



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

Mandatory CPD

Commercial Licensees and Registrants

Participant Manual - Remote

2016



REIWA
TRAINING



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

IMPORTANT

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

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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.

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 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 the specific provisions in the Code, including fiduciary obligations and conflict of interest; and
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.

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

[See activity 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 registered sales representatives and property managers must comply with the 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 sales representative or property manager.

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 amended 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; and
- 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); and
- whether the code unnecessarily duplicates provisions in other laws.

Timing

The new Code was published in October 2016. It will replace 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 amended code before it became fully operational.

The Code and Act interact with other laws

The Code sits under the REBA Act and sets out standards of behaviour which real estate agents and sales representatives (including property managers) are required to meet. 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* (Interpretation 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 ordinary meaning, taking into account matters such as the intention of the law.

Where a conflict exists between WA law and federal 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 how the courts have interpreted legislation can be complex and agents must seek advice where required.

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.

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 which may result in a range of penalties including fines and/or suspension or disqualification of an agent's or sales representatives' licence or registration.

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 *Licensed Valuers Code of Conduct 1985* and the *Settlement Agents' Code of Conduct 1982*.

The *Australian Consumer Law* (the ACL) has not changed and the amended Code reinforces the principles provided for in the ACL.

It is assumed by some that the ACL only applies to consumer transactions. In fact any party to a commercial transaction who has been subjected to misleading or deceptive conduct may be entitled to redress under the ACL. Some consumer warranties also apply and unfair contract conditions can also be an issue.

Issues that were reviewed within the Code

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

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

- Specific duties / prohibitions** Reviewing the benefits of stating other specific duties / bans, e.g.:
- bans on inducements
 - requirement for constant business supervision / bona fide control measures
 - requirement for processes for risky areas
 - inspections
 - conjunctions
 - sale of rented properties
 - reimbursement of costs
 - confirming instructions
 - deposit handling
 - disclosing material facts
 - advising owners of market price
 - advising owners of their rights re changing agents and of the risk of double commission
 - advising owners of their rights under the Code, and in relation to dispute resolution.
-

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

New rule	Previous section the new rule amends
Part 4: Appointment and payment of fees	
R 20: Claiming expenses from client	S 17: Claiming expenses from principal
Part 5: Specific duties of agents and sales representatives	
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 REBA 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 Code will continue 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 on behalf of the person.*
- 2) *An agent or sales representative must obtain the written agreement of the client that the agent or sales representative agreed to act for in an appointment to act before any change is made to the appointment to act.*

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.*



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 activity 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 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 sub rule (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, 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.

What has changed?

The amended Code requires that agents/sales representatives 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.

The change specifies what was already widely practiced, particularly by commercial agencies and business brokers. Section 9 of the former code, required agents to *exercise due skill, care and diligence*, section 10 required them to *verify facts material to the transaction and communicate those facts to any person affected by them* and Section 11 required them to *advise their opinion of current market price*.

The combination of these three sections means it could already be argued that to show compliance, agents/sales representatives need to thoroughly research market price and provide clients with a written appraisal. The change formalises what was already implied.

Risk averse agencies will keep copies of all appraisals, underlying data and calculations, ensuring they record an acknowledgement signature showing the client received written advice on value. 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 or businesses.

Apart from code compliance, this change has a sound commercial basis as agents can potentially be liable if negligent or deceptive when appraising. This new requirement will help agents/sales representatives to protect themselves and ensure their insurer can assist them if a claim arises, showing they took due care.

Conflict of interest

Previously, section 12 of the Code states:

S 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).*

This section of the Code provided a defined view of 'conflict of interest' in a particular context. If complied with, an agent, sales representative, leasing representative or property manager was arguably protected from disciplinary action under the Code in that context. It did not necessarily protect them from common law action that could arise should their client suffer a loss caused by them acting against their interests, when in a position of conflict.

What has changed?

The wording in the amended Code has been altered to remove any inconsistency between point 1) which states that an agent must not act where there is a conflict of interest, and the other paragraphs, which allow for an agent acting where there is a conflict if they make disclosure and seek consent.

The new section retains the current requirement for written consent from the client before taking an interest in the purchase or lease of any real estate or business an agent is engaged to sell or lease, and before taking commission in that situation.

