

**PROPERTY INDUSTRY CODES OF CONDUCT DISCUSSION PAPER June 2013**

**REIWA'S POSITION JULY 2013**

DISCUSSION QUESTIONS	REIWA'S POSITION
<p><b>Question 1 - Meaning of terms 'principal' and 'client' and others</b></p> <p>a) Should the Real Estate Code of Conduct be amended to clarify the meaning of 'agent' and 'principal'? Please provide suggestions on how.</p>	<p>Yes, the definitions should be clarified.</p> <p>The definition of 'agent' differs between the REBA Act and the Code. The Code uses the term 'agent' to refer to both a sales representative and a real estate agent. The REBA Act distinguishes between the two.</p> <p>"Agent" should be a person or an entity that has a license, and a "sales representative" should be a natural person who registered under the Act.</p> <p>Within the industry the term "principal" normally refers to the person in bona fide control of the agency.</p> <p>The term 'principal' in the REBA Act is not defined. Sections 44 and 45 of the REBA Act use the term 'principal' in the context of a sales representative's employer. Sections 61(4), 64, and 65 use the term 'agent's principal' in referring to the client. The intended meaning of the term 'principal' as opposed to 'agent's principal' should be made clear.</p> <p>The Code defines 'principal' in relation to a sales representative as being the principal of the agent by whom the sales representative is employed. The Code does not define who the principal is in relation to an agent. This should be clarified.</p>
<p>b) Should the Settlement Agents Code of Conduct be amended to clarify the meaning of 'licensee' to ensure that where appropriate it extends to</p>	

<p>an employed settlement agent? Please provide suggestions on how.</p>	
<p>c) Do you think that the codes of conduct need to use ‘client’ instead of ‘principal’? If you think so, should they include prospective clients and should both terms be defined?</p>	<p>The concept of principal/agent is a common one in real estate and is well known to both the public and the courts.</p> <p>A REFERENCE TO “CLIENT” MAY NOT COVER ALL THE RELATIONSHIPS THAT EXIST BETWEEN CONSUMERS AND REAL ESTATE AGENTS (E.G. A CONJUNCTIONAL AGENT ACTING AS A SUB-AGENT FOR A PRINCIPAL, WHERE THE CONTRACTUAL ARRANGEMENT IS BETWEEN THE LISTING AGENT AND CONJUNCTIONAL AGENT).</p> <p>THE CODE SHOULD NOT BE EXTENDED TO “PROSPECTIVE” CLIENTS IT WOULD BE DIFFICULT TO RECONCILE THE CONCEPT OF “ACTING IN THE BEST INTERESTS” OF PROSPECTIVE CLIENTS WHEN AGENTS MIGHT HAVE SO MANY PEOPLE WHO FALL INTO THIS CATEGORY.</p>
<p>d) Are there other terms that you think should be used and defined? For example: customer (to be either a buyer or a seller but who is not a client); prudent agent; material facts; substantial time and attendance; frequently attend; current market price; potential conflict of interest; or reimbursement.</p>	<p>Client and customer could be defined, however defining terms such as “frequently attend” is difficult without the definition becoming a guidance note.</p> <p>Other definitions would be useful to give clarity to agents.</p> <p>REIWA STRONGLY URGES THE INSERTION OF A DEFINITION OF “MATERIAL FACTS”. AT THE MOMENT THERE IS MUCH UNCERTAINTY SURROUNDING THIS MAJOR ISSUE. CONSIDERABLE THOUGHT NEEDS TO BE GIVEN TO WHAT MIGHT BE A WORKABLE SOLUTION. FURTHER COMMENT IS MADE ON THIS BELOW.</p>
<p><b>Question 2 - Knowledge of Act and code of conduct</b></p>	
<p>Should the codes of conduct prescribe that an agent must have knowledge of the relevant law and for agents to ensure compliance? Please comment on why or why not.</p>	<p>While such a requirement initially appears reasonable on further reflection there would be a difficulty with this working in practice. What extent of knowledge would be required? What about complex legal issues? If the need for knowledge was limited to the terms of the Code, it would be acceptable. However, if it was extended</p>

