



Government of Western Australia
Department of Mines, Industry Regulation and Safety



Trust account handbook for real estate agents and real estate business agents



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This booklet contains general information that was current at the time of publication. If you have specific enquiries about matters relating to your situation then you are strongly urged to seek independent professional advice.

This publication is available in other formats on request to assist people with special needs.

Contents

| | |
|---|-----------|
| Introduction | 2 |
| Further information | 2 |
| Part 1. Trust accounting | 3 |
| 1:1 What is trust money? | 3 |
| 1:2 What is meant by trust accounting? | 3 |
| 1:3 Why are there special requirements within the Act for the control of trust money? | 3 |
| 1:4 What are the types of trust accounts?..... | 3 |
| Trust accounts..... | 3 |
| Interest bearing trust accounts | 4 |
| 1:5 Titling of trust accounts..... | 4 |
| Trust accounts..... | 4 |
| Interest bearing trust accounts | 5 |
| 1:6 Opening, closing and amending trust accounts | 5 |
| 1:7 Receiving and depositing trust money | 5 |
| 1:8 What trust documents and records must be maintained?..... | 5 |
| 1:9 How long must trust records be retained? | 6 |
| 1:10 What use is made of the documents and records? | 6 |
| 1:11 What must an agent do on becoming aware that a trust account is overdrawn? | 7 |
| 1:12 Fees and disbursements | 7 |
| 1:13 Trust accounting software | 7 |
| Part 2. Trust documents and records | 8 |
| 2:1 Basic principles of trust accounting..... | 8 |
| 2:2 Trust receipts | 8 |
| Trust receipt process..... | 8 |
| Contents of trust receipts..... | 9 |
| Interim receipts..... | 10 |
| 2:3 Trust account withdrawals..... | 10 |
| 2:4 Cash receipts journal and cash payments journal | 10 |
| 2:5 Balancing a trust account at the end of each month..... | 11 |
| 2:6 Buffer account | 11 |
| Part 3. Trust account audits | 12 |
| 3:1 What are the annual duties of an agent regarding trust account audits?..... | 12 |
| 3:2 What are an agent's duties in appointing an auditor?..... | 12 |
| 3:3 What are an agent's responsibilities to the auditor? | 13 |
| 3:4 What are the duties of an auditor?..... | 13 |
| 3:5 How should an agent respond to an auditor's recommendations? | 14 |
| 3:6 What are an agent's duties in changing an auditor? | 14 |
| Part 4. Other relevant compliance matters | 15 |
| 4:1 What if a real estate agency closes?..... | 15 |
| 4:2 Unclaimed trust money..... | 16 |
| 4:3 What must an agent do on becoming aware of fraud or theft?..... | 16 |
| 4:4 "Off-the-plan" properties..... | 16 |
| The Sale of Land Act | 17 |
| The Strata Titles Act | 17 |
| Glossary | 19 |

Introduction

All real estate agents and real estate business agents who hold or receive money on behalf of others relating to a real estate transaction in Western Australia are required to open and maintain trust accounts. The *Real Estate and Business Agents Act 1978* (the Act) and the Real Estate and Business Agents (General) Regulations 1979 (the Regulations) require the strict maintenance of a formal set of trust account records that show at any time the state of a real estate agent's trust account. Section 70 of the Act requires persons who carry on business as a real estate agent to have their trust accounts audited according to the requirements determined by the Commissioner for Consumer Protection and in accordance with accepted auditing practice.

This publication is not a comprehensive accounting text for agents. Familiarity with the content of this publication does not satisfy the requirement that agents have a sound working knowledge of the Act, the Regulations and the Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 (the Code).

It is the view of the Department of Mines, Industry Regulation and Safety – Consumer Protection Division (Consumer Protection) that section 87 of the Act can be interpreted as meaning that, if the trading body corporate or firm has failed to comply with the requirements of Part VI of the Act, then the directors/partners and/or person in *bona fide* control of the trading entity have also failed to comply with Part VI of the Act.