Communicating offers to principals

Previously, section 14 of the Code stated:

S 14. Communicating offers to principal

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

Previously, the Code requires an agent to communicate all written offers to a seller as soon as practicable.

What has changed?

This rule has been amended to require disclosure of all verbal offers.



Activity 3 Communicating verbal offers

1. How would you define a 'verbal offer'?

2. How should a verbal offer be communicated?

[See activity answers](#)

Fees and rewards

Previously, section 16 of the Code stated:

S 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.*

What has changed?

This provision has been removed from the Code because it is considered to be covered adequately in the REBA Act. The DOC will continue to require written disclosure of fees to clients under their interpretation of the REBA Act so the change should not alter agency procedures.

Disclosure requirements

Previously, section 18 of the Code stated:

S 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.*

Under the former Code, when an agent or agency employee 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 with that supplier. There was nothing in the former Code to alert the agent or sales representative to the requirements of other related laws.

What has changed?

The Code has been amended to reflect the 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 also utilised, however 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.

Another new requirement clarifies that agents and registered employees must provide full disclosure to their client and obtain a signed release if they:

- accept reward from a 3rd party service provider 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.

Fiduciaries and their Duties

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 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. Don't worry about the rights and wrongs of the conduct in each situation (some of these issues will be discussed later).

1. Blair was a sales representative. He listed a commercial strata unit. The sellers were in a hurry, quite rude and not very forthcoming with information. They were stressed by financial pressures in their business. The buyers were a pleasant couple investing for their retirement. Blair was diligent in researching and disclosing facts about the property.	<i>Representative Blair Agent Sellers Buyer</i>
2. Jackie was a migration agent and a specialised business broker. She brought groups of Chinese buyers to Australia to look at businesses for sale. Each buyer paid her a fee. She also got a selling fee from sellers.	<i>Jackie Seller Buyer</i>
3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed with the agency. A disclosure of conflict consent form was signed. Mimi was unaware of this purchase until much later.	<i>Ed Mimi Sellers</i>
4. Fleur worked for a large commercial agency. She listed an office property for sale and/or lease. Rod was a tenant representative within another division of the same company. His client applied to lease the property.	<i>Fleur Owner Rod Tenant</i>
5. Cara was a commercial leasing representative consulting to Acme to find premises for new outlets. Her husband Vic was Acme's Facilities Manager. One property she recommended was 50% owned by Vic's family trust. His children from a previous marriage were beneficiaries.	<i>Cara Cara's Agency Acme Vic Family Trust</i>
6. Jon was employed as a strata manager for the Bay View strata complex. He had been appointed by the developer ABC originally. ABC had retained 3 of the 15 units. Jon property-managed the 3 units separately for ABC.	<i>Jon Bay View Strata Co. ABC Developments</i>

[See activity answers](#)

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

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
- employees in senior roles within agencies have fiduciary duties to clients.

Note: Sales representatives, leasing representatives, property managers and other senior agency staff and managers are likely to have fiduciary responsibilities to their employer as well as agency clients 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 amended 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'. Answers will be discussed.

1. A fiduciary must be totally loyal to their principal and keep their confidences	True / False / Maybe
2. If your interests conflict with your client's interests, you breach fiduciary duty	True / False / Maybe
3. A fiduciary must be completely transparent and honest with their principal	True / False / Maybe
4. You become a fiduciary when you sign a client and the fiduciary relationship ends when the transaction is final	True / False/ Maybe
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	True / False/ Maybe
6. Profiting from a breach of fiduciary duty can lead to punitive damages	True / False / Maybe
7. Consumers enjoy the same protection as clients under fiduciary duty	True / False / Maybe
See activity answers	

Fiduciary Duty and Conflict in the 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 are embedded in the Code, at times in ways that also address the agent's duties to consumers (e.g. Rules 24 and 25).

To avoid fiduciary breaches, pay particular attention to the following sections and subsections:

Rule 5 Acting in best interests of client

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

Rule 10 Client's instructions

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 6 Duty of care, diligence and skill

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

Rule 24 Material facts

- 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

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 name of the registered proprietor; and*
 - (b) as soon as practicable after receiving the instructions and before a contract for that 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 9 Confidential information

- 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

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 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.