	to other legislation such as the Residential Tenancies Act then it would not be reasonable for a real estate agent to be making interpretations of legislation.
<b>FIDUCIARY OBLIGATIONS</b>	
<b>Question 3 - General questions about all fiduciary obligations</b>	
a) Licensees must comply with their fiduciary duty to their client.	
i. Should the codes of conduct simply prescribe that ‘an agent must comply with their fiduciary duties? Please comment on why or why not.	No. Agents need guidance as to their fiduciary duties.
ii. Or should the codes of conduct prescribe each of the components of an agent’s fiduciary obligations? Please comment on why or why not.	<p>Yes, the Code should prescribe each of the components. The list of general fiduciary duties as set on page 21 of the Conduct Discussion Paper would be a suitable way of setting out the obligations. It is best that all of the duties be set out in this format so that it is clear what those fiduciary obligations are. Otherwise agents and registered persons would have to search alternative sources of information.</p> <p>It would be useful to list out the fiduciary obligations as possible, however as there may be unforeseen situations, the list should be an inclusive list rather than a definitive list.</p> <p>It would be useful to limit the scope of certain fiduciary duties. For example, the duty of confidentiality should be carefully defined.</p> <p>An agent may have confidential information from one client that could be beneficial to another client, without the agent having a conflict of interests. For example, an agent may be aware of the redevelopment intentions of one client which will affect the future value of another client’s property. Guidance should be provided as to which duty prevails in circumstances where the agents fiduciary duties to two</p>

	different principals conflict.
<p>b) Given the obligations of transparency and acting in good faith, should licensees disclose their duty, in plain English, to others who are not the client (e.g. a buyer when the licensee acts for the seller)?</p>	<p>No.</p> <p>REIWA does not know of any professional who has to explain their fiduciary duty to people with whom the person comes into contact with. If it was a requirement then the only way to prove that a disclosure has been made would be to have the person(s) sign a document that contained a listing of the duties.</p> <p>In practice every prospective tenant and every prospective buyer who ever made an enquiry would have to be given a disclosure statement. In practice how is the agent going to confirm disclosure if the person is unwilling to sign the disclosure.</p> <p>For web site advertising is the agent required to publish a disclosure statement within the advertisement?</p> <p>There also arises the issues as to whether the people speak English, or can read English or even if some people can understand such concepts.</p>
<p>Do you think that requiring licensees to inform customers of their fiduciary duty to their client would assist customers to understand the role of licensees in the property market?</p>	<p>It may assist with an individual's education, but REIWA is not aware of any issues that are making this a problem. REIWA reiterates the points made above with respect to the previous paragraph.</p>
<p>c) Structure - should the different components of a property agent's fiduciary obligations be organised together and perhaps some merged to be more concise and unambiguous? If so, please provide suggestions for how this might be done.</p>	<p>REIWA would support all issues relating to fiduciary duty being grouped together. As previously mentioned the list of duties listed in the Discussion Paper would be ideal.</p>
<p><b>Question 4 - Avoid conflicts of interest (without informed consent)</b></p>	
<p>a) Is there unnecessary duplication or inconsistency of the relevant enabling Act in its code of conduct?</p>	<p>Yes, there is inconsistency with the wording of this issue in the Act and the Code.</p> <p>The provisions of the Code are also</p>