Reference material and the latest Consumer Protection requirements can be found on its website. Visit: www.commerce.wa.gov.au/consumer-protection/real-estate-agents-and-sales-representatives

Further information

Copies of this publication can be accessed from the Consumer Protection website at www.commerce.wa.gov.au/consumer-protection/publications-real-estate

Real Estate Industry e-Bulletins are used to inform industry about policy and best practice, and may be used to convey information about the Commissioner's auditing requirements.

Archived issues of Consumer Protection's Real Estate Industry e-Bulletins are at www.commerce.wa.gov.au/consumer-protection/publications-real-estate

Part 1. Trust accounting

1:1 What is trust money?

Trust money is money received or held for or on behalf of another person in relation to a real estate transaction, business sales transaction or property management transaction. Moneys collected by an agent for or on behalf of a strata company are also deemed to be moneys collected by the agent in respect of a real estate transaction.

Section 68(1) of the Act requires every licensee holding a current triennial certificate to maintain one or more trust accounts exclusively for the purposes of the Act.

Licensed agents have important legal and fiduciary responsibilities in relation to the management of a trust account. The removal of money from a trust account for reasons other than a lawful purpose is a criminal offence.

A separate set of accounting records should be kept for each trust account. Where multiple trust accounts are held, a consolidated set of accounts should also be maintained to assist the audit process.

Reference: sections 67 and 68 of the Act.

1:2 What is meant by trust accounting?

Trust accounting is the general term used to cover the accounting records and practices required under the Act to enable agents to properly account for trust money in their possession.

All moneys paid to an agent in trust in respect of a real estate or business transaction must be paid into and held in the agent's trust account which is to be held with an authorised financial institution.

Reference: section 68(1) of the Act and regulation 6D of the Regulations.

1:3 Why are there special requirements within the Act for the control of trust money?

Financial institutions holding agents' trust accounts are required under the Act to pay the interest on these accounts to Consumer Protection, as prescribed by the Act and Regulations. The interest earned on trust accounts is credited to the Fidelity Guarantee Account and to the General Purpose Account which funds various functions performed by the Commissioner under the Act and in relation to the Act under the *Fair Trading Act 2010*, including education, advice and the investigation of real estate matters.

Reference: section 68B(1) of the Act and regulation 6F of the Regulations.

1:4 What are the types of trust accounts?

Trust accounts

A trust account is used exclusively for money received or held by a real estate agent for or on behalf of another person in relation to a real estate transaction and is not to be used to hold moneys for any other purpose.

An agent may have one trust account for all money received by the agent or have separate trust accounts for sales, rental, business and strata transactions.

Interest bearing trust accounts

Section 68A of the Act allows agents to open separate interest bearing trust accounts for individuals if a request is received in writing from the person paying the money and occurs before settlement.

Where the transaction relates to the sale of real estate or a business, before an agent can comply with a request for an individual interest bearing trust account, it must satisfy one of the following prescribed requirements:

- the amount of moneys paid to the real estate agent exceeds \$20,000; or
- the transaction in respect of which moneys are paid is not to be settled within 60 days (regulation 6E of the Regulations).

Interest earned on a separate interest bearing trust account must be paid to the person requesting the account, not to Consumer Protection.

Agents must comply with such requests where the aforementioned criteria are met and retain the written request in their files for auditing purposes.

When opening an interest bearing account for a client, the client should be advised to provide the bank with their tax file number to avoid tax being withheld at the top marginal rate.

Reference: section 68A of the Act and regulations 6D and 6E of the Regulations.

1:5 Titling of trust accounts

The titling of trust accounts enables easy identification of real estate trust accounts for agents, auditors, financial institutions and Consumer Protection. Regulation 6D of the Regulations requires an agent to designate their trust accounts in a prescribed manner. Examples of the titling of various categories of trust accounts are provided below.

Trust accounts

The title of a trust account needs to contain:

- the description 'REBA Trust Account';
- the name of the holder of the triennial certificate, and any business name of that holder as recorded by the Commissioner; and
- the letters 'TC' followed by the agent's triennial certificate number.

Examples of titles for typical general trust accounts for real estate agents are shown below.

