

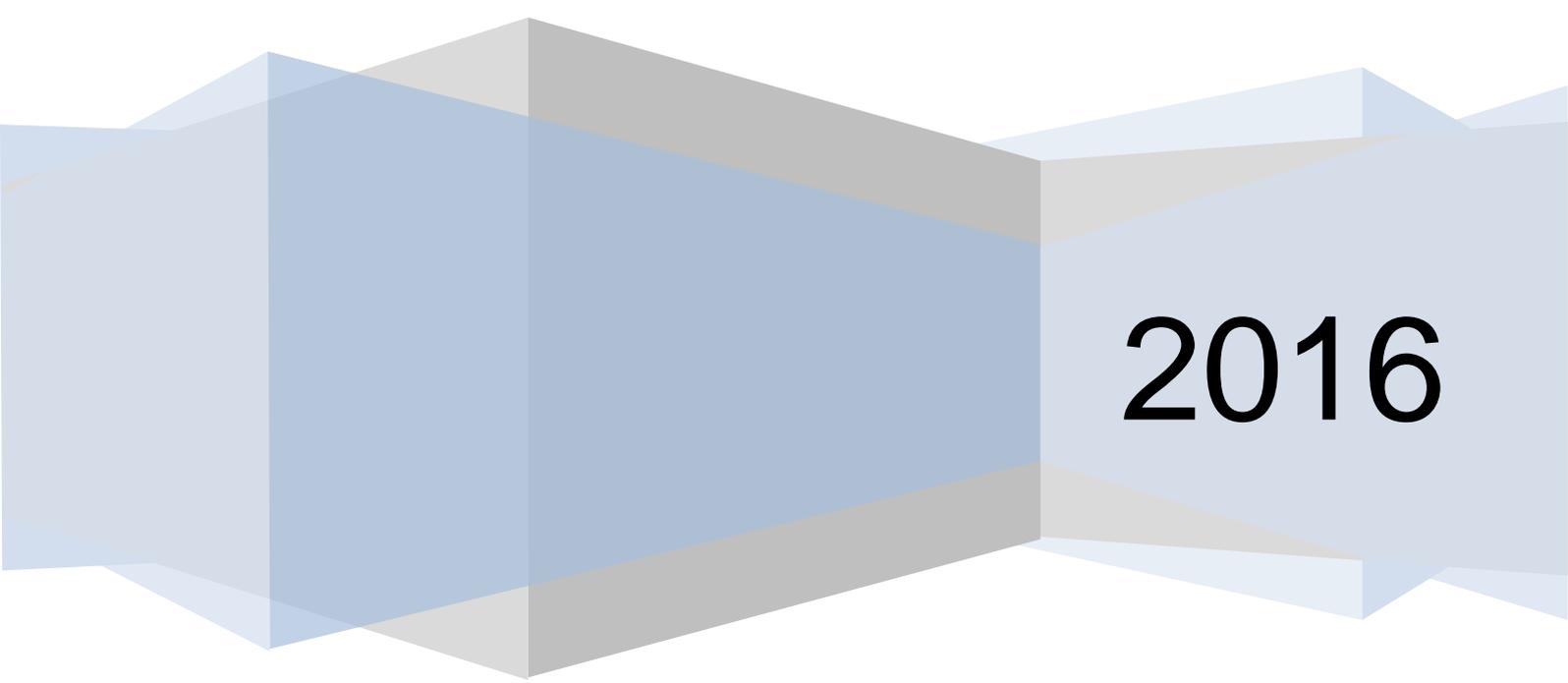


Government of **Western Australia**  
Department of **Commerce**  
Consumer Protection

# Mandatory CPD

## **Real Estate Agents and Sales Representatives**

Participant Manual - Remote

A large, abstract graphic composed of overlapping, semi-transparent geometric shapes in shades of blue and grey. The year '2016' is prominently displayed in the center-right of this graphic.

**2016**



Government of **Western Australia**  
Department of **Commerce**  
Consumer Protection

## **IMPORTANT**

This workbook and the accompanying presentation have been prepared for educational purposes only as part of the Department of Commerce Compulsory Professional Development Program.

**It is not, and should not be construed as, legal advice.**

Any person in doubt as to their legal rights and obligations should seek the advice of a suitably qualified and competent legal practitioner.

### **Copyright**

© 2016. Department of Commerce WA

All rights reserved. This training resource manual has been developed and produced through a collaborative approach with key stakeholders within the Real Estate Industry. This work is copyright, and as such no part of this publication may be reproduced, transmitted or stored in a retrieval system, in any form or by any means, without prior written permission of the copyright holder.

Published by:	Department of Commerce
Developed by:	REIWA Training
Reviewed by:	Department of Commerce and REIWA Training
First Published:	February 2016
Version Number:	V: 1

# CONTENTS

Welcome to Mandatory CPD for 2016.....	2
Introduction .....	3
Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 (the Code).....	4
Activity 1 What do you know about the REBA Code? .....	4
Review of the Code.....	5
The Code and Act interact with other laws .....	5
Issues under review within the Code of Conduct .....	7
What has changed in the amended Code? .....	8
Acting within authority and instructions .....	9
Activity 2 Acting within authority .....	11
Duty to behave fairly .....	12
Duty to advise client of market price.....	13
Conflict of interest .....	14
Communicating offers to principal (now client).....	17
Activity 3 Communicating verbal offers .....	18
Fees and rewards .....	19
Disclosure requirements .....	19
Fiduciaries and their Duties .....	22
How fiduciary roles come about.....	23
Activity 4 Spot the fiduciary.....	24
Fiduciary Duty .....	25
Activity 5 What is fiduciary duty? .....	26
Fiduciary Duty and Conflict in the REBA Code .....	27
Activity 6 Spot the risk .....	31
Conflict of interest .....	33
Types of conflict.....	35
What is informed consent? .....	35
Activity 7 Identifying conflict and breaches of fiduciary duty .....	37
What about Consumers? .....	38
Bibliography .....	41
Activity Answers.....	42
Activity 1 What do you know about the REBA Code? .....	42
Activity 2 Acting within authority .....	42
Activity 3 Communicating verbal offers .....	43
Activity 4 Spot the fiduciary.....	43
Activity 5 What is fiduciary duty? .....	44
Activity 6 Spot the risk .....	45
Activity 7 Identifying conflict and breaches of fiduciary duty .....	46

# Welcome to Mandatory CPD for 2016

The Department of Commerce (the DOC) welcomes you to the Compulsory Professional Development (CPD) program for 2016.



**The purpose of the CPD program is to assist industry members in updating and developing their knowledge and skills in the areas of industry practice and legislative requirements.**

The Commissioner for Consumer Protection (the Commissioner) has determined the subject matter for all Mandatory sessions in 2016.

Any questions arising out of this training may be addressed to the Consumer Protection Division of the DOC by contacting the Consumer Protection Contact Centre on **1300 304 054** or by sending an email to [consumer@commerce.wa.gov.au](mailto:consumer@commerce.wa.gov.au).

## Do you receive e-Bulletins?

The DOC uses electronic bulletins (e-bulletins) as a means of updating the industry with important information including changes to and compliance with legislation and policy.

If you are not registered to receive e-bulletins, please email: [pinews@commerce.wa.gov.au](mailto:pinews@commerce.wa.gov.au) to be added to the distribution list.

### **E-Bulletins**

<http://www.commerce.wa.gov.au/publications/real-estate-bulletins>

### **Newsletters**

<http://www.commerce.wa.gov.au/publications/real-estate-news>

## Introduction

The Compulsory Professional Development (CPD) program is designed to increase your knowledge and skills.

The program aims to increase consumer protection and promote consumer confidence in the real estate industry.



### **This session has three primary objectives:**

1. Overview of the amended *Real Estate and Business Agents and Sales Representatives Code of Conduct 2016* (the Code);
2. Clarification of specific provisions in the Code, including fiduciary obligations and conflict of interest;
3. Learning from case studies relating to managing risk in an agency.

**NB As remote learners you are expected to read the content, complete the activities and answer a short quiz at the end.**

# Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 (the Code)

Let's start with a quick quiz!



## Activity 1 What do you know about the Code?

1. The REBA Code is more like a set of guidelines than a law.	<b>True / False / Maybe</b>
2. Every agency staff member is legally bound by the Code.	<b>True / False / Maybe</b>
3. CPD Training on the Code (and other issues) has helped to reduce complaints against WA agents by over 30%.	<b>True / False / Maybe</b>

[See model answers](#)

**The Real Estate and Business Agents Act 1978 (WA) (REBA Act) prescribes:**

### **s.101. Codes of Conduct**

*The Commissioner may from time to time prescribe and publish in the manner prescribed by the regulations:*

- (a) a code of conduct for agents; and*
- (b) a code of conduct for sales representatives.*

**The Real Estate and Business Agents (General) Regulations 1979 (WA) prescribes:**

### **r. 13. Codes of conduct prescribed to be published (Act s. 101)**

*Any code of conduct that the Commissioner may from time to time prescribe pursuant to section 101 of the Act shall be published in the Government Gazette.*

The Code published in the Government Gazette has the force of law.

Real estate licensees and sales representatives (including property managers) must comply with the REBA Code – it is a condition of holding a licence. Failure to comply with the Code is a breach of s.101 of the REBA Act. This is proper cause for disciplinary action against an agent or sales representative.

The conduct of unregistered / unlicensed agency employees can also cause breaches of the REBA Act – the Agent is however liable for such breaches as the Code does not apply to general staff.

## **Review of the Code**

The Department of Commerce (DOC) undertook a review of the property industry codes of conduct. The principles going forward are very similar to those applied in the past – the Code aims to protect the interests of consumers and clients who deal with real estate agencies, promote public confidence, and keep the market fair and competitive.

While many of the rules have been redrafted in line with modern legislative requirements and to ensure consistency with the other property codes and the Act, the overriding duties and best practice standards of agents and sales representatives remain the same.

The new Code still requires agents and sales representatives to act honestly, exercise due skill, care and diligence and act in the best interests of their client.

The DOC continues to aim to promote a healthy trading environment for agencies, clear guidance on regulatory requirements and acceptable conduct, without over-regulation. DOC must also (by law) ensure that they have the ability to make licensees accountable for their actions.

The principles underpinning the review (and subsequent amendments) of the Code aim to:

- protect the interests of consumers and clients who deal with real estate agencies
- promote public confidence in the work carried out by real estate agencies
- achieve a competitive market with fair trading practices
- provide guidance to the industry on regulatory requirements and acceptable conduct
- provide DOC with tools to effectively hold licensees to account for their actions.

As part of this process, the DOC considered:

- whether the existing codes are achieving fairness and protecting consumers
- how to achieve 'best practice' regulation without regulation being excessive
- avoiding and/or rectifying technical issues such as ambiguity and inconsistencies e.g. between the REBA Act, other property codes and the Australian Consumer Law (ACL)
- whether the code unnecessarily duplicates provisions in other laws.