	<p>inconsistent within themselves. Code 12.1 appears to prohibit conflicts entirely but 12.2 and 12.3 appear to permit them. There are also the overarching common law provisions. This inconsistency and duplication should be resolved. It is unhelpful having this issue dealt with in 2 different documents.</p>
<p>c) Should the codes of conduct prohibit a licensee acting or continuing to act in a transaction if any conflict of interest arises or foreseeably could arise between the licensee and their client?</p> <p>Please comment on why or why not (providing suggested examples where possible).</p>	<p>No</p> <p>If a conflict of interest arises during a transaction then the agent must immediately disclose the conflict of interest and gain informed consent to continue with the transaction and whether a commission is paid. This protects the client.</p>
<p>c) Should the codes of conduct prescribe that an agent must avoid conflicts of interest without informed consent? Please comment on why or why not and provide suggested examples where possible.</p>	<p>Yes, if there is a conflict of interest then the agent should gain informed consent.</p> <p>An agent should gain informed consent to proceed any further with the transaction and be paid a commission.</p>
<p>Please consider whether additional guidance is needed, for example:</p> <p>i. What should the nature of the disclosure and informed consent be?</p>	<p>The current requirement for real estate agents to have written informed consent that discloses the conflict, and to the payment of a commission,</p>
<p>ii. What circumstances, and at what point, do you think requires ceasing to act even where informed consent has previously been given?</p>	<p>If it is likely that the person through their age, language or intellectual capacity do not understand what is being disclosed to them.</p>
<p>iii. Should real estate agents be prohibited from being engaged to sell a buyers property where the offer is subject to sale of their property?</p>	<p>No, but informed consent should be needed to be given by the Buyer to any conflict of interest.</p>
<p>iv. How detailed should the provisions be (please provide suggested examples where possible)?</p>	<p>The standard explanation and written informed consent should be gained if the Buyers' information is to be given to the original Seller.</p> <p>REIWA provides its members with a standard form for this purpose that discloses the</p>

	<p>conflict of interest, provides the opportunity for the client to agree for the transaction to proceed, and provides the opportunity to decline the payment of the agent's commission.</p>
<p>e) Should real estate agents be prohibited from owning, controlling or having an interest in a licensed settlement agency? Please comment on why or why not.</p>	<p>No there should not be a barrier to ownership and control of a settlement agency by a real estate agent either corporate or natural persons nor by people registered under the Act.</p> <p>REIWA is aware of some agents residing in the country and having an ownership a settlement agency located in the city. In such scenarios the settlement agency is not even processing transactions that have been associated with the agency.</p> <p>If a settlement agency is a publicly listed company on the Australian Stock Exchange then an agent should not be prevented from being a shareholder- owner. For example most banks have a settlement licence. Should real estate agents be prevented from owning shares in the bank?</p> <p>Where a potential conflict of interest arises then disclosures need to given. Agents currently have a requirement under the Code of Conduct to provide disclosure where they recommend services.</p> <p>There is no widespread evidence that ownership causes any conflict or problems. One or two isolated problems does not show a widespread problem.</p> <p>It is common for members of other profession to have ownership of associated service providers (eg lawyers having ownership of settlement agencies and doctors having interests in medical testing facilities).</p> <p>There can be consumer benefits when there is connection between the real estate agent and the settlement agent and the consumer</p>

	should be able to retain the ability to make an informed choice.
f) Should settlement agents be prohibited from acting in a transaction where they are also the real estate agent? Please comment on why or why not.	No, proper disclosure is sufficient for a client to make an informed decision.  There is no evidence of a widespread problem in this area. Adequate disclosure needs to be given. One or two isolated problems does not show a widespread problem.
g) Are there any changes you feel are necessary to the Settlement Agents' Code of Conduct Schedule Forms 1 and 2?	The form needs to be more user friendly, more easily read and completed.
h) Are there any other changes to the conflict of interest conduct requirements you think need to be made?	No.
<b>Question 5 - Not accept secret commissions; third party referrals and benefits</b>	
a) Should the codes of conduct prescribe that third party fees and commissions are prohibited unless the client is fully aware of the existence of that arrangement? Please comment on why or why not. If so, how detailed should the provision be (please provide suggested examples where possible)?	Yes this is a current requirement that should continue to be disclosed where necessary.  This is essentially part of the list of general fiduciary detailed in the Discussion Paper that REIWA agrees should be included in the Code.
b) Are there any other changes to the third party fees and commissions conduct requirements you think need to be made?	The disclosure ought to be able to be made on the Contract of Sale.
<b>Question 6 - Act in the best interest of the client</b>	
a) Should the codes of conduct prescribe that an agent must act in the best interest of their client unless unlawful to do so? Please comment on why or why not. If so, how detailed should the provision be (please provide suggested examples where possible)?	Yes, this is essentially part of the list of general fiduciary duties detailed the Discussion Paper that REIWA agrees should be included in the Code.  Some issues such as how to deal with competing offers received from multiple Buyers should be addressed i.e. an agent