Sole trader

REBA Trust Account – Mary Smith T/A ABC Real Estate – TC12345

Partnership

REBA Trust Account – Mary Smith and Bill Jones T/A ABC Real Estate – TC12345

Body corporate

REBA Trust Account – ABC Pty Ltd T/A ABC Real Estate – TC12345

Interest bearing trust accounts

The title of an interest bearing trust account (IBTA) needs to contain:

- the description 'REBA Trust Account – IB';
- the name of the holder of the triennial certificate, and any business name of that holder as recorded by the Commissioner;
- the words 'in trust for' followed by the name of the person who requested the separate account; and
- the letters 'TC' followed by the agent's triennial certificate number.

The example below shows a title for a typical separate interest bearing trust account:

REBA Trust Account – IB – ABC Pty Ltd T/A ABC Real Estate in trust for
Joe Smith – TC12345

Reference: regulation 6D of the Regulations.

1:6 Opening, closing and amending trust accounts

When a trust account is opened, closed, or amended, agents must advise the Commissioner in writing as soon as practicable.

The notification should provide:

- the name and number of the trust account;
- the name and address of the authorised financial institution where the trust account is or was maintained; and
- the date on which the change was made.

You can download a form for this purpose from Consumer Protection's website at:

www.commerce.wa.gov.au/consumer-protection/auditing-real-estate-agents-forms-and-publications

The Commissioner does not need to be advised about the opening, closing, or amending of interest bearing trust accounts; however these accounts must be audited.

Reference: section 68C(1) and (2) of the Act.

1:7 Receiving and depositing trust money

All trust money must be deposited in the trust account with an authorised financial institution as soon as practicable after it is received. It is the view of Consumer Protection that, 'as soon as practicable' means by close of business the next working day.

Reference: section 68(1) of the Act.

1:8 What trust documents and records must be maintained?

Section 77 of the Act requires, for the purposes of an audit or report, that agents produce to the auditor their books and all papers, accounts, documents, and securities, in any way relating to any trust moneys received by the agent in their possession, custody or power. It is essential that copies of the following records are maintained and can be produced at the request of the agent's auditor or an investigator/compliance officer of Consumer Protection.

Trust documents and records that should be maintained include:

- a record of money received for or on behalf of any other person;
- trust receipt books register;
- duplicates of every completed trust account deposit form;
- trust account journals;
- trust ledgers;
- trust cheque books' register;
- records of trust money payments;
- bank statements of trust moneys;
- register of securities;
- trust account reconciliation statements;
- requests for the issue of bank cheques;
- requests for the opening of separate interest bearing trust accounts; and
- any other books, accounts or records kept by an agent relating to trust money.

It is also recommended that back-up copies of computer records be retained offsite. This ensures the agent has access to the records in the event of error, falsification of records by an employee or physical damage to the system.

Reference: sections 69(1)(b) and 77 of the Act.

1:9 How long must trust records be retained?

When an agent receives money for or on behalf of any other person, they must keep a written record of the money received. All trust records and documents are to be retained for a minimum period of six years from the date the money was received and be readily accessible.

Reference: section 69 (1)(b) of the Act and regulation 6H(1) of the Regulations.

Agents should be mindful of taxation legislation with respect to the requirement to retain accounting records. Agents who are a body corporate should also be aware of the requirements of the *Corporations Act 2001* with respect to record keeping.

1:10 What use is made of the documents and records?

Section 70 of the Act requires an annual audit of every agent's trust accounts.

An audit is an examination by an independent person of the accounts held by an agent. Unless the Commissioner approves otherwise, a registered company auditor must conduct the audit. An agent needs to maintain all documents and records relating to a trust account in a manner that enables them to be conveniently and properly audited by the agent's auditor and furnish the auditor with all such information and particulars as he or she reasonably requires.

The documents and records listed at 1.8 above enable the tracking of trust money held by an agent at any time in order to verify that money has been dealt with in accordance with the Act. The auditor will conduct a sample-based audit of the records when performing the annual audit. As well as the annual audit, the Commissioner may order an inspection of trust account records or an interim audit of an agent's trust accounts at any time.

Where for any reason the triennial certificate of an agent ceases to have effect under the Act, a termination audit of the agent's trust account is required.

Reference: sections 70, s.68(6) and s.77 of the Act.

1:11 What must an agent do on becoming aware that a trust account is overdrawn?