## **Timing**

The amended Code was published in October 2016. This amended Code replaces the Code of Conduct for Agents and Sales Representatives 2011. Agents and sales representatives had a two month transition period to become familiar with the new code before it became fully operational.

## **The Code and Act interact with other laws**

The Code sits under the REBA Act and clarifies behavioural requirements for real estate agents and sales representatives (including property managers). If there were an inconsistency between the REBA Act and the Code, the REBA Act would always prevail over the regulations and code.

Generally speaking Acts, Regulations and Codes are written to stand alone and to not affect other laws, but a law may refer to another law, for instance explaining which takes precedence on a particular point or to refer the reader to definitions it shares with another law.

The *Interpretation Act 1984* (the Interpretations Act) provides guidance on how to interpret all WA laws, regulations and codes (unless otherwise specified). It provides that words in subsidiary legislation like the Code have the same meaning as in the Acts they operate under (s. 44). The Interpretation Act also provides that if 'may' appears, discretion is allowed, but that 'shall' in the Code means an action must be performed. Terms that are not defined have their usual English meaning, taking into account the intent of the law.

If there seems to be a conflict between any two WA Acts (or pieces of WA subsidiary legislation) and there is no clarifying statement about which prevails, legal advice may be needed. Where a conflict exists between WA law and Australian law, Commonwealth law prevails, unless stated otherwise.

Legislation (WA or Commonwealth) generally prevails over common law ('case law' made by courts) yet the rules courts use to interpret Acts often come from case law. Understanding case law is not straightforward, as precedents can be modified by later cases, so agents must seek advice if needed.

One important interaction between the REBA Act and other laws, is that the Act not only empowers the Regulator to take action for a breach of the REBA Act, Regulations and Code, but also provides for action where agents breach any other law – for instance the ACL, which has higher penalties. A serious breach may attract disciplinary action, or render the licence holder unfit to hold a licence.

Considering how the REBA Code would interact with other laws was a time consuming part of the review process, due to the need to consider potential interactions with laws which are also under review e.g. the *Valuers' Code of Conduct 1985* and the *Settlement Agents' Code of Conduct 1982*.

To ensure an optimal result, changes to the Code were postponed until other relevant industry codes were finalised. This ensured that duplications and inconsistencies were avoided.

The Australian Consumer Law (the ACL) is not changing at this time. The amended Code reinforces the principles provided for in the ACL.

## Issues that were reviewed within the Code

Some of the issues that were canvassed for review when the process began include:

<b>Interpretation issues / definitions and terminology</b>	<ul style="list-style-type: none"> <li>• 'Principal': (in the Code and in the REBA Act (section 44 and 45) it can mean the 'client' or the licensee/agent)</li> <li>• 'Agent': (slightly different definitions in the REBA Act and Code)</li> <li>• Clarification re coverage of employed agents e.g. those working for a body corporate.</li> </ul>
<b>Knowledge of the law</b>	Should knowledge of the law be prescribed for agents?
<b>Fiduciary obligations</b>	Should fiduciary duty between agent and client be clearer in the Code?
<b>Conflicts of interest</b>	The need for disclosure and informed consent in situations of conflict.
<b>Agencies with settlement agents in-house</b>	Inherent conflicts, disclosure and consumer risks.
<b>Secret commissions, 3rd party referrals and benefits</b>	How effective is the Code in this area?
<b>Australian Consumer Law</b>	Evaluation of the overlap with ACL provisions relating to misleading or deceptive conduct, unconscionable conduct, unfair contract terms, and unfair practices.
<b>Acting in the best interests of the client</b>	Evaluation of effectiveness of current rules.
<b>Acting with honesty and fairness</b>	Review of provisions to prevent misleading or deceptive conduct, high-pressure tactics, and harassment, harsh or unconscionable conduct.
<b>Exercising skill, care and diligence</b>	Review of conduct rules re due skill, care and diligence.
<b>Maintaining confidentiality of information gained from the agency relationship</b>	Consideration of whether the requirement to maintain confidentiality is adequate.
<b>Acting within authority and instructions</b>	Review of whether this needs to be prescribed.
<b>Keeping proper accounts</b>	Review of whether this should be in the Code given it is in the REBA Act.
<b>Specific duties / prohibitions</b>	<p>Reviewing the benefits of stating other specific duties / bans, e.g.:</p> <ul style="list-style-type: none"> <li>• bans on inducements</li> <li>• requirement for constant business supervision / bona fide control measures</li> <li>• requirement for processes for risky areas</li> </ul>

## What has changed in the amended Code?

Before we look into the detail of what has changed in the Code; the table below provides an overview of the new structure of the Code. Whereas previously provisions in the Code were referred to as 'sections' they are now known as 'rules.'

New rule	Previous section the new rule amends
<b>Part 2: General Duties</b>	
<b>R 5:</b> Acting in best interests of client	S 4: General duty to principal
<b>R 6:</b> Duty of care, diligence and skill	S 9: Standard of service
<b>R 7:</b> Duty of honesty	S 7(1): Duty to behave fairly
<b>R 8:</b> <i>Disclosure where related to vendor - new rule (falls under general duty of honesty and fairness)</i>	
<b>R 9:</b> Confidential information	S 13: Confidentiality
<b>R 10:</b> Client's instructions	S 6(2): Acting within authority and instructions.
<b>R 11:</b> Misleading or deceptive conduct	S 7(2): Duty to behave fairly
<b>R 12:</b> Unconscionable conduct	S 7(3): Duty to behave fairly
<b>R 13:</b> <i>Fiduciary obligations - new rule (reflects duty that already exists for agents at common law)</i>	
<b>Part 3: Employees</b>	
<b>R 14:</b> Supervision and control of employees	S 8: Duties to manage, to supervise, to attend at place of business.
<b>Part 4: Conflict of Interest</b>	
<b>R 15:</b> Acting for multiple clients in same transaction.	S 15(1) restriction on receiving commission from any person other than the agent's principal.
<b>R 16:</b> Referrals and recommendations	S 18: Disclosure required when recommending
<b>Part 4: Appointment and payment of fees</b>	
<b>R 17:</b> Appointment to act	S 6(1): Acting within authority and instructions.
<b>R 18:</b> Restriction on discounts and rebates	S 15: Restrictions on commission and other benefits.
<b>R 19:</b> Further restriction on reward for service	S 16: Further restriction on reward for service

New rule	Previous section the new rule amends
<b>Part 4: Appointment and payment of fees</b>	
R 20: Claiming expenses from client	S 17: Claiming expenses from principal
<b>Part 5: Specific duties of agents and sales representatives</b>	
R 21: Terms used	N/A
R 22: Certain inducements prohibited	S 5: Certain inducements prohibited
R 23: Advertising	S 6(3) and (4): Acting within authority and instructions.
R 24: Material facts	S 10(1) and (2): Duties as to details of the transaction.
R 25: Client identification verification	S 10(3) and (4): Duties as to details of the transaction.
R 26: Duties regarding opinion of market price	S 11: Duty to advise of market price
R 27: Communicating offers to client	S 14: Communicating offers to principal

## Acting within authority and instructions

Previously, section 6 of the Code stated:

### Section 6. Acting within authority and instructions

- 1) *An agent must not act as agent or represent himself or herself as acting as agent on behalf of a person without written authority.*
- 2) *An agent must act in accordance with the instructions of a principal, except where it would be unreasonable or improper to do so.*
- 3) *An agent must not advertise that any real estate or business is for sale or lease or erect or display a notice of sale or leasing without written authority.*
- 4) *An agent must not —*
  - a) *advertise or offer for sale or lease any real estate or business at a price or on terms different from that authorised by the principal; or*
  - b) *advertise or offer to purchase or lease any real estate or business at a price or on terms different from that authorised by the principal.*

There is a risk to consumers if an agent fails to operate within their authority, so this section of the REBA Code continues to require agents and sales representatives to hold written authority and to act within that authority and in line with instructions.

The principles have not changed; however the amendments clarify each of the obligations previously contained in section 6 of the Code and reformats each of the obligations under separate/appropriate sections. New rule 17 also expands on former section 6(1) by providing that any change to the instructions in the authority to act will need to be in writing. This can be done by either amending the appointment to act itself (e.g. get the client to initial the change in the appointment to act) or by confirming the amendment in a separate written format (e.g. formal agreement, email etc).

This has been recommended as best practice for many years, so this change should not prove onerous for agencies. It will protect agents as well as their clients in the event of a dispute as to the client's instructions.

The provisions in the Code relating to acting within authority and instructions are now provided in rules 17, 10 and 23 as outlined below.

**Rule 17. Appointment to act [amends 2011 Code section 6(1)]**

- 1) *An agent or sales representative who does not have an appointment to act from a person must not –*
  - a) *act as an agent or sales representative for the person; or*
  - b) *represent that the agent or sales representative is acting for the person.*
- 2) *Any change made to the appointment to act must be in writing and may be made by way of amendment to the original document that appointed the agent or sales representative.*

**Rule 10. Client's instructions [amends 2011 Code section 6(2)]**

*When acting for a client an agent or sales representative must –*

- a) *provide each service relating to the client's instructions within a reasonable time after receiving the instructions; and*
- b) *act in accordance with the client's reasonable instructions.*

**Rule 23. Advertising [amends 2011 Code section 6(3) and (4)]**

- (1) *An agent or sales representative must not, without the written consent of a client –*
  - a) *advertise that any real estate or business is for sale or lease by the client; or*
  - b) *erect or display a notice of sale or lease for the client.*
- (2) *When acting for a client an agent or sales representative must not –*
  - a) *advertise or offer for sale or lease any real estate or business at a price or on any other terms, other than as authorised by the client; or*
  - b) *advertise or offer to purchase or lease any real estate or business at a price or on any other terms, other than as authorised by the client.*



**Activity 2**    Acting within authority

1. What are two key elements necessary to create a formal variation of contract?

---

---

---

---

2. What constitutes an 'improper' instruction that can be disregarded?

---

---

---

---

---

---

---

---

3. What type of instruction is so 'unreasonable' that an agent can disregard it?

---

---

---

---

---

---

---

---

---

---

3. How can an agent protect themselves if they feel an instruction is 'unreasonable or improper'?

---

---

---

---

---

---

---

---

[See model answers](#)

## Duty to behave fairly

Previously, section 7 of the Code stated:

### **Section 7. Duty to behave fairly**

- 1) *An agent must act fairly and honestly.*
- 2) *An agent must not knowingly mislead or deceive any parties in negotiations or a transaction.*
- 3) *An agent must not engage in harsh or unconscionable conduct.*

Contravening conduct could be an act towards a consumer, e.g. giving misleading information about a listed property to a prospective buyer, or towards a client or would-be client, e.g. exaggerating the likely sale price to a prospect who is considering listing a property.

