agent.

#### **48 Notice of commission sharing must be given**

(1) This section applies if an estate agent agrees to share any commission to which he or she becomes entitled in respect of any estate agency work with a person who is not—

(a) a licensed estate agent or an agent's representative in his or her employ; or

(b) a licensed estate agent with whom he or she is in partnership.

(2) Before obtaining a person's signature to an engagement or appointment to do any estate

agency work on behalf of the person, the agent must ensure that the person is given a statement

that complies with subsection (3).

Penalty: 100 penalty units.

(3) The statement—

(a) must state that any commission the agent is entitled to under the engagement or appointment will be shared with one or more other people; and

(b) must identify by name every person who is entitled to share the commission with the

agent; and

(c) must contain any other details required by the regulations; and

(d) must be in a form approved by the Director.

(4) An estate agent must not pay to another person any share of a commission that the agent has

obtained in respect of any estate agency work if the agent failed to comply with subsection (2) in

respect of the work.

Penalty: 100 penalty units.

#### **49A Offence not to give certain information about commission**

(1) An estate agent must not obtain, or seek to obtain, any payment from a person in respect of work done by, or on behalf of, the agent or in respect of any outgoings incurred by the agent unless—

(a) the agent holds a written engagement or appointment that is signed by the person (or the person's representative);

**“End “**

## Form 10:

### CONSENT TO REAL ESTATE AGENT/SALESPERSON<sup>1</sup> OBTAINING A BENEFICIAL INTEREST IN PROPERTY - Relationship

TO: [Insert name and address of client]  
Your sale of [insert address of property]

I/We\* propose to obtain a beneficial interest in the above property. I/We\* set out below a brief description of the nature of the interest and who proposes to obtain it:  
Nature of the interest<sup>2</sup> Person(s) obtaining the interest<sup>3</sup>

.....  
(Signature of real estate agent(s)/salesperson(s) proposing to obtain beneficial interest)

.....  
[Print name of the real estate agent(s)/salesperson(s)]

#### DATED:

<sup>1</sup> The agent or salesperson should delete the inapplicable word. Other places where an inapplicable word must be deleted are also indicated among other things:

- defines a “beneficial interest” in property widely and non-exhaustively;
- deems them to obtain a beneficial interest in circumstances where a person associated with them acquires the beneficial interest eg a close relative. Those deemed circumstances are wide and non-exhaustive.

<sup>2</sup> Briefly describe the interest. Examples include:

- purchasing property,
- obtaining an option to purchase property, or
- being granted a general power of appointment in respect of property.

However, the above examples are *not* exhaustive.

<sup>3</sup> Briefly describe the person(s) proposing to obtain the interest. Examples of persons considered to obtain a beneficial interest in property are:

- the agent or salesperson or a close relative of the agent or salesperson obtaining a beneficial interest in the property, or
- a corporation obtaining a beneficial interest in the property where an executive officer of the corporation is the agent or salesperson or a close relative of the agent or salesperson.



## Form 10:

### IMPORTANT NOTICE TO THE CLIENT

This form must be given to you before the real estate agent/salesperson obtains a beneficial interest in the above property eg the agent or salesperson purchases or obtains an option to purchase it. If this form is given to you afterwards you should not sign below.

A real estate agent retained by a client to sell property or a real estate salesperson employed by that agent must not obtain an interest in that property or be remunerated in relation to the transaction by which the interest is obtained. However, the agent or salesperson may do so, if the client consents in writing in this form.

TO: [insert name(s) of real estate agent(s)/salesperson(s) seeking consent]

I/we\* consent to:

- you obtaining the beneficial interest in the above property;
- the payment of the commission or other reward payable to you in relation to the transaction by which the interest is obtained not being affected merely by reason of you obtaining or being concerned in the obtaining of that interest.

.....  
(Signature of each client)

.....  
[Print name of each client]

DATED:

## Form 11:

### CONSENT TO REAL ESTATE AGENT/SALESPERSON<sup>1</sup> OBTAINING A BENEFICIAL RELATIONSHIP IN DEALING WITH A PROPERTY - Financial

TO: [Insert name and address of recipient of the form<sup>1</sup>]

Your sale/purchase/proposed purchase<sup>2</sup> of [insert address of property]

I/We\* set out below:

- the nature of my/our\* relationship with each person named below to whom I/we\* have referred you for professional services associated with the sale or purchase;
- the amount or value of the monetary or other consideration which I/we\* derive or expect to derive from each person.

Name of person	Nature of relationship <sup>3</sup>	Amount or Value of consideration <sup>4</sup>
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1.

2.

3.

[If insufficient space, add an annexure]

<sup>1</sup> **NB** A *seller's agent* must disclose to the seller and also to the prospective buyer. A buyer's agent must disclose to the buyer.

A buyer's agent is:

- (a) a real estate agent acting for a buyer of land, or
- (b) a real estate salesperson acting for that real estate agent.

A seller's agent is:

- (a) a real estate agent acting for the vendor of land, or
- (b) a real estate salesperson acting for that real estate agent.

A prospective buyer is a person who there are reasonable grounds to believe is a potential or likely buyer of land (whether or not the person has made an offer to buy the land).

<sup>2</sup> Delete the inapplicable word. Other places where an inapplicable word must be deleted are also indicated by \*.

<sup>3</sup> Briefly state whether the relationship is personal, commercial or some other relationship.

Some examples are:

- a family relationship,
- a business relationship, other than a casual business relationship,
- a fiduciary relationship,
- a relationship in which 1 person is accustomed, or obliged, to act in accordance with the directions, instructions, or wishes of the other. The above examples are *not* exhaustive.

<sup>4</sup> Insert the amount or value of consideration (if any). If there is no amount or value, insert "nil".

## Form 11:

I/We\* also set out below the amount, value or nature of any benefit of which I/we\* am/are\* aware that a person to whom I/we\* have referred you has received, receives, or expects to receive in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of the land.

Name of persons <sup>5</sup>	Capacity <sup>6</sup>	Amount value or nature of any benefit <sup>7</sup>
1.		
2.		
3.		

[If insufficient space, add an annexure]

.....  
 (Signature of seller's/buyer's\* agent)

.....  
 [Print name of seller's/buyer's\* agent and the agent's licence or registration number]

DATED:

### IMPORTANT NOTICE TO THE SELLER/PROSPECTIVE BUYER

This form must be given to you at the time the agent refers you to a person for professional services associated with the sale/purchase\* and before you enter into a contract for the sale/purchase\* of the above property. If it is given to you afterwards you should not sign below. I/we\* acknowledge receiving this disclosure form at the time the agent referred me/us\* to a person for professional services associated with sale/purchase\* and before entering into a contract for sale/purchase\* of the above property.

.....  
 (Signature of each seller/prospective buyer)

[Print name of each seller/prospective buyer]

DATED:

<sup>5</sup> Insert the name of each person who has received, receives or expects to receive a benefit.

"Benefit" means monetary or other benefit

<sup>6</sup> Briefly state the capacity in which the person has received, receives or expects to receive a benefit. Some examples are: • seller, • property valuer, • finance broker, • financial adviser, • financier, • legal practitioner, • real estate agent.

The above examples are *not* exhaustive. <sup>7</sup> Insert the amount, value or nature of any benefit.

**END OF FORM 11**