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.*
-

The table below may serve as a useful reminder of what your general fiduciary duties are as an agent or sales representative.

General Fiduciary Duties of an Agent or Sales Representative

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

Source: PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER DOC 2013

Activity 6 Spot the Risk

The 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 any extra information provided.

<p>1. Blair was a sales representative. He listed a commercial strata unit for sale. The sellers were in a hurry, quite rude and not very forthcoming with information. They were stressed by financial pressures in their business. The buyers were a couple counting on the investment for their retirement. Blair was diligent in researching and disclosing facts about the property to the buyers.</p>	
<p>2. Jackie was a migration agent and a specialised business broker. She brought groups of Chinese buyers to Australia to look at businesses for sale. Each buyer paid her a fee. She also got a selling fee from sellers. Sometimes she worked with other brokers who paid her a fee.</p>	
<p>3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed with the agency. A disclosure of conflict consent form was signed. Mimi was unaware of this purchase until much later.</p>	
<p>4. Fleur worked for a large commercial agency. She listed an office property for sale and/or lease. Rod was a tenant representative within another division of the same company. His client applied to lease the property.</p>	
<p>5. Cara was a commercial leasing representative consulting to Acme to find premises for new outlets. Her husband Vic was Acme's Facilities Manager. One property she recommended was 50% owned by Vic's family trust. His children from a previous marriage were beneficiaries.</p>	
<p>6. Jon was employed as a strata manager for the Bay View strata complex. He had been appointed by the developer ABC originally. ABC had retained 3 of the 15 units. Jon property-managed the 3 units separately for ABC.</p>	
<p>See activity answers</p>	

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 or business
- 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.

A 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 any agency practices that mean agents or registered employees accrue benefits over and above the fees clients pay for agency services (or avoid losses)
- 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 registered employee 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 also fiduciaries to their companies 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.

Registered and senior employees have slightly different issues. As well as avoiding conflicts with clients, they must 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 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 / registered employee act against their client e.g. by diverting profits from the client 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 conflict of interests
- c) a breach of the 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 rural former hometown. He listed the property and carried out the usual searches.</p> <p>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.</p> <p>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>Breach of Fiduciary Duty Yes / No / Maybe</p> <p>Conflict of interest Yes / No / Maybe</p> <p>Breach of the Code 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.</p> <p>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>Breach of Fiduciary Duty Yes / No / Maybe</p> <p>Conflict of interest Yes / No / Maybe</p> <p>Breach of the Code 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 far 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.</p> <p>The second seller sold, but later alleged the agent had a conflict of interests and should not have kept him in ignorance of information which would have materially affected the price he was willing to sell for.</p>	<p>Breach of Fiduciary Duty Yes / No / Maybe</p> <p>Conflict of interest Yes / No / Maybe</p> <p>Breach of the Code 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 client's parameters.</p> <p>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>Breach of Fiduciary Duty Yes / No / Maybe</p> <p>Conflict of interest Yes / No / Maybe</p> <p>Breach of the Code 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 potential clients from memory (her employer's records were not accessed directly).</p> <p>After resigning she wrote to over 50 of the agency's clients. Many came across to her new firm.</p>	<p>Breach of Fiduciary Duty Yes / No / Maybe</p> <p>Conflict of interest Yes / No / Maybe</p> <p>Breach of the Code Yes / No / Maybe</p>
<p>See activity answers</p>	

What about Consumers?

This session has focused primarily on your fiduciary duty to your client-principals. Agents, sales representatives, leasing representatives and property managers must also deal with consumers (buyers and tenants of property) honestly and ethically. NB There is however no fiduciary relationship or fiduciary duty involved as a rule when dealing with consumers (unless an agency 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).

While consumer law is not the main focus of this session, it is worth revisiting the obligations that exist under the *Competition and Consumer Act 2010*, including the Australian Consumer Law (ACL), the *Fair Trading Act 2010* (FTA), and the *Commercial Tenancies (Retail Shops) Agreements Act 1985* (CTRSA), and considering how these work with the Code of Conduct.

On the next page, there is a quick refresher of how some key elements of these different laws reinforce one another. Remember if you breach them heavy fines can apply, and you may implicate your agency (if you are an employee) and/or your principal (client) as well.