The principles for this section of the Code have not changed. The amended Code continues to preclude unfair practices that fall short of being honest and transparent and to affirm the Australian Consumer Law which states that “a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive” – this is a higher standard than was required prior to the amendments.

New rule 8 requires agents and sales representatives to disclose to buyers if they have any direct interest in a property or business they are actively involved in selling (i.e. ownership, either personally or through a controlling interest in a company or trust). They will need to disclose any direct family relationship with a seller (e.g. if a seller is their spouse, de-facto, sibling, parent, son or daughter, but not a cousin, uncle or grandparent).

Owning shares in a public company that owns a property is not a controlling interest. No disclosure will be needed if the person dealing with buyers is not the one with an interest in the property or relationship with the seller.

The provisions in the amended Code relating to acting fairly and honestly and providing disclosure when related to a vendor are now provided in rules 7, 11, 12 and 8 as outlined below.

### **Rule 7. Duty of honesty [Amends 2011 Code section 7(1)]**

*When acting for a client an agent or sales representative must be honest in all dealings with the client, other agents and sales representatives, and other persons involved in a transaction.*

### **Rule 11. Misleading or deceptive conduct [Amends 2011 Code section 7(2)]**

*When acting for a client an agent or sales representative must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive within the meaning of the Australian Consumer Law (WA) Part 2-1.*

**Rule 12. Unconscionable Conduct [Amends 2011 Code section 7(3)]**

*When acting for a client an agent or sales representative must not engage in unconscionable conduct within the meaning of the Australian Consumer Law (WA) Part 2-2.*

**Rule 8. Disclosure where related to vendor [New rule]**

- 1) *When acting for a client who is a vendor an agent or sales representative who is related to the vendor as described in subrule (2) must disclose that in writing to each purchaser.*
- 2) *An agent or sales representative is related to a vendor if the agent or sales representative –*
  - a) *has a controlling interest in the vendor; or*
  - b) *is a spouse, de facto partner, child, grandchild, sibling, parent or grandparent of the vendor.*

## **Duty to advise client of market price**

Previously, section 11 of the Code stated:

**Section 11. Duty to advise of market price**

*An agent engaged to sell or purchase any real estate or business must advise his or her principal as to what the agent considers to be the current market price of that real estate or business and, if requested, give reasons for that opinion.*

Rule 26 of the amended Code requires agents and sales representatives to always provide sellers with reasons for their opinion of market price. An appraisal substantiating this must be in writing and supported by details of sales of comparable properties or businesses, where available.

This rule is not intended to capture “over the phone” desktop estimates.

The change makes clear what is already widely practised. Rule 6 of the amended Code (formerly section 9) requires agents to exercise due, diligence and skill; rule 24 (formerly section 10) requires agents to verify facts material to the transaction and communicate those facts to any person affected by them; and rule 26 (formerly section 11) requires agents to advise their opinion of current market price.

The combination of these three rules means it could be argued that to show compliance, agents and sales representatives have been thoroughly researching market price and providing clients with a written appraisal in practice. The change to the Code formalises what has already been implied.

Even though it is not specifically required by the Code, prudent agencies should be keeping copies of all appraisals, underlying data and calculations, ensuring they record an acknowledgement signature showing the client received written advice on price. This will give them evidence of compliance with the code and show that there were valid reasons for their opinion of market price i.e. sales of comparable properties. Apart from code compliance, this change has a sound commercial basis.

Agents and sales representatives can potentially be liable if negligent or misleading in giving appraisals. This new requirement will help them to protect themselves and provide important information as to how their opinion was arrived at to their insurer should a claim arise.

The provisions in the amended Code relating to the duty of agents and sales representatives to advise of market price is now provided in rules 26 as outlined below.

**Rule 26. Duties regarding opinion of market price [Amends 2011 Code section 11]**

*If an agent or sales representative gives a person an opinion as to the current market price of real estate or a business, the agent or sales representative must not act as an agent or sales representative for the person unless the agent gives the person the following in writing –*

- a) a statement of the opinion;*
- b) the reasons on which the opinion is based;*
- c) if available, information regarding the sale or similar real estate or businesses, supporting the opinion.*

## **Conflict of interest**

Previously, section 12 of the Code stated:

**Section 12. Conflict of interest**

- 1) An agent must not accept an engagement to act, or continue to act, where to do so would place his or her interest in conflict with that of the principal.*
- 2) An agent shall not without the prior written consent of the principal, directly or indirectly, purchase or take on lease or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease.*
- 3) An agent who directly or indirectly purchases or takes on lease or is in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease shall not demand, retain or receive a commission unless the principal has agreed in writing to pay the commission at the same time as or following the signing of the consent referred to in section 10(2).*

One of the drafting conventions in re-writing the Code was that rules in the REBA Act cannot be repeated or summarised in the code. This is to avoid confusion if there is a difference in the wording used in the code.

Under section 64 of the REBA Act, an agent or sales representative shall not have, directly or indirectly, any interest, otherwise than in his capacity as an agent, in any transaction in which he acts or purports to act as an agent, unless his principal has given prior written consent.

As the former sections 12(2) and 12(3) of the Code substantively repeated the content of section 64 of the REBA Act, this section of the code has been removed. However an agent's obligation to avoid acting (without the written consent of their principal) if there is a conflict of interest, remains the same.

Rule 15 and Rule 16 in the amended Code provide some further clarification on what an agent must do to avoid conflicts of interest.

**Rule 15. Acting for multiple clients in same transaction**

*An agent or sales representative must not act for more than one client in a transaction unless, before the agent or sales representative begins so acting, the clients gave fully informed written consent for the agent or sales representative to act for more than one client in the transaction.*

This rule replaces section 15(1) of the 2011 Code which prohibited accepting commission from someone other than the principal in respect of any service performed or to be performed by the agent. There was some uncertainty as to when this section would apply. One practical "mischief" that the former 15(1) potentially helped prevent was an agent acting as a seller's agent and buyer's agent for the same person and receiving a commission from both. As such, section 15(1) has been replaced by a new rule to cover the situation where an agent or sales representative is acting for more than one client in a transaction.

While an agent can act for more than one party to a transaction with informed consent they are still obligated and bound by the other requirements of the code and the act.

In acting for more than one client in the same transaction an agent is also still bound by their other duties to -

- Act in the best interests of the clients
- Act honestly and fairly
- Undertake their work with due skill, care and diligence
- Not disclose confidential information
- Comply with their fiduciary obligations

Given this an agent should not act for more than one party to a transaction if:

- there is a real possibility that the licensee would be required, in order to comply with the Act, the regulations and the Code, to act contrary to the interests of a party; or
- the interests of one party require withholding information or advice from another party.

In effect, an individual agent acting for more than one party in a transaction could only act in the role of an intermediary, conveying offers between the parties. For example, if an agent was to negotiate a higher purchase price for the seller, they are unlikely to be acting in the best interests of the buyer. As such, the agent should not undertake negotiations on their client's behalf as they would not be able to comply with their other duties.

"Informed consent" means that the client needs to be aware of all of the issues and risks. The clients will need to be informed about the limitations placed on the role of an agent acting for multiple parties in one transaction.

The fee disclosure rules also provide further clarification about what an agent must do to avoid a conflict of interest. The new rule 16 is outlined below.

**Rule 16. Referrals and recommendations**

1) *In this rule –*

**supplier** means a person supplying any goods or services and includes a finance broker and a settlement agent.

2) *An agent or sales representative who recommends a supplier to a client must disclose in writing to the client —*

- a) any significant relationship, connection or affinity between the agent or sales representative and the supplier; and*
- b) any potential conflict of interest, and the nature of that potential conflict of interest, arising from the relationship, connection or affinity referred to in paragraph (a).*

3) *An agent or sales representative who recommends —*

- a) a supplier, other than a settlement agent, to a client must disclose in writing to the client any commission accepted, directly or indirectly, by the agent or sales representative from any person for the recommendation; or*
- b) a settlement agent to a client must not accept, directly or indirectly, any commission from any person for the recommendation.*

4) *Before being appointed to act by a client who has been referred by any person to an agent or sales representative, the agent or sales representative must disclose in writing to the client any commission paid or given by the agent or sales representative, directly or indirectly, for the referral.*

## Communicating offers to principal (now client)

Previously, section 14 of the Code stated:

### **Section 14. Communicating offers to principal**

*An agent must communicate all written offers to his or her principal as soon as practicable.*

Prior to being amended, the Code required an agent to communicate all written offers to a seller as soon as practicable. Rule 27 now requires disclosure of all offers including verbal ones as shown below.

### **Rule 27. Communicating offers to client [Amends 2011 Code section 14]**

*When acting for a client an agent or sales representative must communicate each offer to the client as soon as practicable after the offer is made.*

The amendment to Rule 27 to include the communication of verbal offers has been made to ensure full disclosure and transparency in real estate transactions. It is considered important that clients are made aware of all legitimate offers to purchase their property, including verbal ones.

Presentation of verbal offers provides consumers with full transparency which allows clients to make more fully informed decisions about their property -

It is suggested that even if this rule did not exist, an agent or sales representative would still be required to disclose all offers (including verbal offers) under their general duty to act in the best interests of their client. In order to act in the best interest of their client, agents should be presenting all offers to their clients. This amended rule simply informs agents about their existing obligations. In addition to providing clients with full transparency and disclosure, the new rule will also prohibit the potential situation where an agent or sales representative, motivated to receive a quick commission, fails to inform their client about a verbal offer (even if it is a higher offer) in order to ensure commission.

### **What is a verbal offer?**

Verbal offers are more than just “puffery.”

The question to consider is would a reasonable person in the position of the agent or sales representative; believe that an offer was intended.

Agents and sales representatives should take the following factors into consideration when determining what constitutes an offer.

- A proposal/statement only amounts to an offer if the person making it indicates that acceptance is invited and will conclude the agreement.
- An offer must be an expression of willingness to contract on the terms stated, without further negotiation, as to the terms of the proposed contract.

- A statement of intention as to a future course of action is not an offer. For example, a statement along the lines of “I hope to be able to put in an offer to buy this house soon.”

### **No change to how agents and sales representatives conduct business**

This rule is not intended to encourage clients to conduct business verbally. While an agent would be expected to “communicate each offer to the client as soon as practicable” a prudent agent would also request that the potential purchaser put their offer in writing. The sale would still occur through the Contract for Sale of Land (O&A) and the General Conditions.



#### **Activity 3    Communicating verbal offers**

1. A potential buyer indicates that they feel a property should be worth less than the advertised price and then suggests what they consider to be an appropriate value.