Section 68C(3) of the Act requires the financial institution and the agent to inform the Commissioner in writing whenever a real estate agent's trust account is overdrawn. Regardless of the amount overdrawn or whether the overdrawn amount is a result of a bank error, the Commissioner must be notified in writing as soon as is practicable.

The notification should include the date the trust account was overdrawn, the amount involved, the reason it occurred and full details of any action taken to correct it.

It is best practice for the agent to also notify the appointed auditor of the overdrawn amount.

Reference: section 68C(3) of the Act.

1:12 Fees and disbursements

A real estate agent is not entitled to receive any commission, reward or valuable consideration in respect of his services in that capacity unless he has a valid appointment to act in that capacity which is in writing, signed before the services are rendered, by the client for whom the services are to be provided.

Under section 68(4) of the Act, moneys received by an agent for or on behalf of another person in respect of a transaction shall not be withdrawn from a trust account except for the purposes of the transaction or as otherwise authorised by the Act or by the person or persons lawfully entitled to the moneys.

An agent is required to transfer any entitlement gained from a real estate transaction, from the trust account to the agency's general account before using that entitlement to meet general operating expenses. The agent should not pay general operating expenses or personal expenses directly from the trust account. As best practice, fees should be transferred to the agent's general account at least weekly but only after the agent is entitled to draw the fees.

Reference: sections 60 and 68(4) of the Act.

1:13 Trust accounting software

The requirements of the Act and the Regulations apply to all computerised trust accounting systems. Before obtaining software to create and maintain trust account records and produce reports, an agent should check the software is capable of producing trust records that comply with the requirements of the Act.

Agents should consider discussing the software they are contemplating using with their auditor to ensure it is able to maintain and generate the required records.

Consumer Protection does not approve of or endorse any particular software package and any claims made by suppliers that approval has been granted could be a misrepresentation and should be reported to Consumer Protection.

Whilst many agents delegate the day-to-day maintenance of trust account records to office staff, it is important for the licensed person in *bona fide* control of the agency to be fully conversant with the computer systems used. This is a requirement of the supervision obligations found in Rule 14 of the Code. Full use should be made of any checks and controls that are integrated into the system and daily reports should be produced for checking by the person in *bona fide* control. Discrepancies and errors should be noted and checked and any irregularities immediately addressed, with the relevant records then kept for review by the auditor.

Reference: Rule 14 of the Code.

Part 2. Trust documents and records

The prescribed requirements for trust accounts are explained in this section. Where needed, a model that meets the requirements of the Act is shown. It should be understood, however, that models serve only as examples. While legislation prescribes the information that must be recorded, it does not prescribe the way that information must be presented.

2:1 Basic principles of trust accounting

To aid in keeping full and accurate records, it is helpful for the agent to adhere to a number of basic trust accounting principles, which include that:

- accurate records are kept for all transactions and are written up by the end of the next business day;
- each client must have a separate trust ledger account and each individual trust ledger account must never go into debit;
- trust money is banked by close of business of the next business day where practicable, and in the same form it was received (i.e. cash received must be banked as cash);
- client funds held in a particular trust ledger have cleared before drawing against those funds;
- unidentified deposits to the trust account are immediately followed up;
- unrepresented trust cheques are followed up and presented as soon as practicable;
- appropriate authorisation is held for any transfer journal entries;
- address and adjust journal entries for any errors or discrepancies as soon as possible and make detailed notes to assist in the annual audit;
- trust account reconciliations are completed at least monthly and should be completed more often where recommended by the auditor and/or the volume of transactions so dictates;
- trust account reconciliations are completed as at the end of the last day of each month and signed by the licensed person in *bona fide* control;
- fee entitlements should not be transferred from the trust account to the general account until after settlement; and
- back-up computer records are kept offsite.

2:2 Trust receipts

Trust receipt process

When a real estate agent receives trust money in person, a receipt must be provided to the person at the time of making the payment and a record of the transaction maintained, such as providing a duplicate receipt, which contains all of the information in the receipt. If a payment is made by cheque through the mail, the receipt should be provided as soon as possible and a duplicate retained. Whilst a receipt does not have to be issued if the money is received by electronic transfer, a record of the money received must be kept.