Quick Refresher – Key elements of the laws and how they reinforce one another

Key provisions ACL / FTA	Code or CTRSA	Examples
<p>No misleading or deceptive conduct or <u>conduct likely to mislead or deceive</u>:</p> <ul style="list-style-type: none"> - false promises or predictions - letting wrong impressions stand - hiding disclosures in fine print. <p>Disclose all 'material facts'- silence can be misleading or deceptive.</p>	<p>Code: Rule 24 - Material Facts</p> <p>CTRSA: Section 16C - Parties to lease not to engage in misleading conduct etc.</p>	<p>An agent told tenancy applicants that other shops would be trading by the time they opened. Name tenants were said to have taken leases. This was misleading. <i>Miletich vs Murchi [2012]</i></p> <p>A business broker did not disclose that legal seating capacity of a restaurant was less than the seating in place when viewed. <i>Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd (1987)</i></p> <p>A broker did not let on that a proposed business could not be conducted legally at the premises. <i>GA Nominees Pty Ltd v Bardon Motors Pty Ltd (1984)</i></p>
<p>No false or misleading representations when promoting goods or services.</p> <p>No 'bait' advertising (e.g. <i>advertising property if you know you cannot supply it at the price</i>)</p> <p>No 'drip pricing' <i>advertising a base price then later revealing added costs.</i></p> <p>No misleading images</p> <p>Only use truthful testimonials from actual customers.</p> <p>Written disclosure must be accurate.</p>	<p>Code: Rule 10 – Client's instructions</p> <p>CTRSA: Requirement to provide Disclosure Statement, tenant's rights if not given etc.</p>	<p>An agent's appraisal included a 'gross realisation' achievable if it was redeveloped. This figure was misleading. <i>Australian Equity Investors an Arizona Ltd Partnership v Colliers International NSW Pty Ltd (No 4) [2011]</i></p> <p>An actual location was less desirable than an advertised location – this was viewed as bait advertising.</p> <p>ASIC fined <i>Australian Property Alliance Pty Ltd</i> \$40,800 for misleading advertising suggesting consumers could buy investment property from "\$59 per week". The ads did not disclose the need for a deposit of \$35,000 or any other requirements.</p> <p>A company was issued a \$125,000 penalty by the ACCC for posting fake testimonials on websites and YouTube. <i>ACCC v P & N Pty Ltd [2014]</i> <i>Citymove</i> faced a similar fine more recently for creating fake testimonials.</p>

<p>No 'unconscionable conduct' - i.e. no statements / actions that defy good conscience – e.g. bullying, high pressure tactics, intimidation, or taking advantage of a person's vulnerability or impairment.</p>	<p>Code: Rule 7 – Duty to behave fairly</p>	<p>Retail tenants were pressed to renew leases at short notice and high rents. The tenants spoke little English. <i>ACCC v Dukemaster Pty Ltd</i> [2009]</p> <p>A man contracted to sell his land below true value while drunk - the court set the contract aside. <i>Blomley v Ryan</i></p>
<p>Avoid lease constraints that reduce competition unless exemption can be gained</p>	<p>N/A</p>	<p>Coles and Woolworths formerly required exclusivity i.e. landlords could not lease space to other supermarkets. They eventually gave legally binding undertakings to ACCC to stop these practices.</p>
<p>No 'exclusive dealing' or 3rd line forcing unless exemption is granted</p>	<p>N/A</p>	<p>A tenant was required to use one online payments company. A developer offered residential lots on condition that buyers used one nominated builder.</p>
<p>No resale price maintenance</p>	<p>N/A</p>	<p>A landlord tried to prevent a tenant from charging a sub-tenant a lower rent than the tenant was paying.</p>
<p>No cartel conduct, collective boycotts or anti-competitive agreements</p>	<p>N/A</p>	<p>A shopping centre owner let space to a fast-food outlet conditional on them agreeing to not rent space in a competing centre.</p>
<p>No unfair contract conditions in 'standard form' contracts – to apply to small business transactions as well as consumer transactions once the <i>Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015</i> takes effect.</p>	<p>Code: Rule 7 – Duty to behave fairly</p>	<p>Avoid contract terms that:</p> <ul style="list-style-type: none"> - create a significant imbalance between the parties to the contract - are not necessary to protect the legitimate interests of a party and <p>would cause detriment to a party if applied or relied upon by.</p>

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

Activity Answers

Activity 1 What do you know about the Code?	
1. The Code is more like a set of guidelines than a law	False
The REBA Code of Conduct has the force of law	
2. Every staff member in an agency is legally bound by the REBA Code	False
The agent and his registered staff are bound. If other staff cause breaches the agent is liable.	
3. CPD Training on the Code (and other issues) has helped to reduce complaints against WA agents by over 30%	True
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.	

