



# Australian Grain Industry – Code of Practice Technical Guideline Document

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No. 19

## BROKER / AGENT OPERATING STANDARDS

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Grain Trade Australia**

# Australian Grain Industry – Code of Practice

<http://www.graintrade.org.au>

## Technical Guideline Document

### No. 19 Operating Standards for Brokers and Agents



#### Version Control

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# 1. Application

This Technical Guideline Document (TGD) refers to industry best practice for organisations operating as Brokers or Agents in the Australian Grain Industry. The objective of this document is to raise awareness and maintain and improve ethical behaviour of Australian grain Broker and Agent professions and their conduct. This is to be achieved through removing ambiguity between the roles and functions of Brokers and Agents. This TGD is administered by Grain Trade Australia (GTA) and has been developed in consultation with stakeholders.

Whilst the difference between Brokers and Agents is significant it is not always clear and can be prone to misunderstanding. At law, the distinction is based on what the parties do, and not how they describe themselves. The distinction is particularly important in the context of the GTA Trade Rules and the evidentiary priority granted to Broker's Notes by Trade Rule 3.1.<sup>1</sup>

The critical distinguishing factor is the broker's independence. This is comparable to that of an auctioneer who creates a contract between two parties without representing either.

If you are in any doubt about whether you are a Broker or Agent or are dealing with a Broker or Agent you may need to obtain legal advice, for which this TGD is not a substitute.

## 2. Discussion on Brokers and Agents

### 2.1 What is a Broker?

As defined in the GTA Trade Rules, a Broker means an independent person, firm or electronic trading platform engaged or used by others, at least partially on a commission basis, to facilitate contracts under instructions from Buyers and Sellers, relative to goods to which it does not have actual or constructive possession.

The Broker's independence is a critical and distinguishing factor.

A person is not a Broker:

- a) who has possession and absolute control of goods supplied to him or her to sell and collect the price (therefore, a commission Agent to whom a commodity is consigned for sale is not a Broker).
- b) who only acts for one Principal to the exclusion of all others.

### 2.2 What is an Agent?

As defined in the GTA Trade Rules, an Agent means a person who is not a Broker and who is authorised to act on behalf of a Principal.

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<sup>1</sup> GTA - [Trade Rules Link](#)

### 2.3 How do you distinguish between a Broker and Agent?

A determining factor is how the entity is instructed by a Principal and their authority to negotiate. A Broker can act only based on specific instructions (without authority to negotiate any term outside that instruction) and must continually seek further instruction from the Principal/s. An Agent has some power to negotiate (any term of the contract) on behalf of the party they are authorised to act on behalf of.

	Question/Scenario	Yes	No
1	Have you been appointed by a party to buy or sell goods on its behalf?	Agent	Broker
2	Do you act exclusively for one Principal in the transaction at hand?	Agent	Broker
3	Are you authorised to agree a price?	Agent	Broker
4	Are you acting impartially in the transaction, like an auctioneer, when you bring together a Buyer and Seller?	Broker	Agent
5	Your Principal /client says he'll "sell at \$200 ex farm, find a buyer". Do you need to revert to your Principal before concluding the transaction?	Broker	Agent

NB: These scenarios are not an exhaustive list, and indicative only. Other scenarios may exist or arise from time to time.

### 2.4 What are Broker and Agent Notes?

A Broker's Note is the contract confirmation between Principals of a transaction with all the terms of the contract issued by a Broker who has acted under impartial instruction by both Principals.

An Agent Note is the contract confirmation between Principals of a transaction with all the terms of the contract issued by an Agent who has acted on behalf of a Principal.

### 2.5 Why is determining a Broker or Agent important?

A Broker's Note, being the contract document issued by the Broker, takes precedence in the event of a dispute over contract terms between the parties to the contract. The Broker is seen to be independent and not to have any vested interest in documenting a transaction inaccurately or in a way which favours a particular party.