	must present and inform clients of all offers made on their property.
b) Are there any other changes to the best interest of the client conduct provisions you think need to be made?	No.
<b>Question 7 - Act with honesty and fairness</b>	
a) Should the codes of conduct prescribe that an agent must act with honesty and fairness? Please comment on why or why not. When doing so, please consider whether there is unnecessary duplication of the ACL in the codes of conduct or whether additional industry specific regulation is required. If you consider that the codes of conduct should provide more detail, how detailed should the provisions be and please provide suggested examples where possible?	<p>This is essentially part of the list of general fiduciary duties detailed in the Discussion Paper that REIWA agrees should be included in the Code.</p> <p>While there is duplication, it is REIWA's view that the Code should contain a list of the general fiduciary duties. It is important that agents can access the list in one place rather than have to search various documents.</p> <p>The Code should only provide the general list of fiduciary duties. An explanation/guide can be prepared to assist with interpretation.</p>
b) Are there any other changes to the honesty and fairness conduct provisions, or associated provisions, you think need to be made?	No.
<b>Question 8 - Exercise skill, care and diligence</b>	
a) Should the codes of conduct prescribe that an agent must exercise skill, care and diligence? Please comment on why or why not. When doing so, please consider whether there is an unnecessary duplication of the ACL in the codes of conduct. If you consider that the codes of conduct should provide more detail, how detailed should the provision be? Please provide examples where possible.	<p>This is essentially part of the list of general fiduciary duties detailed in the Discussion Paper that REIWA agrees should be included in the Code.</p> <p>While there is duplication, it is REIWA's view that the Code should contain a list of the general fiduciary duties. It is important that agents can access the list in one place rather than have to search various documents.</p> <p>The Code should only provide the general list of fiduciary duties. An explanation/guide can be prepared to assist with interpretation.</p>
b) Are there any other changes to the skill,	No.



care and diligence conduct requirements you think need to be made?	
<b>Question 9 - Confidentiality of information gained from the agency relationship</b>	
Should the codes of conduct prescribe that an agent must maintain confidentiality of information gained from the agency relationship; and why or why not. If so, how detailed should the provision be and please provide suggested examples where possible.	<p>This is essentially part of the list of general fiduciary duties on page 21 of the Discussion Paper that REIWA agrees should be included in the Code.</p> <p>While there is duplication, it is REIWA's view that the Code should contain a list of the general fiduciary duties. It is important that agents can access the list in one place rather than have to search various documents.</p> <p>The Code should only provide the general list of fiduciary duties. An explanation/guide can be prepared to assist with interpretation.</p>
<b>Question 10 - Acting within authority and instructions</b>	
a) Should the codes of conduct prescribe that an agent must carry out instructions and act within their authority? Please provide comment on why or why not. If so, how detailed should the provision be and please provide suggested examples where possible?	No. Their written authority and verbal instructions sets out their authority. There is no need to prescribe anything further.
b) Are there any other changes to the carry out instructions and act within their authority conduct rules you think need to be made?	No.
<b>Question 11 - Keep proper accounts</b>	
Should the codes of conduct prescribe that proper accounts must be kept? Please provide comment on why or why not. Comment is also sought on how the Act, regulations and code of conduct could be reconciled.	<p>This is essentially part of the list of general fiduciary duties detailed on page 21 of the Discussion Paper that REIWA agrees should be included in the Code.</p> <p>While there is duplication, it is REIWA's</p>

	<p>view that the Code should contain a list of the general fiduciary duties. It is important that agents can access the list in one place rather than have to search various documents.</p> <p>The Code should only provide the general list of fiduciary duties. An explanation/guide can be prepared to assist with interpretation.</p>
<b>OTHER ASSOCIATED DUTIES TO CLIENTS</b>	
<b>Question 12 - Inducements</b>	
<p>a) Should the codes of conduct prohibit agents soliciting or inducing or attempting to induce people in relation to property transactions? Please provide comment on why or why not. If so, how detailed should the provision be and please provide suggested</p>	<p>No</p> <p>“Soliciting” is a very broad term and would include an agent approaching a property owner at the owner’s home or dropping printed promotional material into a person’s mail box.</p> <p>REIWA would assume that the ACCC would have some concerns with any proposal that had the effect of significantly reducing competition.</p> <p>The ACL does contain provisions on soliciting.</p> <p>The current provisions in the Code for soliciting and inducements are adequate and are a reflection of common law.</p>
<p>b) Are there any other changes to the inducements conduct provisions you think need to be made?</p>	<p>No.</p>
<b>Question 13 - Supervision and control of the business</b>	
<p>a) Should supervision and control of an agency business be a matter regulated under the codes of conduct or should it be a business decision for the licensee (who retains full responsibility regardless of the operational model chosen)? Please provide comment on why it should</p>	<p>Yes the Codes should confirm that an agency business requires a person to be in bona fide control and that person must be a licensed agent.</p> <p>The Code should continue to state that the person in bona fide control must properly</p>