Is this a verbal offer?

---

---

---

---

2. How should a verbal offer be communicated?

---

---

---

---

[See model answers](#)

## **Fees and rewards**

Previously, section 16 of the Code stated:

### **Section 16. Further restriction on reward for service**

*An agent must not demand, retain or receive a commission, reward or other valuable consideration for a service which is:*

- a) greater than the amount agreed in writing with the principal; or*
- b) unjust in the circumstances; or*
- c) not initialled on the agreement by the principal.*

The wording of this provision is relatively unchanged in the amended Code. The DOC continues to require written disclosure of fees to clients under their interpretation of the REBA Act so agency procedures shouldn't need to be altered.

The amendment to the provision related to fees and rewards is shown below.

### **Rule 19. Further restriction on reward for service [Amends 2011 Code section 16]**

*An agent or sales representative must not demand or receive a commission, reward or other valuable consideration from any person for the provision of a service that is:*

- a) greater than the amount agreed in writing with the client; or*
- b) unjust in the circumstances; or*
- c) not initialled on the agreement by the client.*

## **Disclosure requirements**

Previously, section 18 of the Code stated:

### **Section 18. Disclosure required when recommending**

- 1) An agent who recommends to a party to a transaction, a settlement agent, finance broker or any other supplier of goods or services, must make a written disclosure to the party of any significant relationship, connection or affinity between the agent and the supplier.*
- 2) Where the relationship, connection or affinity between the agent and the supplier is capable of producing a conflict between the interests of the party to the transaction and the agent, the agent shall include in such written disclosure an explanation of the nature of the potential conflict.*

Prior to the amendments, when an agent or sales representative recommended a finance broker or any other supplier of goods or services to a party to a transaction (e.g. the buyer or seller) they were required to make written disclosure of any significant relationship between the agent and the supplier. There was nothing in the Code to alert the agent or sales representative to the requirements of other laws.

The Code has been amended to reflect the current requirements of section 44(7) of the *Settlement Agents Act 1981* (SA Act) i.e. that no third party can receive a reward from a licensed settlement agent for referring business to that settlement agent. Where it is proven that a reward has been given by a licensed settlement agent to a third party for referral of business, both parties are in breach of the legislation.

This prohibition applies to all licensed real estate agents, registrants and settlement agents and covers all types of rewards that could be received for referring business to a licensed settlement agent. These rewards include, but may not be limited to:

- Gifts of money, wine, tickets, travel, or 'payment in kind' e.g. free secretarial work, title searches, discounted rent, use of equipment.
- Profit sharing payments and/or income distributed via trust structures where there is a **direct relationship between the income received and the business referred.**

In the case *Settlement Agents Supervisory Board and Strand Settlements Pty Ltd [2005] WASAT 350*, a unit trust business structure was utilised and the SAT determined that there was a direct relationship between distribution of profits to unit holders in the settlement agency and the unit holder's previous referrals of business to the agency. The conduct was found to amount to a reward for referral of settlement agent business (or a kickback) in breach of the SA Act.

It should be noted however, this new provision does not prevent a real estate agent from owning an interest in a settlement agency and receiving profit from that settlement agency so long as there is no direct relationship between the interest or profit received and the referral of business.

This is exemplified in the case of *Settlement Agents Supervisory Board and LJ Hooker Settlements Pty Ltd [2008] WASAT 27*, the State Administrative Tribunal (SAT) determined, and the Supreme Court upheld, that the unit trust business structure used by the subject settlement agency did not breach the SA Act because there was found to be no connection between the referral of business to the settlement agency and the issue of units or profit in the unit trust to give rise to a breach of the SA Act i.e. receipt of profit was not determined by the number of clients referred by the unit holder to the settlement agency.

The amended Code also clarifies that agents and sales representatives must provide full disclosure to their client and obtain a signed release if they:

- accept reward from a 3rd party service provider (other than a settlement agent as per section 44(7)) for referring a client to the service provider; or
- pay a 3rd party service provider a reward or commission for referring a client to them.

The amendments to the Code are shown below.

**Rule 16. Referrals and recommendations [Amends 2011 Code s.18]**

1) *In this rule –*

**supplier** means a person supplying any goods or services and includes a finance broker and a settlement agent.

2) *An agent or sales representative who recommends a supplier to a client must disclose in writing to the client –*

a) *any significant relationship, connection or affinity between the agent or sales representative and the supplier; and*

b) *any potential conflict of interest, and the nature of that potential conflict of interest, arising from the relationship, connection or affinity referred to in paragraph (a).*

3) *An agent or sales representative who recommends –*

a) *a supplier, other than a settlement agent, to a client must disclose in writing to the client any commission accepted, directly or indirectly, by the agent or sales representative from any person for the recommendation; or*

b) *a settlement agent to a client must not accept, directly or indirectly, any commission from any person for the recommendation.*

4) *Before being appointed to act by a client who has been referred by any person to an agent or sales representative, the agent or sales representative must disclose in writing to the client any commission paid or given by the agent or sales representative, directly or indirectly, for the referral.*

## Fiduciaries and their Duties

This next part of the session will discuss some common law concepts, including fiduciary duty, and conflict of interests. These concepts have previously, and continue to form part of the Code however focusing on their wider implications may help you to better understand your duties under the Code.

The amended Code includes a new rule that requires an agent to comply with their fiduciary obligations arising as an agent. While agents have always had fiduciary obligations, the new provision is intended to remind agents of these obligations.

### **Rule 13.      *Fiduciary obligations [New rule]***

*An agent or sales representative must comply with any obligation that may arise as a result of any fiduciary relationship between the agent or sales representative and a client.*

Fiduciary relationships have been touched on in CPD but rarely covered in depth. Understanding fiduciary duty is a key principle for agents as it underpins several sections of the REBA Code. Questions arising out of past CPD sessions show that this concept is not understood consistently by all agents, so it is worth addressing.

While there is no absolute definition of a fiduciary relationship, over the years four key elements of fiduciary relationships have been elucidated in court findings:

- an undertaking is given to carry out duties
- control of property (or a material outcome) is entrusted to the person giving the undertaking
- the party giving control relies on and trusts the other or is entitled to do so
- one party has power to affect the interests of the other (who is therefore vulnerable to them).

Legal sources agree that not all of these characteristics will be found in every fiduciary relationship as the concept has always been a flexible one covering a variety of relationships.

Case law has established some relationships that are now assumed to be fiduciary by default:

- a trustee is a fiduciary to any beneficiaries of the trust
- an agent is a fiduciary to their principals
- a director is a fiduciary to their company
- a partner is a fiduciary to their partner(s)
- a broker is a fiduciary to their clients
- a legal practitioner (or accountant) is a fiduciary to their clients and
- an employee is a fiduciary to their employer *if they are in a position of trust.*

The key one of these roles affecting agency work is obviously the agent to client relationship, but several of the other relationships listed also arise in the real estate context. Agents and their staff should consider the concept of the fiduciary and their duties in these other roles as well.

### **How fiduciary roles come about**

Fiduciary relationships come into existence whenever a person undertakes to act in one of the roles listed as being recognised as fiduciary or agrees to carry out a fiduciary duty.

Fiduciary relationships can also be created by agreement in a contract (for example a loan agreement can make the borrower a fiduciary to the lender).

A relationship can be deemed fiduciary by a court, based on their interpretation of circumstances and facts – e.g. courts have found a seller of land to be a fiduciary between sale and settlement.

A written law can state that a certain type of relationship or duty will be fiduciary.

A fiduciary relationship can also be implied in law where one party relies on another to act for them – proper evidence of a basis for dependency and undertaking to act, advise or protect is needed.

Knowing when you are acting as a fiduciary is not always simple, but it is important, as it impacts on how you must conduct yourself. It can also be useful to know when you are not acting as a fiduciary.

This activity will help you understand some of the distinctions.



## Activity 4 Spot the fiduciary

These scenarios are based on real cases from various jurisdictions. Consider which of the parties in each scenario owe a fiduciary duty to which other parties.

1. Blair was a sales representative. He listed an older strata unit for sale. The sellers were in a hurry, quite rude and not forthcoming with information. The buyers were a very nice young couple buying their first home. Blair was diligent in researching and disclosing everything about the property.	<i>Agent</i> <i>Representative</i> <i>Sellers</i> <i>Buyer</i>
2. Jacqui was an independent real estate agent who occasionally acted as a buyer's agent. She spent a lot of time looking for a property for one buyer, without success, then offered him a property she had listed, disclosing her role as listing agent. The sale went ahead.	<i>Jacqui</i> <i>Seller</i> <i>Buyer</i>
3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed within the agency in another company name. A disclosure of conflict consent form was signed by the sellers. Mimi was unaware of this purchase until much later.	<i>Ed</i> <i>Mimi</i> <i>Sellers</i>
4. Ann was an agent who had a listing that wasn't moving. Bea was a rep with another agency who approached her with a conjunctural offer from Jack (an investor). Bea's agency was selling another property for Jack at the time but they were not acting for Jack as buyer's agents. Ann was hesitant about conjuncting because of her commission, but finally agreed to present the offer.	<i>Agent Ann</i> <i>Conjunctural Rep Bea</i> <i>Seller</i> <i>Investor Jack</i>
5. Lee was an independent contractor with two part-time roles, one as a sales representative and one as a self-employed solicitor/settlement agent. He had decided to leave the agency. He handled the settlement of his last sale before resigning and paid himself commission.	<i>Real Estate Agent</i> <i>Rep Lee</i> <i>Sellers</i> <i>Solicitor Lee</i>

[See model answers](#)

It can be confusing to unravel who is a fiduciary to whom in some situations and most agents do not consciously think about it – they just try to adopt good business practices all the time.

If you want to start to be more conscious of who you owe fiduciary duty to, some say to simply “follow the money” – i.e. if you undertook to act for someone for a fee, you are a fiduciary to them.

Based on various sources, including regulatory and legal opinions, it is fair to say that:

- a licensee agent is always a fiduciary to every agency client
- representatives acting on their employer’s behalf have fiduciary duties to agency clients
- people in senior roles within agencies have fiduciary duties to clients.

Note: Sales representatives, senior agency staff and managers are also likely to have fiduciary responsibilities to their employer due to the level of trust and confidence implicit in the relationship.

Agents who are company directors are always a fiduciary to their company.

If an agent is a partner, they are always a fiduciary to their partners.

A settlement agent is a fiduciary to their clients and to their employer.

It is also important to understand that fiduciary relationships can begin without formal written agreement. For example, if an agent negotiates with a prospective partner, or a representative deals with a potential client, fiduciary duties may be implied even if the deal does not proceed.