Reference: section 69(1) and (2) of the Act and regulation 6H(2) and (3) of the Regulations.

Contents of trust receipts

It is a requirement that all trust receipts show the following information:

- the name of the holder of the triennial certificate, and the business name of the holder, that is recorded in the register;
- a number or letter, or a combination of both, in consecutive order that allows the receipt to be uniquely identified;
- the date on which the money was received;
- the name of the person paying the money;
- the amount of money received;
- a brief description of the purpose of the payment; and
- if the receipt is handwritten, the name of the person receiving the money evidenced by the signature of that person.

Reference: regulation 6G of the Regulations.

When money has been received by electronic transfer, an agent must ensure a record is kept to allow the receipt of the money to be uniquely identified, by including:

- a number or letter, or combination of both, in consecutive order that allows the record to be uniquely identified;
- the date the money was received;
- the name of the person paying the money;
- the amount of the money received; and
- a description of the purpose of the payment.

The example below demonstrates a general purpose trust receipt format that meets the requirements under the Regulations:

| | |
|---|------------------------|
| ABC PTY LTD ABN 12 345 678 912 T/A ABC Real Estate | |
| Licensed Real Estate Agent | Trust Account Receipt |
| 16 Horizon Street, Perth 6000 | No: 00001 |
| | Date/...../..... |
| Received from | |
| Address | |
| The sum of | |
| For | |
| | |
| | |
| | |
| For and on behalf of ABC Pty Ltd ABN 12 345 678 912 | |
| Signed | |
| (name of signatory)..... | |
| | Cheque \$..... |
| | Cash \$..... |
| | Total \$..... |

All receipts should be posted to the cash receipts journal by the next working day.

Reference: regulation 6G(b)(c)(d)(e) and (f) and regulation 6H(3) of the Regulations.

Interim receipts

The use of interim receipts is not encouraged. However, there are certain circumstances when an interim receipt may need to be issued (eg when the agent's printer is out of order). In these situations, a duplicate of the interim receipt should be retained in the records and the interim receipt should be immediately followed by a formal trust receipt cross-referenced to the interim receipt.

When using a manual system to issue interim receipts, cross-referencing information should be included when recording the receipt in the trust ledger and issuing the formal receipt. If a computer system is used, the formal trust receipt should be cross-referenced against the interim receipt in the computer system.

2:3 Trust account withdrawals

An agent must ensure that deposited funds have cleared before those funds are drawn against. Drawing against a trust ledger account before a deposit has cleared will cause a shortfall in that ledger if the deposit is dishonoured.

At no time should a trust ledger account have a debit balance.

Reference: section 68(4) of the Act.

As a matter of best practice, all withdrawals from a trust account should be made by electronic transfer or a trust cheque. Where a trust cheque is used, an agent must retain the cheque butts and ensure such cheque butts contain all relevant information.

Consumer Protection considers an agent may be placing client's trust moneys at considerable risk if trust cheques are pre-signed prior to all of the other details (particularly payee and amount) being written. It may also be prudent to ensure that all trust cheques are clearly endorsed "not negotiable – account payee only" and if the cheque is pre-printed with the words "or bearer," these words are struck out.

2:4 Cash receipts journal and cash payments journal

All receipts and payments of trust money are to be summarised in the trust account cash journals. The journals are updated each time money is paid into or out of the trust account. The journals also provide a sequential and chronological record of trust account receipts and payments.

If using a computerised system, the procedures and terminology may be different but the same essential information must be recorded. The journals are used to update the trust account ledger and for the preparation of the monthly trust account reconciliation statement. The trust account cash journals must contain sufficient particulars of all receipts, payments and transfers to enable adequate details of the transactions to be posted into the trust account ledger.

The receipts section is prepared from the record of trust account receipts. Each receipt number must be entered in strict numerical sequence. If a receipt is cancelled, the number must still be entered and the word "cancelled" written beside it. The original copy of any cancelled receipt should be retained for inspection by the agent's auditor.

Reference: section 68(6) of the Act.