<p>be in the codes of conduct or why not. If you think it should be regulated in the codes of conduct - how detailed should the provision be and please provide suggested examples where possible?</p>	<p>supervise the agency business and take reasonable steps to ensure that registered representatives of the agency and other employees comply with the provisions of the Act, the Code and other relevant statutes, rules and regulations.</p> <p>Code 8(4)(a) requires the person in bona fide control to personally manage the agency business full-time.</p> <p>The Real Estate and Business Agents Supervisory Board previously interpreted that to mean that the person in bona fide control could only manage one agency. The implication of that position is that an agent may be in bona fide control of an agency, with say seven branch offices but cannot be in bona fide control of say two agencies that have one office each.</p> <p>This provision prevents a person from being in bona fide control of more than a single agency.</p> <p>With consideration to the level of technology that is available to monitor offices from remote locations the discussion should centre on whether this requirement is necessary. If so the number of offices that a person in bona fide control may be responsible for.</p> <p>The Codes do not need to specify how the person in bona fide control is to carry out their responsibilities in more detail. Such matters could be addressed in an associated guide.</p>
<p>b) Comment is also sought on how the Act and code of conduct for real estate agents and sales representatives could be reconciled in relation to any duplication or inconsistency.</p>	<p>If there is any inconsistency then it must be clear as to what takes precedence. Duplication of provisions should be avoided.</p>
<p>c) Are there any other changes to the supervision and control of the business conduct rules you think need to be made or terms defined?</p>	<p>No.</p>

<p><b>Question 14 - Duty to advise of market price</b></p>	
<p>Should the codes of conduct prescribe that an agent advise their client what the agent considers to be the current market price and give reasons for their opinion?</p> <p>Please provide comment on why or why not. If you think it should be regulated in the codes of conduct, how detailed should the provision be? Please provide suggested examples where possible.</p>	<p>Yes, but precise figures are difficult and an agent should only be required to give a reasonable estimate.</p> <p>The current provision is fairly adequate and only needs minor amendments.</p>
<p>b) Are there any other changes to the conduct requirements about advising on market price you think need to be made?</p>	<p>No.</p>
<p><b>Question 15 - Claiming reimbursement of expenses from a client</b></p>	
<p>a) Should the codes of conduct prescribe when and how an agent may claim reimbursement of expenses? Please provide comment on why or why not.</p> <p>If it should be prescribed, how detailed should the provision be?</p>	<p>REIWA is of the view that the initialling provisions in Code 16 and 17 need to be amended so that initialling is only required once on each page where an expense, commission, reward, or other valuable consideration for a service is agreed.</p> <p>Initialling is not necessary next to each item.</p> <p>It is assumed that expenses are different from the agreed commission. While commission is payable on 'settlement', expenses should remain payable when incurred by the agent on behalf of the client.</p> <p>These expenses would be for services that are of direct benefit to the client that would be assumed to make the pending transaction either more efficient or to bring forward the time when the desired contract is signed.</p> <p>If the expenses have been agreed to and the agent has incurred the expense then the agent should not be required to carry/fund the client's costs any longer than what has been agreed between the parties.</p>