Activity 2 Acting within Authority
<p>1. What are two key elements necessary to create a formal variation of contract?</p> <p>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”</p>
<p>2. What constitutes an ‘improper’ instruction that can be disregarded?</p> <p>Fiduciary duty requires you to act on instructions per the principal’s wishes unless ‘unreasonable or improper’. The ‘improper’ exception covers requests such as:</p> <ul style="list-style-type: none"> • 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.
<p>3. What type of instruction is so ‘unreasonable’ that an agent can disregard it?</p> <p>An instruction can be unreasonable because it is onerous for the agent to carry out <u>and</u> 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. <i>Agents should not ignore instructions just because they are inconvenient if they fall within the scope of the agency agreement however.</i></p>
<p>4. How can an agent protect themselves if they feel an instruction is ‘unreasonable or improper’?</p> <p>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.</p>

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 a commercial strata unit. The sellers were in a hurry, quite rude and not very forthcoming with information. They were stressed by financial pressures in their business. The buyers were a pleasant couple investing for their retirement. Blair was diligent in researching and disclosing facts about the property.</p>	<p>Agent ► Sellers Representative Blair ► Sellers Representative Blair ► Agent NO FIDUCIARY DUTY FROM REP BLAIR TO BUYERS</p>
<p>2. Jackie was a migration agent and a specialised business broker. She brought groups of Chinese buyers to Australia to look at businesses for sale. Each buyer paid her a fee. She also got a selling fee from sellers.</p>	<p>Jackie as BB ► Seller Jackie as Buyers Agent ► Buyers Jackie as Migration agent ► Migration clients</p>
<p>3. Ed and Mimi were partners in a real estate firm. Ed bought a property listed with the agency. A disclosure of conflict consent form was signed. Mimi was unaware of this purchase until much later.</p>	<p>Ed ► Sellers Ed ► Mimi Mimi ► Sellers Mimi ► Ed</p>
<p>4. Fleur worked for a large commercial agency. She listed an office property for sale and/or lease. Ron was a tenant representative within another division of the same company. His client applied to lease the property.</p>	<p>Fleur ► Owner Fleur ► Agency Ron ► Sellers Ron ► Agency</p>
<p>5. Cara was a commercial leasing representative consulting to Acme to find premises for several of their new outlets. Her husband Vic was Acme's Facilities Manager. One property she recommended was 50% owned by Vic's family trust. His children from a previous marriage were beneficiaries.</p>	<p>Cara ► Acme Cara ► her Agency Vic ► Acme Vic ► his family Trust (if he is a Trustee)</p>
<p>6. Jon was employed by Q-Strata Services. He managed the Bay View strata complex. Q-Strata had been appointed by the developer ABC originally. ABC had retained 3 of the 15 units. Jon also property-managed the 3 units separately for ABC.</p>	<p>Jon as SM ► Bay View strata company Q-Strata ► Bay View strata company Jon ► Q-Strata Jon as PM ► ABC</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

True

Loyalty is the highest and most important duty of a fiduciary.

2. If your interests conflict with your client’s interests, you breach fiduciary duty

True / Maybe

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.

3. A fiduciary must be completely transparent and honest with their principal

True

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.

4. You become a fiduciary when you sign a client and the fiduciary relationship ends when the transaction is final

False

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.

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

False

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’ if all material facts are disclosed.

If the agent went on to make an undisclosed profit the client might still have a valid claim against the agent.

6. Profiting from a breach of fiduciary duty can lead to punitive damages

True

YES – courts have awarded the ‘secret profit’ to the principal and added punitive damages on top.

7. Consumers enjoy the same protection as clients under fiduciary duty

False

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.