2:5 Balancing a trust account at the end of each month

To ensure the requirements of section 68(6)(d) of the Act are met, an agent should complete a trust account reconciliation statement at the close of business each month. This statement reconciles the cash records of the business with the records of the bank. It reconciles the balances of the trust account cash book, the bank trust account statement and the total of the clients' trust account ledgers. The purpose of the exercise is to match all three totals after taking into account any reconciling items.

The monthly trust account reconciliation must be:

- as at the close of business of the last day of the month;
- completed within 10 working days after the end of each month;
- verified, signed and dated by the agent, or if the agent is a corporation, the person in *bona fide* control, even if there are no funds in the account; and
- retained for auditing purposes.

Regular monitoring of trust account transactions and account balances may help prevent the successful fraudulent transfer of money from a trust account.

Section 68(6)(d) of the Act provides that a real estate agent must correctly balance the accounts at the end of each month and certify in records this has been done.

Trust reconciliation statements, including related bank statements, must be retained as they form part of the trust account records.

Reference: section 68(6)(d) of the Act.

2:6 Buffer account

Under no circumstances should agents maintain a surplus amount within the trust account to absorb any inadvertent deficiencies that may arise from dishonoured bank cheques or bank charges. Any bank fees or charges must be redirected to be drawn from the general trading account and must not be drawn from the trust account.

A buffer fund cannot be used to offset bank fees or for any other reason. Agents should regularly clear their commission or account fees to their general account. The Commissioner strongly recommends against the practice of retaining commissions and management fees in the trust account for an extended period of time.

The removal of these excess funds from the trust account is for the benefit of all parties. If an agent maintains a buffer in a trust account, they will not be aware when the trust account is overdrawn. This means they are less likely to identify poor trust account management practices or fraud by employees or unauthorised withdrawals by third parties. The person in *bona fide* control is responsible for checking each ledger account each month to determine if specific ledgers are overdrawn and to correct any errors.

Reference: section 68(1) and 68(6) of the Act.

Part 3. Trust account audits

3:1 What are the annual duties of an agent regarding trust account audits?

Persons who carry on business as a real estate agent must cause the trust accounts to be audited by the approved auditor and the audit report lodged with the Commissioner. If the agent has not held or received any trust funds during the year, the agent can instead lodge a statutory declaration to this effect in lieu of an audit report.

All audit reports or statutory declarations (as appropriate) are required to be lodged within three months of the end of each audit period. For most real estate agents, the audit period ends on 31 December of each year, with the audit report or statutory declaration due to be lodged by 31 March each year. It is the auditor's responsibility to deliver the audit report to the Commissioner.

Where an agent's triennial certificate has ceased to have effect, a termination audit of the agent's trust account must be conducted within the period of three months thereafter.

Reference: sections 70 and 86 of the Act.

3:2 What are an agent's duties in appointing an auditor?

An agent must appoint an auditor at the time of applying for a licence.

To audit an agent's trust account, a person must be a registered company auditor, under Part 9.2 of the *Corporations Act 2001*(Cth). In regional areas where no qualified company auditors are available, the Commissioner may approve another person with appropriate qualifications as an auditor.

To comply with section 72(3) of the Act, an auditor must disclose to the Commissioner any relationship by blood or marriage, or any business dealing, with the real estate agent at any time during the auditor's appointment. Agents should ensure their auditor is aware of this requirement, and are encouraged to notify the Commissioner if any relationship exists. The Commissioner will consider each instance of disclosure on a case-by-case basis.

Where an auditor is related to an agent by blood or close relationship, there is a clear conflict of interest that could compromise the auditor's independence. Where an auditor has business dealings with an agent at any time during the auditor's appointment, the Commissioner will consider the facts in each case. Generally, the Commissioner will not approve an auditor where that auditor also acts as the agent's general accountant.

Section 75 of the Act allows the Commissioner to cancel, suspend, vary or revoke an auditor from acting for an agent if the Commissioner believes there is just cause. An auditor can apply in writing to the Commissioner to request the decision be reconsidered. For the decision to be reversed, the auditor needs to show that any 'business dealings' with the agent have ceased or establish that there are no longer reasons for concern regarding independence. The auditor may also apply in writing to the State Administrative Tribunal (SAT) to have the decision reviewed under section 23 of the Act.