An Agent's Note does not take precedence in the event of a dispute, due to the fact that an Agent is working exclusively for the benefit of one of the Parties. In the event of a dispute between Principals as to the terms of the contract, an Agent Note holds the same weight as a contract confirmation note issued by a Principal.

### 2.6 What are the Powers and Duties of a Broker?

In the case that a Broker establishes a contract between two Principals, a Broker's Note should be provided to both parties as evidence of the contract.

GTA Trade Rule 3.1 defines the following powers of a Broker:

1. A Broker's Note shall be prima facie evidence of the terms of the contract between the parties. To the extent of any inconsistency between a Broker's Note and a document generated by a party, the Broker's Note shall prevail. For the avoidance of doubt, a Broker is not a party to the contract and does not represent or act as Agent for either party.
2. A Broker has the power to bind two Principals only to the extent of their instructions and the Principals are not liable for any acts of the Broker in excess of such instructions.

3. A Broker who, in good faith or otherwise, exceeds its authority is liable for resulting damages.
4. A Broker who, in good faith, negotiates a contract which is in accordance with instructions from both Principals, who, at the time of negotiations, advises each Principal the name of the other, and who completes such negotiations in accordance with the rules and customs governing such transactions, thereby fulfils all obligations and has no further liability to either of the Principals. A contract so negotiated is valid and binding between the Buyer and the Seller the same as if it had been negotiated directly between them.

In the case that a Broker establishes a contract between two Principals, and there is an issue with the contract or Broker Note, the Broker should work with both parties to seek a resolution.

## **2.7 What are the Powers and Duties of an Agent?**

An Agent has some power to negotiate on behalf of a Principal that has authorised them to act on their behalf. Given this level of duty, GTA recommends Agents have in place some form of written "Authority" signed or approved by the Principal they may act on their behalf from time to time.

In the case that an Agent acts on behalf of a Principal in establishing a contract, an Agent Note should be provided to both parties as a record of what has been agreed. The Agent's record may not be the contract confirmation.

The General Law of Principal and Agency states that

### **2.1. Fiduciary Duties of an Agent to a Principal**

An Agent has 2 fundamental fiduciary duties to their Principal:

- a) The duty to avoid a conflict between the Agent's own interests, or those of another person for whom the Agent acts, and the duty owed to the Principal; and
- b) The duty to avoid profiting from the position as Agent other than from the remuneration payable to the Agent by the Principal in connection with the relevant transaction.

### **2.2. An Agent's engagement and scope of authority**

In negotiating the terms of engagement and the scope of an Agent's authority, the Principal should carefully consider requiring the Agent to obtain the Principal's written consent prior to taking important decisions such as agreeing the final commercial terms.

In the case of the sale and purchase of grain, such written consent may include the final commercial terms include tonnage, price, grade, delivery period, payment terms etc.

## **2.8 Is a Broker's Note always presumed correct?**

The special evidentiary weight of a Broker's Note relative to an Agent Note or Contract Confirmation by a Principal means it will be presumed correct unless there is strong evidence to the contrary. The Broker's Note may nevertheless be challenged:

- a) If it is amended or expanded upon in any way;
- b) If it is manifestly wrong;
- c) Where the parties agree orally to amend the contractual terms and there is good evidence to this effect; or
- d) Where the parties implicitly amend the terms by their conduct in performing the contract and there is good evidence to this effect.



The GTA Broker Note and Agent Note is available for download from the website

<http://www.graintrade.org.au/contracts>

## **2.9 GTA Membership and Code of Practice**

Being a member of GTA means committing to the obligations spelt out in GTA's Constitution and By-Laws and the Australian Grain Industry Code of Practice as well as any other applicable laws. Following evolving market conditions and industry's desire to demonstrate self-regulation, GTA Members and the broader grain industry recognised that the development of a more prescriptive Code of Practice which better defines industry processes and procedures will negate the need for government imposed regulation.

Adherence to the Code became mandatory for all GTA members from 1 July 2014. Organisations that are not members of GTA will be encouraged to become Code signatories.