### **Fiduciary Duty**

Where a fiduciary relationship exists between parties, fiduciary duty will exist (and vice-versa – if you agree to carry out a fiduciary duty, you become a fiduciary). The concept of fiduciary duty is not defined by legislation (although it may be better defined under the new Code) so for now understanding the common law application of fiduciary duty and being very familiar with the Code are an agent’s best options.

So can you identify what fiduciary duties you owe? This quiz highlights some key duties.



## Activity 5 What is fiduciary duty?

Review these questions – the answers may be True, False, or ‘Maybe’.

1. A fiduciary must be totally loyal to their principal and keep their confidences	<b>True / False / Maybe</b>
2. If your interests conflict with your client's interests, you breach fiduciary duty	<b>True / False / Maybe</b>
3. A fiduciary must be completely transparent and honest with their principal	<b>True / False / Maybe</b>
4. You become a fiduciary when you sign a client and the fiduciary relationship ends when the transaction is final	<b>True / False / Maybe</b>
5. If a principal signs a form that says they are giving informed consent to a conflict, you no longer need to put their interests first.	<b>True / False / Maybe</b>
6. Profiting from a breach of fiduciary duty can lead to punitive damages	<b>True / False / Maybe</b>
7. Consumers enjoy the same protection as clients under fiduciary duty	<b>True / False / Maybe</b>
<a href="#">See model answers</a>	

## **Fiduciary Duty and Conflict in the REBA Code**

Obviously an agency has a contractual duty to do for their principals what they have undertaken to do in the Appointment to Act. Fiduciary duty adds an extra layer of responsibility – it requires the agent to not only carry out the undertakings, but to do so in a very dedicated, careful and loyal way.

The concepts of fiduciary duty, disclosure and conflict were embedded in the Code prior to amendments, at times in ways that also address the agent's duties to clients [e.g. Rule 24 (formerly section 10)].

Aside from the new Rule 13, to avoid fiduciary breaches, pay particular attention to the following rules and sub rules of the amended Code:

### **Rule 5. Acting in best interests of the client [Amends 2011 Code s. 4]**

*When acting for a client an agent or sales representative must act in good faith in the best interests of the client.*

### **Rule 17. Appointment to Act [Amends 2011 Code s. 6(1)]**

- 1) *An agent or sales representative who does not have an appointment to act from a person must not -*
  - a) *act as an agent or sales representative for the person; or*
  - b) *represent that the agent or sales representative is acting for that person.*
- 2) *Any change made to the appointment to act must in writing and may be made by way of amendment to the original document that appointed the agent or sales representative.*

### **Rule 10. Client's instructions [Amends 2011 Code s. 6(2)]**

*When acting for a client an agent or sales representative must –*

- a) *provide each service relating to the client's instructions within a reasonable time after receiving the instructions; and*
- b) *act in accordance with the client's reasonable instructions.*

### **Rule 23. Advertising [Amends 2011 Code s. 6(3) and (4)]**

- 1) *An agent or sales representative must not, without written consent of a client –*
  - a) *advertise that any real estate or business is for sale or lease by the client; or*
  - b) *erect or display a notice of sale or lease for the client.*
- 2) *When acting for a client an agent or sales representative must not –*
  - a) *advertise or offer for sale or lease any real estate or business at a price or on any other terms, other than as authorised by the client; or*
  - b) *advertise or offer to purchase or lease any real estate or business at a price or on any other terms, other than as authorised by the client.*

**Rule 6. Duty of care, diligence and skill [Amends 2011 Code s. 9]**

*When acting for a client an agent or sales representative must exercise due care, diligence and skill.*

**Rule 24. Material facts [Amends 2011 Code s. 10(1) and (2)]**

- 1) *Prior to the execution by a client of any contract relating to the sale or lease of any real estate or business the agent or sales representative must make all reasonable efforts to ascertain or verify all facts material to the transaction (the material facts) that a prudent agent or sales representative would ascertain or verify.*
- 2) *An agent or sales representative must promptly communicate a material fact to any person who may be affected by the material fact and appears to be unaware of it.*

**Rule 25. Client identification verification [Amends 2011 Code s. 10(3) and (4)]**

*An agent or sales representative who receives instructions to offer real estate for sale must –*

- a) *promptly obtain a copy of the certificate of title for the real estate and refer to that copy for the names of the registered proprietor; and*
- b) *as soon as practicable after receiving the instructions and before a contract for the sale is executed, make all reasonable efforts to verify –*
  - i. *the identity of each person who claims to be, or to act for, a person who is to sell all or any of the real estate; and*
  - ii. *each person's authority to sell the real estate, or to act for the person selling it.*

**Rule 15. Acting for multiple clients in the same transaction**

*An agent or sales representative must not act for more than one client in a transaction unless before the agent or sales representative begins so acting, the clients gave the agent or sales representative fully informed written consent to the agent or sales representative acting for more than one client in the transaction.*

**Rule 9. Confidential information [Amends 2011 Code s. 13]**

- 1) *An agent or sales representative must treat as confidential information obtained while acting for a client that has not been made public and that –*
  - a) *is by its nature confidential; or*
  - b) *was specified as confidential by the person who supplied it; or*
  - c) *is known by the agent or sales representative to be confidential.*
- 2) *Information to be treated as confidential under subrule (1) must not, directly or indirectly, be disclosed by an agent or sales representative to another person, unless –*
  - a) *the disclosure of the information is required by law; or*
  - b) *The client is fully informed of the proposed disclosure and agrees to it in writing.*

**Rule 27. Communicating offers to client [Amends 2011 Code s. 14]**

*When acting for a client an agent or sales representative must communicate each offer to the client as soon as practicable after the offer is made.*

**Rule 8. Disclosure where related to vendor**

- 1) *When acting for a client who is a vendor an agent or sales representative who is related to the vendor as described in subrule (2) must disclose that in writing to each purchaser.*
- 2) *An agent or sales representative is related to a vendor if the agent or sales representative –*
  - a) *has a controlling interest in the vendor; or*
  - b) *is a spouse, de facto partner, child, grandchild, sibling, parent or grandparent of the vendor.*

**Rule 18. Restriction on discounts and rebates [Amends 2011 Code s. 15]**

- 1) *An agent or sales representative must not demand or receive a discount or rebate that relates to a service provided by a service provider, in connection with a transaction or a service provided to a client by the agent or sales representative, unless the agent or sales representative has –*
  - a) *disclosed to the client the full nature, extent and amount of the discount or rebate; and*
  - b) *obtained the written consent of the client to the demanding or receiving of the discount or rebate by the agent or sales representative.*
- 2) *In subrule (1), a service provider includes a stockbroker, tradesperson and a person providing a service relating to advertising.*

**Rule 16. Referrals and recommendations [Amends 2011 Code s. 18]**

- 1) *In this rule –*

**supplier** *means a person supplying any goods or services and includes a finance broker and a settlement agent.*
- 2) *An agent or sales representative who recommends a supplier to a client must disclose in writing to the client –*
  - a) *any significant relationship, connection or affinity between the agent or sales representative and the supplier; and*
  - b) *any potential conflict of interest, and the nature of that potential conflict of interest, arising from the relationship, connection or affinity referred to in paragraph (a).*

- 3) *An agent or sales representative who recommends –*
- a) *a supplier, other than a settlement agent, to a client must disclose in writing to the client any commission accepted, directly or indirectly, by the agent or sales representative from any person for the recommendation; or*
  - b) *a settlement agent to a client must not accept, directly or indirectly, any commission from any person for the recommendation.*
- 4) *Before being appointed to act by a client who has been referred by any person to an agent or sales representative, the agent or sales representative must disclose in writing to the client any commission paid or given, directly or indirectly, for the referral by the agent or sales representative.*

The amended Code does not include a definition of fiduciary duties because it is considered too prescriptive and there is a risk that some aspects of the common law fiduciary duties could be missed.

However, for training purposes, the table below provides a **general guide** to the fiduciary duties of agents and sales representatives.

### **General Fiduciary Duties of Agents and Sales Representatives**

<b>Loyalty</b>	<ul style="list-style-type: none"> <li>• Owes undivided loyalty to the client and must put the client's interest above their own.</li> <li>• Must not put himself in a position of conflict without informed consent.</li> <li>• Must not make a profit from their position without informed consent.</li> <li>• Must act in the best interests of the client.</li> <li>• Must act in good faith.</li> <li>• Must disclose to the client any information they receive that may benefit the client's position in a negotiation (disclosure).</li> <li>• Must obey all lawful orders that the client gives them (obedience).</li> </ul>
<b>Care</b>	<ul style="list-style-type: none"> <li>• Must use all their skills to the best of their ability on behalf of the client.</li> </ul>
<b>Confidentiality</b>	<ul style="list-style-type: none"> <li>• Must keep confidential any information given to them by or about their client, their business, financial, personal affairs or motivation. The duty lasts forever.</li> </ul>
<b>Accounting</b>	<ul style="list-style-type: none"> <li>• Must account for all funds entrusted in them and not combine client/customer funds with their own personal and/or business funds.</li> </ul>

Source: *PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER DOC 2013*



## Activity 6 Spot the risk

These scenarios used in Activity 4 were based on real cases. We now know which of the parties in each scenario owes a fiduciary duty. Think about what the risks might have been for the fiduciaries in these scenarios, taking into account the extra information provided.

1. Blair was a sales representative. He listed a strata unit for sale. The sellers were rude, in a hurry and not forthcoming with information. They were stressed by their impending divorce. The buyers were a very young couple buying their first home.

Blair was diligent in researching and disclosing everything about the property to the buyers.

2. Jacqui was an independent real estate agent who occasionally acted as a buyer's agent. She spent a lot of time looking for a property for one buyer, without success, then offered him a property she had listed, disclosing her role as listing agent.

The sale went ahead.

3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed within the agency in another company name. A disclosure of conflict consent form was signed by the sellers.

Mimi was unaware of this purchase until much later.

4. Ann was an agent who had a listing that wasn't moving. Bea was a rep with another agency who approached her with a conjunctional offer from Jack (an investor). Bea's agency was selling another property for Jack at the time but they were not acting for Jack as buyer's agents.

Ann was hesitant about conjuncting because of her commission, but finally agreed to present the offer. There were some negotiations where Bea tried to get the price reduced. The sale went ahead eventually.

5. Lee was an independent contractor with two part-time roles, one as a sales representative and one as a solicitor / settlement agent. He had decided to leave the agency.

He handled the settlement of his last sale before resigning. He used his position as conveyancer to pay himself a (disputed) 30% commission directly.

[See model answers](#)

Common themes in many articles and legal opinions about fiduciary duty include that the fiduciary relationship is one of utmost trust and confidence, that the principal is entitled to undivided loyalty from their agent and that the agent is precluded from profiting from the role, or helping any 3rd party to do so, without informed consent of the principal.