	<p>REIWA is of the view that agents engaged in selling property off the plan should be entitled to commission prior to settlement. This would require changes to be made to the REBA Act.</p> <p>The agent is normally performing a role for a financially aware investor who does not need the level of consumer protection that is afforded to a person who is selling the family home.</p> <p>The developer of the land is often trying to achieve pre-sales so that finance will be approved or a tranche of finance extended to the investor.</p> <p>If the agent has achieved the desired result then the agent should be rewarded for the service that has been contracted and completed.</p> <p>Currently agents can achieve the contractual conditions of the agency appointment but be forced to wait several years until 'settlement'.</p>
<p>b) Should commercial agents be exempt from the formal requirements of the Real Estate Code of Conduct articles 16 and 17, especially where an appointment is prepared by qualified lawyers?</p>	<p>Yes. All transactions should be exempt from this current provision whether the relevant agreement has been prepared by a lawyer or not.</p> <p>The issue is that the client in non-residential transactions is deemed to be a person with greater financial experience than the average consumer.</p>
<p><b>Question 16 - Change of agent and termination of services</b></p>	
<p>Should the codes of conduct regulate when and how services can be terminated? Please provide comment on why or why not.</p> <p>If you think it should be prescribed, please provide comment on how detailed such a provision should be and any other suggestions.</p>	<p>No as this goes into contract law and it would be very difficult to anticipate through the Code the various scenarios that could arise.</p> <p>REIWA remains of the view that exclusive agency agreements are in the best interests of the consumer.</p>

<b>Question 17 - Confirmation of instructions</b>	
<p>Should the codes of conduct prescribe requirements about confirming instructions?</p> <p>Please provide comment on why or why not. If so, please provide comment on how detailed such a provision should be and any other suggestions.</p>	<p>No.</p> <p>An agent has an obligation to follow instructions unless unreasonable or unlawful.</p> <p>REIWA cannot see any consumer benefit in such a provision and it would be difficult to apply in practice.</p> <p>It also becomes unreasonable for an agent to determine what is an instruction and what is an expression of a mere hope or wish. For example the client may want the agent to ring them on Friday at 10:30. Is that a direction that the agent has to confirm?</p> <p>If there was such a provision then confirmation would have to be in writing and proof kept that it had been given.</p> <p>This type of provision is totally unnecessary and REIWA is not aware of any consumer protection issues that have occurred to warrant such a provision.</p>
<b>Question 18 - Receiving deposits</b>	
<p>Should the codes of conduct prescribe requirements for agents receiving deposits? Please provide comment on why or why not. If so, please provide comment on how detailed such a provision should be and any other suggestions.</p>	<p>No.</p> <p>The Act provides clear requirements for the receipt of money into trust accounts</p>
<b>Question 19 - Property inspections</b>	
<p>Should the codes of conduct prescribe requirements for agents to undertake property inspections? Please provide comment on why or why not.</p> <p>If so, please provide comment on how detailed such a provision should be and any other suggestions.</p>	<p>No.</p> <p>The term “property inspections” is very broad and therefore difficult to understand what is being asked. Is it asking about residential, commercial, rural, or businesses?</p>

	<p>Is the question asking whether agents should be inspecting properties and making reports for owners informing them about aspects of the property that should be disclosed to prospective buyers or tenants? It would be assumed that this might include health, safety, and structural issues.</p> <p>Is the statement asking as to whether there should be compulsory disclosure statements to prospective buyers and tenants? Previous reviews have determined this is not necessary.</p> <p>Is the question asking whether an agent must determine and report on the legality of structures on the land?</p> <p>Requiring agents to inspect, for example, building matters would potentially require agents to be making judgments on matters that they are unqualified to assess (e.g. compliance with planning conditions/approvals).</p> <p>The underlying issue would be as to whether a real estate agent is trained to provide reports on health and safety issues to a seller/ lessor or provide reports on the structural status of a building. If the agent does not have the expertise then the agent should not have to pay a qualified service provider to prepare a report.</p> <p>It would not be surprising for a professional indemnity insurer to deny cover for these duties.</p> <p>This would be a fundamental change in the duties of a real estate agent, and is not necessary.</p> <p>REIWA strongly disagrees with any such proposal.</p>
<p><b>Question 20 - Professional responsibilities when undertaking functions</b></p>	
<p>a) Should the codes of conduct prescribe further responsibilities for agents in undertaking their functions? Please provide</p>	<p>No. Agents are adequately regulated by the REBA Act and Code where the prime responsibilities of the agent are reflected in</p>