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.</p> <p>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 buyers, but if this led him to disclose the situation the sellers are in (major financial pressure) and their need to sell quickly, he would be in breach of his fiduciary duty.</i></p>
<p>2. Jackie was a migration agent and a specialised business broker. She brought groups of Chinese buyers to Australia to look at businesses for sale. Each buyer paid her a fee. She also got a selling fee from sellers. Sometimes she worked with other brokers who paid her a fee.</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 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.</p> <p>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.</i></p> <p><i>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. Fleur worked for a large commercial agency. She listed an office property for sale and/or lease. Rod was a tenant representative within another division of the same company. His client applied to lease the property</p>	<p><i>This situation can happen in large agencies and need not carry any great risk so long as 'Chinese walls' ensure each client's confidences are kept within the different divisions. The risk is that if there are tough negotiations or conflicts later on, there may be a perception of the agency favouring the more valued client (usually the owner).</i></p>
<p>5. Cara was a commercial leasing representative consulting to Acme to find premises for new outlets. Her husband Vic was Acme's Facilities Manager. One property she recommended was 50% owned by Vic's family trust. His children from a previous marriage were beneficiaries.</p>	<p><i>Cara has a disclosable conflict because in law Vic's children are direct relatives of hers, and their interests compete with those of her client.</i></p> <p><i>Vic is a trusted employee and has a duty to Acme that conflicts with his children's interests. If he is trustee the conflict is even more direct.</i></p> <p><i>Vic and Cara may decide no disclosure is needed as they get no direct benefit from the trust. That could be risky as the perception of conflict exists and the deal has unusual features...</i></p>

<p>6. Jon was employed as a strata manager for the Bay View strata complex. He had been appointed by the developer ABC originally. ABC had retained 3 of the 15 units. Jon property-managed the 3 units separately for ABC.</p>	<p><i>This scenario has potential to cause conflict because the strata manager's fiduciary duty to the strata company can easily be in conflict with his direct duty to the developer as a PM e.g. where the developer wants something that is in their interests but not necessarily in the interests of the strata company.</i></p> <p><i>There is also the risk that long term loyalty to a developer providing repeat business can lessen the strata manager's effectiveness in negotiations e.g. if the strata company is seeking rectification of building faults.</i></p>
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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 material conflict of interest b) a breach of fiduciary duty c) a breach of the Code
The answers may be 'Yes', 'No' or 'Maybe'.

<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. <u>There seemed no reason to mention the boundary issue to the seller.</u> Later Jamie had a few local enquiries, and decided to establish a local presence. <u>His mate (the buyer) gave him space in his office at a low rent.</u> <i>Valenti Lawyers</i></p>	<p>Breach of Fiduciary Duty - YES Duties of loyalty and confidentiality were both breached</p> <p>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.</p> <p>Breach of the Code-YES Rule 5 – the agent did not act in their clients best interests. Rule 24 - the agent did not verify and <u>communicate</u> facts ascertained to affected parties, Rule 9 – the agent did not keep the clients matters confidential.</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>Breach of Fiduciary Duty - YES By not letting the other partners know of the side deal the agent breached his fiduciary duty to his partners</p> <p>Conflict of interest - YES The agent had a conflict between his own interests and the interests of his partners. He did not make disclosure or get consent to that conflict.</p> <p>Breach of the Code - MAYBE Rule 19 does not allow an additional reward for services</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 which would have materially affected the price he was willing to sell for.</p>	<p>Breach of Fiduciary Duty - NO The two sales are separate. The agent had to keep the first sale confidential until it became public.</p> <p>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.</p> <p>Breach of REBA Code NO The agent acted properly. Once the information was public there would however have been an obligation to tell the 2nd seller the relevant information about the market.</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 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>Breach of Fiduciary Duty - YES The Rep was not loyal to his client, and put his own interests first</p> <p>Conflict of interest - YES The rep made a secret profit.</p> <p>Breach of the Code - MAYBE If he told his wife first, then he breached Rule 5 and Rule 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>Breach of Fiduciary Duty – YES The PM owed fiduciary duty to her employer</p> <p>Conflict of interest –YES The PM had a conflict of interests with her employer</p> <p>Breach of the Code - MAYBE 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:

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