Some legal commentators say that a fiduciary is remiss if they even allow themselves to be in a position where their interest appears to be in conflict with their principal's interests – the standard of conduct can be argued to be that high. For a fiduciary to take advantage of a conflict without informed consent, is a clear and serious breach of their fiduciary duty.

In common law if a complaint is made about a breach, liability is strict. It is no defence to say that a fiduciary acted against their client's interests 'in good faith', or with 'good intent', or that 'no harm was done' by the conflicted action.

The only real defence is that the beneficiary gave **informed consent prior to the conduct**.

To avoid a breach of fiduciary duty:

- carry out all undertakings as agreed – do not ignore or exceed the client's authority
- if a client's instructions cannot be followed, inform the client at once
- only act for one party in any one transaction
- only accept remuneration from one client in any transaction - no 'secret commissions'
- do not derive benefits from acting that should have rightly gone to the principal
- notify the principal of all relevant matters relating to the agency, buyers etc.
- do not take advantage of, misuse or wrongly divulge confidential information
- be accountable for all sums and benefits received.

## Conflict of interest

We have already discussed that the key obligation of the fiduciary is to be loyal to their principal. This duty of loyalty cannot be seen to be carried out if loyalty is owed to clients with opposing interests (or if an agent / representative is 'loyal' to their own interests in opposition to a client's interests).

'Conflict of interest' is not a legally defined term, probably because it means slightly different things in different contexts, but there are working definitions in use. The quote below may be useful as a starting point to consider how conflict of interest relates to a real estate agent's fiduciary duty.

*"Conflict of interest" - a situation where a person has a competing professional or personal obligation or interest that makes it difficult for the person to fulfil his or her professional duties to a client fairly. (Osborn's Concise Law Dictionary Tenth Edition, Sweet & Maxwell (2005)).*

Some real estate definitions refer to conflict being where the fiduciary continues to act when they:

- have an interest (or plan to take an interest) in a subject property
- stand to make a gain on the transaction, apart from the fee the client pays
- represent parties whose interests conflict, or could foreseeably conflict
- act for a client with whom they compete in some way, or may compete in the near future
- anticipate they will profit from information acquired in the course of the transaction.

In law there are three types of conflict of interest - agents need to be aware of and avoid all of these. They are actual conflict, perceived conflict and potential conflict.

**Actual conflict of interest:** where an agent or sales representative has a direct interest in a matter that is contrary to their client's interests or represents two parties simultaneously who have conflicting interests.

Examples of this include where an agent or representative:

- owns a property and recommends that a client should buy it
- buys a property listed within the agency, or sells a listed property to a close personal associate
- sells a listed property to a buyer with whom they have done business or hope to do business
- recommends an offer if that offer brings the agent greater benefit than another offer available
- represents both buyer and seller or sells a property for one client to another client
- recommends a service provider if they are a part-owner of the service-provider or will receive a benefit in return for the referral.

**Perceived conflict of interest:** where a reasonable person looking at a scenario would be likely to think a conflict is probable, but there is no actual conflict. Examples of this could include if an agent or representative:

- recommended a service-provider who was a friend, but received no benefit
- sold a property for a relative but conducted the sale as usual.

**Potential conflict of interest:** conflict which does not yet exist but has potential to arise in future. Examples of this could include if an agent or representative:

- accepted a listing to sell a business while considering starting a similar business
- recommended their in-house settlement agent to both buyer and seller.

Agents and sales representatives must avoid or properly manage all conflicts, including financial and non-financial conflicts. At times they may choose to act in a position of conflict where they are confident they can manage the conflict effectively, so as not to prejudice any client. They should however ensure any clients involved are fully informed of the conflict (even if they feel it is insignificant or perceived rather than actual) and gain the clients' informed consent before acting.

### **Identifying conflicts and gaining informed consent**

To be in a position to identify conflicts of interest that may put the interests of agency clients at risk, agents need to keep conflict of interest 'front of mind', and encourage representatives to do likewise. Not every conflict will be clear-cut and obvious.

Some issues for agents and sales representatives to consider in relation to conflict include:

- whether the agent, their family or employees have outside interests that may cause conflicts
- whether there are any agency practices that mean agents / representatives accrue benefits over and above the fees clients pay them (or avoid losses) when they list and sell properties
- whether personal 'amity' or 'enmity' could cause a conflict of interests (e.g. a personal bond with a buyer, or a dislike for a seller)
- how to avoid a 'conflict of duty' when you have clients whose interests are competing
- whether foreseeable future events could create conflict
- whether information you will acquire on listing a property or business may create a conflict
- what consequences might result from proceeding to act for a client despite a conflict
- whether informed consent is needed, and from whom
- how to manage conflicts fairly and ensure they do not result in claims or bad publicity.

If a conflict of interest is clear (or highly likely) the agent or representative should consider whether to resign from representing the client to avoid the conflict entirely, or to seek to manage the conflict. It is not always practical to avoid all conflicts - for instance if there is only one agent in a town. If a conflict exists it may be managed by disclosing it to the client and gaining informed consent to continue to act. An agent wanting to minimise risk will closely supervise all conflicted transactions.

## Types of conflict

The most common conflicts arise from the agent-principal relationship, however agents who are directors are fiduciaries to their company and must also consider conflicts of interests in this context. Their duty of loyalty to the company means they cannot use their position to gain an undisclosed profit.

For example if a director becomes aware of an investment opportunity through work, they have an obligation to offer the opportunity to the company. If they use knowledge acquired through the company for exclusive personal gain, without consent, the company is entitled to seek recompense. Courts have been known to award the profits plus costs to the company.

Partners have similar fiduciary obligations to their partners. They owe undivided loyalty and will have a conflict if they work competitively or exclude their partners from profit opportunities.

Representatives have slightly different issues. As well as avoiding conflicts with clients, they need to avoid conflicts of interest with their employer, and with agents and sellers they engage with in conjunctive sales. If they have an interest outside work that conflicts with their duties to the agency and its clients, they must also take great care with this. *Representatives establishing a competing business whilst working for an agency have been found to have a conflict of interests even where there was no 'non-compete' clause in their employment contract precluding this.*

## What is informed consent?

When a fiduciary has a conflict and seeks consent to proceed with acting for a principal, they will ask the principal to sign a disclosure and consent form. There is no precise formula to ensure that this consent has been given validly and will stand up - legal opinions suggest it depends on the circumstances.

The following guidelines could help however to protect you and your clients.

For informed consent to be valid, a fiduciary should ensure:

- they fully disclose the conflict, explaining its nature and extent - *if full disclosure is not possible due to another client's confidentiality, informed consent is not achieved – agents may need to consider withdrawing from acting*
- they do not bundle multiple conflicts together if this makes disclosure unclear
- the principal understands the disclosure and is competent and capable of consenting
- the consent is voluntary, with opportunity to seek independent advice - *to be truly voluntary ideally there is another viable option available to the principal that is not financially punitive*
- both the agent's disclosure and the principal's consent are put in writing and signed
- where the agent (or one of their representatives) buys or leases the client's property, the client is not charged a commission or leasing fee *unless the principal first signs a consent form, agreeing to pay the fee, in the knowledge that they can decline to do so.*

Note: Informed consent forms are limited in scope to exactly what they state.

The consent will usually allow an agent to continue to act while conflicted. It may also consent to payment of a fee. *An informed consent form does not release the agent / sales representative from their duty to act in the client's best interests.* Unless specified, the client is not agreeing to the agent:

- making a secret profit or improper gain, at the time or in the future
- concealing information from them that is pertinent to the transaction
- colluding with a third party such as a buyer
- taking advantage of or revealing their confidences
- acting against their best interests.

Should an agent or representative act against their client e.g. by diverting profits from their principal to themselves, a signed consent form would not necessarily prevent the client pursuing damages.





## Activity 7 Identifying conflict and breaches of fiduciary duty

Review these scenarios (based on real events) and decide for each whether there is:

- a) a breach of fiduciary duty
- b) a material conflict of interest
- c) a breach of the REBA Code

The answers may be 'Yes', 'No' or 'Maybe'. Answers will be discussed.

<p>1. A Perth-based agent (Jamie) was asked to sell a property known as Blackacre, in his former rural home town. He listed the property and carried out the usual searches. It seemed to him that the fences (in place for nearly 20 years) were not on the actual boundary and that the land holding could be larger than the seller had stated. Jamie mentioned this to a mate at the pub, who later made an offer. Jamie recommended the offer. The seller accepted. There seemed no reason to mention the boundary issue to the seller. Later Jamie had a few local enquiries, and decided to establish a local presence. His mate (the buyer) gave him space in his office at a low rent.</p> <p><i>Case study courtesy of Valenti Lawyers</i></p>	<p><b>Breach of Fiduciary Duty</b> Yes / No / Maybe</p> <p><b>Conflict of interest</b> Yes / No / Maybe</p> <p><b>Breach of the Code</b> Yes / No / Maybe</p>
<p>2. A real estate partnership was in the business of both selling property and land speculation. One of their clients was a developer involved in several land developments. The firm acted as his real estate agent. A partner of the firm had a private arrangement with the client to deliver extra consulting services in return for a share in the profits made by the client on the sale of one parcel of land, which was sold through the firm.</p>	<p><b>Breach of Fiduciary Duty</b> Yes / No / Maybe</p> <p><b>Conflict of interest</b> Yes / No / Maybe</p> <p><b>Breach of the Code</b> Yes / No / Maybe</p>
<p>3. An agent acted for two sellers of adjoining beach-front properties. There was strong interest in both and a buyer made an offer on one for above the advertised price. While the first sale was still 'under offer' there was a lower offer to purchase the other. The agent did not tell the second seller any details about the other offer. The second seller sold, but later alleged the agent had a conflict of interests and should not have kept him ignorant of information that would have materially affected the price he was willing to sell for.</p>	<p><b>Breach of Fiduciary Duty</b> Yes / No / Maybe</p> <p><b>Conflict of interest</b> Yes / No / Maybe</p> <p><b>Breach of REBA Code</b> Yes / No / Maybe</p>
<p>4. A real estate sales representative acting as a buyer's agent was instructed to locate a small commercial property for an offshore client. He found a property that fitted the parameters. He advised the client but also alerted his wife to the opportunity. She purchased the property while the client was still considering options</p>	<p><b>Breach of Fiduciary Duty</b> Yes / No / Maybe</p> <p><b>Conflict of interest</b> Yes / No / Maybe</p> <p><b>Breach of the Code</b> Yes / No / Maybe</p>

<p>5. A property manager prepared for some months to start her own business. She did this in her own time at home, preparing lists of clients from memory (her employer's records were not accessed directly). After resigning she wrote to over 50 of the agency's clients. Many came across to her new firm.</p>	<p><b>Breach of Fiduciary Duty</b> Yes / No / Maybe</p> <p><b>Conflict of interest</b> Yes / No / Maybe</p> <p><b>Breach of the Code</b> Yes / No / Maybe</p>
<p><a href="#">See model answers</a></p>	

### What about Consumers?

This session has focused primarily on the fiduciary duty you have to your principals. Agents and sales representatives must also deal with consumers (buyers and tenants of property) honestly and ethically. There is no fiduciary relationship or fiduciary duty involved (unless an agent undertakes to act as a buyer's agent or tenant representative – in those cases there is a fiduciary duty to the buyer or tenant as they are the client).