<http://www.graintrade.org.au/grain-industry-code-practice>

The GTA Code of Practice makes reference to Technical Guideline Documents such as this.

## **2.10 General Principles of this TGD**

The general principles of this TGD advocate that a Broker or Agent should:

- Act in the best interests of the client;
- Provide guidance on market prices/conditions;
- Provide accurate information regarding particular transaction details;
- Respects the client's confidentiality;
- Be professional, efficient and responsive in all dealings;
- Take every step necessary to ensure transactions are complete and accurate;
- Honour their obligations to clients in a timely manner (which includes producing a complete and accurate Broker or Agent Contract Confirmation).

## **2.11 Broker and Agent Professional Competency**

GTA membership aims to ensure that GTA Members are equipped to provide a high level of professional standard. Brokers and Agents must be competent, conscientious, efficient and effective in their work.

To be a GTA member and conduct either Broker or Agent services, individuals must take reasonable action to ensure they have sufficient knowledge of the grain industry, GTA Contracts and Trade Rules, the Australian Grain Industry Code of Practice, relevant legal requirements (including customs and usages) to properly undertake their activities.

It is recommended that individuals within organisations conducting Broker or Agent services in Australian grain have completed the following GTA Training and Development Workshops:

- GTA Trade Rules and Contracts
- GTA Dispute Resolution and Arbitration

GTA Members should maintain their competency through continuing professional development and only undertake work in which they are competent.

Principals of organisations conducting Broker or Agent services must take reasonable steps to ensure their staff are competent and their conduct as employees is consistent with this TGD. Principals should provide staff with information, training and supervision that enables them to competently do their work and comply with the law in the performance of their profession.

## **2.12 Brokers and Agents to act with Honesty and Integrity**

Brokers and Agents must act in the best interests of their clients. GTA Members must be honest and otherwise not engage in conduct that would bring the profession or GTA into disrepute.

In the conduct of their profession, Brokers and Agents must exercise reasonable care to avoid misrepresentation and must, in the conduct of his/her profession, act fairly and honestly and to the best of his/her knowledge and ability.

Brokers/Agents, in attempting to secure bids to buy and offers to sell, shall not deliberately mislead or deceive any parties involved in a transaction. Brokers/Agents shall avoid exaggeration, misrepresentation, or concealment of pertinent facts relating to the transaction they are brokering.

Brokers/Agents must compete fairly in the market, including not taking unfair advantage of other parties and not engaging in anti-competitive or unconscionable conduct. Brokers/Agents must not knowingly engage or induce another person to engage in conduct that will, or is likely to, mislead or deceive in the performance of their profession.

Brokers/Agents reserve the right to provide professional services to parties at their discretion, however shall not deny equal professional services (or be party of discrimination) to any person for reasons of race, colour, religion, sex, handicap, familial status, or national origin.

Brokers/Agents shall be careful at all times to present a true picture in their advertising and representations to the public. Brokers/Agents shall also ensure that their professional status (e.g., Broker, Grower Agent etc.) is clearly identifiable in any such advertising.

Brokers/Agents shall not knowingly or recklessly make false or misleading statements about competitors, their businesses, or their business practices.

## **2.13 Authority to Act for Clients**

A Broker must only present an offer or bid when duly authorised by a Principal (client) or by an Agent acting on the instructions of, and with the authority of, a Principal. An Agent should have appropriate authority in place with a Principal before acting on their behalf and there should be adequate record of this.

A Broker/Agent must not purport to hold or make use of authority where that authority is not in fact held, nor may a Broker/Agent alter the substance of any authority without the approval of the Principal concerned. This should be read to include that a Broker/Agent may not purport of holding a firm bid or offer from a Principal where in fact none exists.

At no point is the Broker/Agent guaranteeing adherence to the contract by either Principal, nor should they be assuming any portion of counterparty risk. However, Brokers and Agents should outline any risks to parties ahead of contracting, including the risk of default by a counterparty. A Broker/Agent should not knowingly Broker a transaction with a counterparty that they know, or should reasonably know, is insolvent.