comment on why or why not. If so, please comment on how detailed such a provision should be and provide suggested examples.	their fiduciary duties.  These duties can be applied broadly to the majority of any set of circumstances.
b) Are there any other changes to the professional responsibilities conduct provisions you think need to be made?	No.
<b>OTHER PROVISIONS FOR CONSIDERATION</b>	
<b>Question 21 - Agents to publicise code of conduct</b>	
In Queensland, an agent who is a principal licensee must prominently display a notice of the existence and availability of the code in the public area of each of the agent's offices and if asked by a customer must tell where the client can obtain a copy. Do you support a similar provision in Western Australia?	No, it is not necessary. REIWA is not adverse to the suggestion. A copy is displayed on REIWA's Public web site.
<b>Question 22 - Complaint system</b> Do you support the codes of conduct prescribing that licensees must have a complaint resolution system?	No. The current complaint systems are adequate. Such a system would be unfair on small agencies and would potentially involve agencies in a structured system that may not be necessary for minor matters.
<b>Question 23 - Additional guidance</b>	
a) Do you support additional guidance in particular provisions so as to provide more detail and examples for agents to use in day-to-day activities? For example, there may be provisions in other jurisdictions that you would like to see added as is or in a modified form. If so, please provide suggestions for appropriate areas of conduct.	REIWA supports guidance from regulators on topical issues that arise from time to time such as material facts and disclosure of confidential information.
b) Do you support some provisions across the three codes being made consistent for all of the property industry in Western Australia as well as across jurisdictions? If so, please provide suggestions.	Yes. Areas such as conflict of interest and acting in the client's best interest.
<b>Question 24 - Provisions that duplicate the ACL</b>	



<p>a) Are there any provisions that you consider unnecessarily duplicate the ACL or their enabling Acts which should not be in the codes of conduct?</p>	<p>REIWA’s view is that the Code should be the source of all obligations stretching across various legislative requirements.</p> <p>This provides easy access for industry participants to consider and understand.</p> <p>Having a clear Code is in the public interest and would enhance consumer protection.</p>
<p>b) Are there any provisions that are duplicated in the ACL or the enabling Act but you feel the industry specific codes should retain? If so please explain why.</p>	<p>No.</p>
<p><b>Question 25 - Correction of any anomalies</b></p>	
<p>Are there any other anomalies in the codes of conduct that you think should be fixed? Please identify and provide comments and any suggestions for how to do so.</p>	<p>Many provisions in the Codes are unclear and should be clear and unambiguous. REIWA supports a re-write that achieves clarity.</p>
<p><b>Question 26 - Conjunction sales</b></p>	
<p>Do you support requirements relating to conjunction sales being prescribed in the code of conduct? If so please provide details.</p>	<p>No.</p> <p>Conjunctional matters between agents are contractual and probably have no relevance to consumer protection.</p>
<p><b>Question 27 - Notifying managing agent</b> Do you support a code of conduct provision requiring a selling agent to give a managing agent immediate notice of their appointment to sell the property?</p>	<p>REIWA had a similar provision in its membership codes until 1998. REIWA would support such a provision.</p>
<p><b>Question 28 - Electronic conveyancing</b></p>	
<p>Should the codes of conduct include provision to cover electronic transactions?</p>	<p>This is not necessary as there will be codes developed by each state or adopted by each state. These codes will be inserted into the Joint Form of General Conditions for the Sale of Land.</p>
<p><b>Question 29 - Mutual recognition</b></p>	

<p>Should the codes of conduct include provisions to support the requirements of mutual recognition?</p>	<p>No this is a matter for the Act to address</p>
<p>Other Issues Not Addressed in the Discussion Paper</p> <p><u>Material Facts</u></p>	<p>Code 10(1) and (2) requires an agent to ascertain and verify the facts that are material to that transaction and then to relay those facts to any person who may be affected by the material fact.</p> <p>Under the REBA Code of Conduct agents have a duty to disclose material facts.</p> <p>Understanding material facts is an important and confusing issue not only to real estate agents but also to consumers and therefore REIWA is surprised that the Discussion Paper has avoided this issue.</p> <p>A prime concern relates to nonphysical (psychological) defects with properties. These defects can include deaths on the premises, health related issues, local crime rates, drug dealings in the neighbourhood, the presence of sex offenders in the neighbourhood, environmental factors, noisy neighbours, paranormal and supernatural stigma associated with properties and security issues.</p> <p>There is no set guideline or definition as to what is deemed to be a 'material fact', but rather it is issue which agents must assess as the occasion arises.</p> <p>Would suicides or death from natural causes in residential properties have to be disclosed to potential purchasers, and for how many years would the obligation last? These are valid issues of real day to day concern to real estate agents.</p> <p>Discussion should centre on whether the Code should address this issue of material fact in greater depth.</p> <p>A potential way of dealing with this issue is found in the judgment of <i>Hinton &amp; Ors v</i></p>

