



Conflicts of interest in real estate transactions

The Department of Commerce (the Department) has recently become aware of a new business scheme in relation to online advertising which may raise a potential conflict of interest and wishes to remind agents of their obligations under the *Real Estate and Business Agents Act 1978* (the REBA Act) and the Code of Conduct for Agents and Sales Representatives 2011 (the Code).

The scheme offers agents equity in an online advertising business by way of shareholdings which are proportionate to the value of advertising placed by the agent through the business. It appears that the higher advertising spend by the agent, the greater the dividend to the agent.

There are concerns these circumstances raise a potential conflict of interest and therefore require disclosure.

Types of conflict

Conflicts of interest arise when an agent's personal or professional interests compete with or are different from those of the agent's client. Interests can be financial, personal, business, shareholdings or a role in a company as well as the beneficiary of a trust, and can be either direct or indirect.

Direct interests involve taking possession of or receiving a benefit personally, whether it is financial or otherwise. Examples of this may include:

- when an agent personally buys, leases or takes an option on a property that they hold an agency listing for; or
- where an agent receives a benefit such as shares, holidays, discounted goods or dividends from a company whose services are recommended by the agent to clients.

An indirect interest may arise when the agent assists a person or entity to which they are affiliated to obtain an interest in a property that is subject to the agency's real estate duties. Examples of this may include:

- when an agent assists an employee, close associate, friend or family member to take some form of interest in a property that is the subject of the agency's real estate duties; or
- when an agent recommends to a person, a service provider which is operated by or affiliated with a relative, friend, business or other associate of the agent.

When is it necessary to disclose?

While it is a principle of common law that an agent must avoid conflicts of interest, the obligation for an agent to disclose any conflict of interest is also a specific requirement under the REBA Act and the Code.

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Should a potential conflict of interest arise, the REBA Act and the Code requires the agent to make written disclosure to their principal (the client) of the nature of the conflict before commencing negotiations and obtain the principal's written consent before proceeding.

This includes circumstances where an agent may recommend a party to the transaction, a supplier of goods or services including a settlement agent or finance broker to which the agent holds a significant relationship, connection or affinity.

Without such a disclosure to and consent from the principal; an agent cannot demand, retain or receive a discount or rebate which relates to a service by a stocktaker or tradesperson or to advertising in connection with a transaction or a service provided by the agent.

Agents referring business to a settlement agent should be aware that section 44 of the *Settlement Agents Act 1981* prohibits any person, including a real estate agent or sales representative, from directly or indirectly demanding, receiving or holding any reward for referring business to a licensed settlement agent. It also prohibits a licensed settlement agent from paying or giving rewards, whether directly or indirectly, to others in return for referrals of business.

Actions an agent should take

When making a disclosure and obtaining consent, agents must ensure:

- the consent is separate from the contract or lease;
- consent is obtained from the principal in writing before the offer is negotiated and written;
- the principal acknowledges awareness of the relevant details eg acknowledge the buyer/tenant's relationship to the agent;
- the principal agrees to proceed with the sale/lease notwithstanding the conflict; and
- the principal is advised when the agency is not entitled to charge commission and understand that they can either consent to pay or not. NOTE: A seller simply agreeing in writing to pay commission is not giving informed consent if they have not been made aware that the agent is not entitled to commission.

The agent is responsible for retaining and securely storing the evidence of the consent and any supporting documentation with the transaction documents for future reference for a best practice period of six years.

The acknowledgment of the conflict and consent to the matter proceeding may not prevent a principal from making a claim through legal channels if they believe that the conflict of interest has disadvantaged the handling of the transaction. Therefore agents must ensure that the conflict of interest does not impact negatively on the principal in any way.

It is important to note that, notwithstanding the disclosure and consent by the principal, the Code still requires agents to act in the best interests of their principal, by acting fairly and honestly and without knowingly misleading or deceiving any parties in a transaction.

Information on the obligations of real estate agents and sales representatives is available on the Consumer Protection website: www.commerce.wa.gov.au/cp/realestate or enquiries can be made by email: consumer@commerce.wa.gov.au or by calling **1300 30 40 54**.

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