The agency's client must always be paramount. Agents and representatives must pursue their client's best interests, without breaching the code of conduct or consumer laws.

While consumer law is not the main focus of this CPD session, it is worth revisiting the duty to consumers that exists under Australian Consumer Law (ACL) and the *Fair Trading Act 2010* (FTA) (WA) and considering how this works with the code of conduct. Here is a quick refresher of how key consumer laws and the code of conduct reinforce one another to protect consumers.

Remember if you breach consumer law very heavy fines can apply, and you may implicate your principal as well.

Key provisions of ACL / FTA	Code of Conduct	Examples
<p><b>No</b> misleading / deceptive conduct or:</p> <ul style="list-style-type: none"> <li>• unfounded promises or predictions</li> <li>• allowing false impressions to stand</li> <li>• hiding disclosures in small print.</li> </ul> <p><b>Disclose all 'material facts'</b> - silence can be misleading or deceptive.</p> <p><b>Material facts: "any fact likely to influence a person in deciding whether or not to buy (or lease) a property and/or how much they would be willing to pay".</b></p>	<p><b>11. Misleading or deceptive conduct</b></p> <p><i>When acting for a client an agent or sales representative must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive within the meaning of the Australian Consumer Law (WA) Part 2-1.</i></p> <p><b>24. Material facts</b></p> <p>1) <i>Prior to the execution by a client of any contract relating to the sale or lease of any real estate or business the agent or sales representative must make all reasonable efforts to ascertain or verify all facts material to the transaction (the material facts) that a prudent agent or sales representative would ascertain or verify.</i></p> <p>2) <i>An agent or sales representative must promptly communicate a material fact to any person who may be affected by the material fact and appears to be unaware of it.</i></p>	<p>An agent did not disclose issues with water leaking into a bedroom and garage in a property he sold. <i>Whitaker v Paxtad Ltd (2009)</i></p> <p>Agents did not disclose recent murders in a house they sold. <i>Hinton &amp; Ors v Commissioner for Fair Trading</i></p>
<p>No false or misleading representations made about goods or services when promoting those goods or services.</p> <p>No 'bait' advertising - advertising a property for sale / lease if you know you cannot supply it.</p> <p>Only use genuine testimonials.</p>	<p><b>23. Advertising</b></p> <p>1) <i>An agent or sales representative must not, without the written consent of a client –</i></p> <p>a) <i>advertise that any real estate or business is for sale or lease by the client;</i> or</p> <p>b) <i>erect or display a notice of sale or lease for the client.</i></p>	<p>An agent advertised a house with a price guide well below what sellers would accept. <i>ACCC v Gary Peer &amp; Assoc. Pty Ltd [2005]</i></p> <p>Ads quoted a prediction that prices would 'double in 5 years'. Price dropped before settlement. The buyers got out of the contract. <i>Zhang v VP302 SPV &amp; Ors [2009]</i></p>

	<p>2) <i>When acting for a client an agent or sales representative must not –</i></p> <p>a) <i>advertise or offer for sale or lease any real estate or business at a price or on any other terms, other than as authorised by the client; or</i></p> <p>b) <i>advertise or offer to purchase or lease any real estate or business at a price or on any other terms, other than as authorised by the client.</i></p>	
<p>No 'unconscionable conduct' - i.e. no statements / actions that defy good conscience – e.g. bullying, high pressure tactics, intimidation, taking advantage of vulnerability or impairment.</p>	<p><b>12. Unconscionable conduct</b></p> <p><i>When acting for a client an agent or sales representative must not engage in unconscionable conduct within the meaning of the Australian Consumer Law (WA) Part 2-2.</i></p>	<p>Threats were used to press tenants to renew leases at higher rents. The tenants spoke little English. The conduct was unconscionable. <i>ACCC v Dukemaster Pty Ltd</i> [2009]</p> <p>A man contracted to sell his land below value while drunk - the court set the contract aside. <i>Blomley v Ryan</i></p>

# Bibliography

## Articles and Papers

Breach of Fiduciary Duties *Owen Hodge Lawyers 2015* [www.owenhodge.com.au](http://www.owenhodge.com.au)

Conflicts of Interest, Conflicts of Duty – Abstract *John Glover 2002 Adelaide Law review*  
[www.austlii.edu.au](http://www.austlii.edu.au)

Conflicts of Interest for Real Estate Agents *Kim Valenti 2014* [www.valentilawyers.com.au](http://www.valentilawyers.com.au)

Court grants injunction to restrain former employee without a restraint clause in his contract  
*Workplace Relations Bulletin: December 2014* by *Rachael Sutton & Ethan Brawn* [www.mondaq.com](http://www.mondaq.com)

Directors' Duties: the duty to avoid conflicts of interest *The FindLaw Team 2015 Thomson Reuters (Professional) Australia Limited* [www.findlaw.com.au](http://www.findlaw.com.au)

Dissertation on the law of fiduciary duty, especially re directors *Murphy JA 2011*  
[www.mrlegal.com.au](http://www.mrlegal.com.au)

Fiduciary Duties *Alexandra Bartlett Yeldham Price O'Brien Lusk 2015*  
[www.13wentworthselbornechambers.com.au](http://www.13wentworthselbornechambers.com.au)

FindLaw Legal Dictionary  
[dictionary.findlaw.com](http://dictionary.findlaw.com)

Halsbury's Laws of Australia

Lindgren's Business Law of Australia - Partnership  
[www.lexisnexis.com.au](http://www.lexisnexis.com.au)

Principles of Australian Equity & Trusts *Radan & Stewart 2009* [sydney.edu.au](http://sydney.edu.au)

Protecting Your Business From Your Employees - Part 2 *Richard Naughton, Deacons 2006*  
[www.tved.net.au](http://www.tved.net.au)

The Role of Status in the Law of Obligations: Common Callings, Implied Terms and Lessons for Fiduciary Duties *James Edelman 2013* [www.supremecourt.wa.gov.au](http://www.supremecourt.wa.gov.au)

The Latest on Fiduciary Relationships 2007 *Stephen Warne lawyerslawyer.net*

What are the duties of directors? *Australian Institute of Company Directors*  
<http://www.companydirectors.com.au>

## Government Publications

### Government of Western Australia, Department of Commerce

Avoiding unfair business practices - A guide for businesses and legal practitioners

The Code of Conduct: Section 18 *Real Estate News Issue No 06 May 2013*

Consumer Protection *Consultation Regulatory Impact Statement - Property Industry Codes of Conduct Discussion Paper May 2013*

<http://www.commerce.wa.gov.au>

### Northern Territory Government

CITATION: *Lee v Agents Licensing Board* [2009] NTMC 039

## Activity Answers



### Activity 1 What do you know about the REBA Code?

1. The REBA Code is more like a set of guidelines than a law. <i>The REBA Code of Conduct has the force of law.</i>	<b>False</b>
2. Every agency staff member is legally bound by the REBA Code. <i>The agent and his registered staff are bound. If other staff cause breaches the agent is liable.</i>	<b>False</b>
3. CPD Training on the Code of Conduct (and other issues) has helped to reduce complaints against WA agents by over 30%. <i>Yes – in the first 5 years of CPD the complaint rate dropped dramatically – the proof of the effectiveness of CPD in helping consumers and agents is clear.</i>	<b>True</b>



### Activity 2 Acting within authority

1. What are two key elements necessary to create a formal variation of contract?

*All signatories who signed the initial contract must sign the variation. The variation should state what agreement it is varying e.g. “this document varies the agreement attached dated..”*

2. What constitutes an ‘improper’ instruction that can be disregarded?

*Fiduciary duty requires you to act on instructions per the principal’s wishes unless ‘unreasonable or improper’. The ‘improper’ exception covers requests such as:*

- any action in breach of any written or common law e.g. a client asking you to assist them in avoiding duty (a breach of the Duties Act) or to act in a way that ignores duty of care*
- instructions to act ‘unconscionably’ to consumers*
- requests to go outside a set procedure (such as a Landgate process)*
- instructions from one owner if other owners have not authorised the action.*

3. What type of instruction is so ‘unreasonable’ that an agent can disregard it?

*An instruction can be unreasonable because it is onerous for the agent to carry out and was not agreed on in the authority to act – in that case it is negotiable, especially if there is a cost.*

*An agent may also argue that an instruction is unreasonable if it does not further the agreed desired outcome or causes a problem (e.g. the owner insists on inspections at a time that will upset tenants). The latter example would need to be negotiated rather than decided unilaterally.*

*Agents should not ignore instructions just because they are inconvenient if they fall within the scope of the agency agreement however.*

4. How can an agent protect themselves if they feel an instruction is ‘unreasonable or improper’?

*Advise the client as soon as possible of the difficulty and your inability to carry out the instruction. If the issue is of major significance, do this in writing and get their acknowledgement. If arrangements to not carry out an instruction are verbal, keep detailed diary notes and/or confirm in an email.*

*Clients may have the option of withdrawing from the agency agreement if you are not willing to follow an instruction that is legal and could be argued to be within the scope of the agreement.*



### Activity 3 Communicating verbal offers

1. How would you define a ‘verbal offer’?

*The FindLaw Legal dictionary defines an offer as a proposal, promise, or other manifestation of willingness to make and fulfil a contract or bargain under proposed terms with another party that has the power to accept it.*

2. How should a verbal offer be communicated?

*This type of offer could be communicated by telephone with a note in the weekly activity summary provided to the client, or by email.*



### Activity 4 Spot the fiduciary

These scenarios are based on real cases from various jurisdictions. Consider which of the parties in each scenario owe a fiduciary duty to which other parties.