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## **2.14 Rights of the Client**

Brokers and Agents must provide adequate information to clients that will enable the client to give informed authority in relation to providing the Broker/Agent with a firm bid or offer and the fees and payments to be charged.

A Broker/Agent must respect a client's right to privacy and confidentiality and comply with the law in relation to those rights (such as privacy laws).

A Broker/Agent who engages in unsolicited contact must ensure that the client knows the identity of the person making the approach and what the approach is in relation to.

A Broker/Agent must not knowingly induce or attempt to induce a person to breach terms of a contract.

## **2.15 Disclosure of Commissions**

Brokers and Agents must disclose any commission arrangements to clients prior to (where known) providing services. The aim is to ensure there is absolute clarity regarding who pays for the service. As an aside, it is general industry practice for the Seller to pay commissions on tonnes brokered (per GTA Trade Rule 3.2.3).

When Brokers and Agents provide consultative services to clients that involve advice or counsel for a fee (not a Brokerage commission), such advice shall be rendered in an objective and transparent manner. If Brokerage or transaction services are to be provided in addition to consultative services, a separate compensation may be paid with prior agreement between the client and the Broker/Agent.

## **2.16 Disclosure of Conflicts of Interest**

Brokers and Agents must try to avoid any conflicts of interest where reasonably practical. In the instance that a conflict cannot be avoided, the Broker/Agent must disclose the potential conflict of interest to the client before or when the service is provided. When making a disclosure, the member should reasonably ensure the client is adequately informed about the conflict of interest. Disclosure should not reveal commercially sensitive or confidential information.

Brokers and Agents must minimise the potential adverse impact of conflicts of interest on clients by having adequate arrangements for controlling any conflicts in relation to the activities of their firm. Adequate arrangements for controlling conflicts need to include identifying, managing, avoiding, and disclosing conflicts of interest.

Specifically, for an Agent authorised to act on behalf of a Principal, where-ever possible the Agent should not accept an engagement to act where to do so would place his or her interest in conflict with that of the Principal.

## 2.17 Dispute Resolution

Brokers and Agents must have appropriate arrangements for handling client complaints, including (where applicable) policies and procedures consistent with market standards for complaints handling, and/or referral to an appropriate external dispute resolution service.

GTA provides a dispute resolution service which works to avoid litigation and reduce friction among GTA Members and other industry participants by encouraging dispute resolution through peer review. The service is conducted in a manner that promotes the saving of time and expense while providing an efficient, fair and equitable means to settle disputes related to commercial transactions.

[http://www.graintrade.org.au/dispute\\_resolution](http://www.graintrade.org.au/dispute_resolution)

## 2.18 Other Definitions

**Firm Bid** means a firm price to buy grain conveyed by a potential buyer to a Broker/Agent which the Broker/Agent can execute given all other details are met.

**Firm Offer** means a firm price to sell grain conveyed by a potential seller to a Broker/Agent which the Broker/Agent can execute given all other details are met.

**Indicative Bid** means an indicative price conveyed by a potential buyer to a Broker/Agent which the Broker/Agent cannot execute without further instruction from the buyer making the bid firm.

**Indicative Offer** means an indicative price conveyed by a potential seller to a Broker/Agent which the Broker/Agent cannot execute without further instruction from the seller making the offer firm.

## 3. Contract Negotiations

This section provides guidance as to good practice in day-to-day market negotiations.

### 3.1 General Principles

When representing a buyer, seller or other client, Agents pledge themselves to protect and promote the interests of their client.

Brokerage and Agent services must be conducted with care and accuracy.

It is the custom for Brokers/Agents to record the progress and details of negotiations in a “day book”. This can provide a check-list as to the agreed position and outstanding issues and can later, in the event of a dispute, be used to safeguard their own and/or their Principal’s position. However, copies of emails, instant messaging exchanges, and the like, may represent the equivalent of a day book. It is essential that such correspondence is recorded and retained, at least until the contract has been fulfilled and all matters have been finalised.