	<p><i>Commissioner for Fair Trading, Office of Fair Trading (GD) [2007] NSWADTAP 17</i> where the Administrative Decisions Tribunal in NSW stated that a “material fact” in relation to section 52 of the <i>Property, Stock and Business Agents Act 2002</i>(NSW) is an objective question to be considered in all the circumstances, but list the following as relevant indicia:</p> <ul style="list-style-type: none"> <li>(a) whether the fact is capable of being independently ascertained;</li> <li>(b) whether the fact is likely to impact on price;</li> <li>(c) the reaction of other purchasers to the fact; and</li> <li>(d) whether the fact results in the property being in an unusual or rare position.</li> </ul> <p>An exception to this test could be when the disclosure of the material fact might breach legislation, such as anti-discrimination legislation (eg in some areas, the existence of a racial group in a neighbourhood might have an impact on the price of property).</p> <p>Consideration could also be given to the equivalent code in Queensland that states “<i>23 Finding out or verifying material facts A real estate agent appointed to sell, purchase, exchange, or lease property must take reasonable steps to find out or verify the facts material to the sale, purchase, exchange, or lease that a prudent agent would have found out or verified to avoid error, omission, exaggeration or misrepresentation.</i>” Greater guidance needs to be given as to what is required.</p>
<p><u>Commission to more than one agent</u></p>	<p>Code (5)(2) prevents an agent from entering into an agency agreement where the person would then become liable to pay two fees.</p> <p>Consideration should be given to this rule not applying if the person was fully informed and aware of the obligation to pay two fees then it would not be a breach of the Code.</p>
<p><u>Confidentiality</u></p>	<p>Code 13 requires that an agent must not disclose any confidential information</p>

	<p>obtained while acting on behalf of his or her principal.</p> <p>The Discussion Paper raises confidentiality; however it does not discuss information that is provided by a person (such as a Buyer) that may be in the interests of the principal to know.</p> <p>Consideration could be given to whether a definition of confidential information should be included.</p> <p>An example would be as to whether the detail of a buyer's offer is confidential and cannot be passed onto alternate competing buyers.</p> <p>Another example would be that the buyer has requested that information that has been relayed to the agent be withheld from the seller. That information, if given to the seller may result in the seller being more aggressive in their negotiations. By way of illustration the buyer maybe interested in buying both sides of a duplex that are owned by separate owners and does not want one of the seller's to know that he wanted to buy both. Also a buyer may by mistake reveal to the selling agent the maximum purchase that the buyer is prepared to eventually offer.</p> <p>Is it acting in the principal's best interest to withhold that information?</p> <p>The Courts have ruled in some circumstances that withholding information from a principal might be justified (e.g. the Ross Perot case <i>Kelly v Cooper</i> [1993] AC 205).</p>
<p><u>Obligation to pay commission beyond agreed termination date</u></p>	<p>REIWA is aware some agents in preparing exclusive selling agency agreements place an obligation upon the seller to pay the agent a fee even if the agency has finished and another agent has been appointed and that second agent has caused the sale.</p> <p>Some consideration could be given to addressing unfair contractual terms. This</p>

	could be included in code 6- Acting within authority and instructions.
<u>Commission</u>	Consideration should be given to allow agents to be paid some consideration if a contract does not settle or if the seller agrees to pay an amount for the agent’s work for negotiating an end to a contract eg Buyer requests termination and the Seller agrees to termination. A Seller may want to engage agents to perform this work for remuneration in some circumstances but the current system means that agents would usually not agree to provide this service.