<p>1. Blair was a sales representative. He listed an older strata unit for sale. The sellers were in a hurry, quite rude and not forthcoming with information. The buyers were a very nice young couple buying their first home. Blair was diligent in researching and disclosing everything about the property.</p>	<p><i>Agent ► Sellers Representative Blair ► Sellers Representative Blair ► Agent NO FIDUCIARY DUTY FROM REP BLAIR TO BUYERS</i></p>
<p>2. Jacqui was an independent real estate agent who occasionally acted as a buyer’s agent. She spent a lot of time looking for a property for one buyer, without success, then offered him a property she had listed, disclosing her role as listing agent. The sale went ahead.</p>	<p><i>Agent Jacqui ► Sellers Agent Jacqui ► Buyer</i></p>
<p>3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed within the agency in another company name. A disclosure of conflict consent form was signed by the sellers. Mimi was unaware of this purchase until much later.</p>	<p><i>Ed ► Sellers Ed ► Mimi Mimi ► Sellers Mimi ► Ed</i></p>
<p>4. Ann was an agent who had a listing that wasn’t moving. Bea was a rep with another agency who approached her with a conjunctional offer from Jack (an investor). Bea’s agency was selling another property for Jack at the time but they were not acting for Jack as buyer’s agents. Ann was hesitant about conjuncting because of her commission, but finally agreed to present the offer.</p>	<p><i>Agent Ann ► Sellers Conjuncting Rep Bea ► Sellers Conjuncting Rep Bea ► Ann NO FIDUCIARY DUTY TO JACK AS BUYER - Bea owes fiduciary duty to Jack in the matter her agency is handling for him, but that is irrelevant here, where she is acting for the agent for the seller</i></p>
<p>5. Lee was an independent contractor with two part-time roles, one as a sales representative and one as a self-employed solicitor/ settlement agent. He had decided to leave the agency. He handled the settlement of his last sale before resigning and paid himself commission.</p>	<p><i>Real Estate Agent ► Sellers Rep Lee ► Sellers Rep Lee ► Real Estate Agent Solicitor Lee ► Sellers</i></p>



## Activity 5 What is fiduciary duty?

Review these questions – the answers may be True, False, or ‘Maybe’.

1. A fiduciary must be totally loyal to their principal and keep their confidences  <i>Loyalty is the highest and most important duty of a fiduciary.</i>	<b>True</b>
2. If your interests conflict with your client’s interests, you breach fiduciary duty  <i>The correct answer is TRUE. Maybe is an understandable answer as if the conflict is consented to by the client and managed so as not to harm the client’s interests, the agent has a defence for the breach.</i>	<b>True / Maybe</b>
3. A fiduciary must be completely transparent and honest with their principal  <i>YES – the only defence for keeping something material from a principal would be if you owed a duty of confidentiality to another principal. You would need to disclose the conflict and might need to resign if the conflict could not be managed.</i>	<b>True</b>
4. You become a fiduciary when you sign a client and the fiduciary relationship ends when the transaction is final  <i>A fiduciary obligation can begin from the first conversation with a prospective client (even one who does not become a client) and does not ever end– for instance all information is confidential for ever.</i>	<b>False</b>
5. If a principal signs a form that says they are giving informed consent to a conflict, you no longer need to put their interests first.  <i>The duty to put the client’s interests first is not fully discharged by the consent form – the form is only an effective defence to being accused of ‘undisclosed conflict’ <u>if all material facts are disclosed.</u>  If the agent went on to make an undisclosed profit the client might still have a valid claim against the agent.</i>	<b>False</b>
6. Profiting from a breach of fiduciary duty can lead to punitive damages  <i>YES – courts have awarded the ‘secret profit’ to the principal and added punitive damages on top.</i>	<b>True</b>
7. Consumers enjoy the same protection as clients under fiduciary duty  <i>NO – duties to buyers or tenants under consumer law are more general and at a lower level than the fiduciary duty an agent owes their principal.</i>	<b>False</b>



## Activity 6 Spot the risk

These scenarios used in Activity 4 were based on real cases. We now know which of the parties in each scenario owes a fiduciary duty. Think about what the risks might have been for the fiduciaries in these scenarios, taking into account the extra information provided.

<p>1. Blair was a sales representative. He listed a strata unit for sale. The sellers were rude, in a hurry and not forthcoming with information. They were stressed by their impending divorce. The buyers were a very young couple buying their first home. Blair was diligent in researching and disclosing everything about the property to the buyers.</p>	<p><i>Blair has not clicked with the sellers. He is at risk of forgetting he legally owes a fiduciary duty to them. There is nothing wrong in his diligent disclosure, or his personal empathy for the young buyers, but if this led him to disclose the situation the sellers are in (divorce pending) and their need to sell quickly, he would be in breach of his fiduciary duty.</i></p>
<p>2. Jacqui was an independent real estate agent who occasionally acted as a buyer's agent. She spent a lot of time looking for a property for one buyer, without success, then offered him a property she had listed, disclosing her role as listing agent. The sale went ahead.</p>	<p><i>If Jacqui served two principals with competing interests and did not make disclosure and obtain informed consent from <u>both</u>, she has risked breaching her fiduciary duty. If she collected two commissions for one transaction she may have breached the REBA Code.</i></p>
<p>3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed within the agency in another company name. A disclosure of conflict consent form was signed by the sellers. Mimi was unaware of this purchase until much later.</p>	<p><i>Ed may have breached his fiduciary duty to his principals if disclosure was incomplete or consent to continue to act was not informed. If Ed handled that conflict correctly and there is no issue from the seller's point of view, he may still have breached his fiduciary duty to his partner Mimi, by not informing her of the investment opportunity.</i></p>
<p>4. Ann was an agent who had a listing that wasn't moving. Bea was a rep with another agency who approached her with a conjunctual offer from Jack (an investor). Bea's agency was selling another property for Jack at the time but they were not acting for Jack as buyer's agents. Ann was hesitant about conjuncting because of her commission, but finally agreed to present the offer. There were some negotiations where Bea tried to get the price reduced. The sale went ahead eventually.</p>	<p><i>Ann risked losing a client the opportunity to sell out of self-interest, a breach of fiduciary duty. Bea may have been at risk of mistaking where her fiduciary duty lay. Her agency is a sub-agent to Ann's agency with the same high level of fiduciary duty to the sellers that Ann has. Bea must be loyal to Ann's seller even if she has never met them, and cannot reveal seller confidences to Jack. Her fiduciary duty to Jack in the other matter is irrelevant in this situation.</i></p>
<p>5. Lee was an independent contractor with two part-time roles, one as a sales representative and one as a solicitor / settlement agent. He had decided to leave the agency. He handled the settlement of his last sale before resigning. He used his position as conveyancer to pay himself a (disputed) 30% commission directly.</p>	<p><i>The case on which this scenario is based went to court. The rep was found to have owed fiduciary duty to both the seller, and the agent he worked for, even though he was a contractor. Lee was found not only to have put his own interests in relation to commission on the sale, ahead of those of Litchfield Realty, but also to have left the seller open to claims and litigation by the agent regards the payment of commission.</i></p>



## Activity 7 Identifying conflict and breaches of fiduciary duty

Review these scenarios (based on real events) and decide for each whether there is:

- a) a breach of fiduciary duty
- b) a material conflict of interest
- c) a breach of the REBA Code

1. A Perth-based agent (Jamie) was asked to sell a property known as Blackacre, in his former rural home town. He listed the property and carried out the usual searches. It seemed to him that the fences (in place for nearly 20 years) were not on the actual boundary and that the land holding could be larger than the seller had stated. Jamie mentioned this to a mate at the pub, who later made an offer. Jamie recommended the offer. The seller accepted. There seemed no reason to mention the boundary issue to the seller. Later Jamie had a few local enquiries, and decided to establish a local presence. His mate (the buyer) gave him space in his office at a low rent.

*Case study courtesy of Valenti Lawyers*

### **Breach of Fiduciary Duty - YES**

The duties of loyalty and confidentiality were both breached

### **Conflict of interest - YES**

There was a non-pecuniary conflict initially due to the friendship with the buyer. It became pecuniary when the reduction in rent was accepted.

### **Breach of the Code - YES**

Rule 5 – the agent did not act in their clients best interests. Section 10 - the agent did not verify and communicate facts ascertained to affected parties, Rule 9 – the agent did not keep the clients matters confidential,

2. A real estate partnership was in the business of both selling property and land speculation. One of their clients was a developer involved in several land developments. The firm acted as his real estate agent.

A partner of the firm had a private arrangement with the client to deliver extra consulting services in return for a share in the profits made by the client on the sale of one parcel of land, which was sold through the firm.

### **Breach of Fiduciary Duty - YES**

By not letting the other partners know of the side deal the agent breached his fiduciary duty

### **Conflict of interest - YES**

The agent had a conflict between his own interests and the interests of his partners. He did not make disclosure.

### **Breach of the Code - MAYBE**

Rule 19 does not allow an additional reward for services

3. An agent acted for two sellers of adjoining beach-front properties. There was strong interest in both and a buyer made an offer on one for above the advertised price. While the first sale was still 'under offer' there was a lower offer to purchase the other.

The agent did not tell the second seller any details about the other offer. The second seller sold, but later alleged the agent had a conflict of interests and should not have kept him ignorant of information which would have materially affected the price he was willing to sell for.

### **Breach of Fiduciary Duty - NO**

The two sales are separate. The agent had to keep the first sale confidential until it became public.

### **Conflict of interest - MAYBE**

There could be a perceived conflict representing two competing sellers – one may suspect the agent of selling the other property more strongly.

### **Breach of the Code - NO**

Agent acted properly. Once the information was public there would have been an obligation to tell the 2nd seller.

<p>4. A real estate sales representative acting as a buyer's agent was instructed to locate a small commercial property for an offshore client. He found a property that fitted the client's parameters. He advised the client but also alerted his wife to the opportunity. She purchased the property while the client was still considering options</p>	<p><b>Breach of Fiduciary Duty - YES</b> The Rep was not loyal to his client, and put his own interests first</p> <p><b>Conflict of interest – YES</b> The rep made a secret profit.</p> <p><b>Breach of the Code - MAYBE</b> If he told his wife first, then he breached Rules 23, 15 and 9.</p>
<p>5. A property manager prepared for some months to start her own business. She did this in her own time at home, preparing lists of clients from memory (her employer's records were not accessed directly). After resigning she wrote to over 50 of the agency's clients. Many came across to her new firm.</p>	<p><b>Breach of Fiduciary Duty – YES</b> The PM owed fiduciary duty to her employer</p> <p><b>Conflict of interest – YES</b> The PM had a conflict of interests with her employer</p> <p><b>Breach of the Code - MAYBE</b> Using her knowledge of agency clients may have been a breach of their confidentiality and was an abuse of her employer's trust</p>

**This course material (and the discussions that arise if you are attending CPD training in a classroom environment) are not legal advice. Sales representatives must refer to their agent if they have questions. Agents may consult the Regulator and can also seek their own legal advice if they have specific legal questions.**

**DISCLAIMER:**

The information provided in this publication was adapted from material prepared by the Department of Commerce and the Real Estate Institute of Western Australia, with reference to various other sources described in the bibliography.

This material is presented in good faith but is not warranted in any way. It is not a statement of law. The courseware and bibliography provide references to sources of further information. REIWA and the Department of Commerce strongly recommend that you seek legal or expert advice if you are uncertain about your obligations or need more information.