If agreement is reached, a Broker Note or Agent Note (depending on the service) should be exchanged in a timely manner to all parties summarising the final agreement.

Where Brokerage or any form of commission is to be paid by the buyer or seller for a transaction, Brokers/Agents must advise parties of the amount of compensation they will receive prior to a transaction.

### **3.2 Firm Offers and Firm Bids**

An agreement or contract is arrived at by the exchange of 'firm offers' and 'firm bids' through a Broker acting on behalf of the Principals, or an Agent acting on behalf of one Principal and negotiating with another, to a point where agreements on price and contract details is concluded, that is all contract terms are agreed, where upon it is an enforceable contract. As per GTA Trade Rules, verbal contracts are binding.

A firm bid or offer should be limited as to time, and be definite as to terms. Opening firm bids or offers are normally based on the main terms and such bids/offers are made subject to agreement of further terms and conditions (e.g. Application of GTA Trade and Dispute Resolution Rules and subject to acceptance of the counterparty which is often revealed upon acceptance of all other terms.).

A 'firm bid or 'firm offer' can be declined by the recipient. At that point the Broker or Agent is free to work the parcel of grain elsewhere. If a firm counter is made (to a conveyed firm bid or offer), however minor the change in terms, the simple act of countering allows the opposite negotiating party the opportunity to decline and withdraw from the negotiation without further discussion or recourse. A party may also decline final acceptance upon learning who the counterparty to the negotiated contract is, which is often revealed upon acceptance of all other terms.

**No firm offer or firm bid may be relayed by a Broker without authority from a Principal.**

**An Agent may make a firm offer or firm bid on behalf of a Principal if they have authority to do so.**

### **3.3 Importance of keeping Clients Informed**

Brokers and Agents exchange bids/offers and counter bids/offers on behalf of Principals until such time as both parties are in agreement on all details that will eventually form the contract. It is important that Brokers and Agents ensure the Principals are kept fully advised on the status of outstanding details when confirming that details are in order.

### **3.4 Time Limits on Offers and Bids**

When exchanging bids/offers, it should be understood by both parties that the reply time stipulated is set by the party making the initial bid/offer or the party making a counter bid/offer.

Brokers and Agents shall submit bids/offers and counter bids/offers objectively and as quickly as possible.

### **3.5 Warranty of Authority**

A Broker negotiating as an impartial intermediary between buyer and seller is deemed to warrant that they have the full authority of a Principal to contract in the terms of an offer or bid which they transmit. An Agent negotiating on behalf of a Principal is deemed to warrant that they have the full authority of that Principal to contract in the terms of the offer or bid which they transmit.

### **3.6 Authorities and Instructions**

A Broker must not represent himself/herself as acting on behalf of their Principal, without authority (i.e. without being given a firm bid/offer). This authority may be verbal.

An Agent must act on behalf of and in accordance with the instructions of their Principal, except where to do so would be unlawful. These instructions may be verbal.

A Broker must not:

- a) Offer at a lower price than authorised, or on different terms than authorised, by the Principal; or
- b) Bid at a higher price than authorised, or on different terms than authorised, by the Principal.

### **3.7 Disclosure of Market Prices**

The Broker and Agent can and should provide their Principals indicative price levels as to what they consider to be the current market price of the particular grain and, if requested, give reasons for that opinion, as the Principal requires.

Brokers and Agents must not imply that they hold a firm bid or offer when they do not, nor should they imply that they hold an indicative bid or offer from a counterparty when they do not, in order to secure a response from another Principal.

It is never acceptable to attempt to manipulate prices.

### **3.8 Confidential Information**

A Broker/Agent must not at any time use or disclose any confidential information obtained while acting on behalf of their Principal, except for information that they are required by law to disclose.

## **4. Further Information**

The GTA Trade Rules can be found at [http://www.graintrade.org.au/trade\\_rules](http://www.graintrade.org.au/trade_rules)

The GTA Broker Note and Agent Note is available for download from the website <http://www.graintrade.org.au/contracts>