Reference: sections 72(3) and 75 of the Act.

3:3 What are an agent's responsibilities to the auditor?

As part of the audit process, the agent is required to prepare a statement of trust account moneys held for the auditor. This statement should show details of all money held for or on behalf of any other person, as well as deposit receipts and negotiable or bearer securities in the name of the agent, which represent money drawn from the agent's trust account. The statement made by the agent must be verified by a statutory declaration.

In the statement to the auditor, the agent is required to provide full details of the trust accounts held, including:

- details of the names, account numbers and financial institution name and branch name where the trust accounts are maintained (this reporting requirement also applies to clients' separate interest bearing trust accounts); and
- the reconciled balance held in each trust account as at the audit date (including those closed during the audit period).

After examining the prepared statement, the auditor will certify the document and return a copy along with a copy of the audit report to the agent. A copy of the agent's declaration and statement of trust account money held is required to be attached to the audit report and submitted to the Commissioner.

All trust account records must be made available to the auditor at every audit, or when the auditor reasonably requests.

Reference: sections 77 and 80 of the Act.

3:4 What are the duties of an auditor?

An auditor must audit trust accounts in accordance with accepted auditing practice, including selective testing when the auditor considers it appropriate. The auditor must also be satisfied the trust records are kept in accordance with the requirements of the Act. The audit of an agent's trust accounts is a compliance audit, where materiality does not apply and the auditor is to report every discrepancy to the Commissioner.

The auditor must determine if any proactive visits or investigations by Consumer Protection staff have taken place, obtain a copy of correspondence from Consumer Protection and address any issues raised in a management letter accompanying the audit report.

On completion of an audit, the auditor is required to deliver the original audit report to the Commissioner. Generally, the audit report must be delivered to the Commissioner by 31 March each year (i.e. within three months of the end of the audit period, which is from 1 January to 31 December).

It is the duty of the auditor to report any relevant issues to the Commissioner. The auditor is also required to provide copies of any management letters issued to the agent and attach these to the audit report.

Consumer Protection's publication, *A guide to auditing trust accounts: Real estate agents, business agents and settlement agents and business settlement agents*, can assist auditors and agents in understanding the requirements for an audit of an agent's trust account.

A copy of the guide can be downloaded from Consumer Protection's website at:

www.commerce.wa.gov.au/publications/guide-auditing-trust-accounts-real-estate-agents-business-agents-and-settlement-agents

Reference: section 70(2) of the Act.

3:5 How should an agent respond to an auditor's recommendations?

An agent must promptly implement any recommendations made by the auditor where the recommendations arise from a breach of the Act. The Commissioner looks upon any breaches of the trust account provisions seriously and may take enforcement action where necessary.

If an agent considers the recommendations to be unfair or unreasonable, the agent may make a request in writing to the Commissioner to reconsider the recommendations in light of the agent's objections.

3:6 What are an agent's duties in changing an auditor?

Under section 73(3) of the Act, an agent must continue to employ the statutory appointed auditor unless the Commissioner approves a change in the appointment. Agents seeking to change their statutory appointed auditor must lodge an application with the Commissioner no later than one month after the end of the year of being audited. Applications for a change of auditor will not be accepted after this time due to the proximity with the due date for provision of the annual audit. For example, where the audit period expires on 31 December, an application must be received by 31 January.

All agents seeking to change their statutory appointed auditor must complete a Change of Auditor request form and return this to the Commissioner – www.commerce.wa.gov.au/publications/change-auditor-request-real-estate-and-business-agent

The Commissioner does not consider delays caused by a change in the appointment of an auditor as an acceptable reason for granting an extension of time for the submission of the audit report. Further details on these points can be found on Consumer Protection's website at: www.commerce.wa.gov.au/consumer-protection/auditing-real-estate-agents-forms-and-publications

Part 4. Other relevant compliance matters

4:1 What if a real estate agency closes?

The closing of a real estate agency can be a complex matter. Whilst some guidelines are provided below, it is advisable for an agent to seek legal and accounting advice to address all of the potential issues involved.

If the business is licensed as a partnership or body corporate, written notification of the date of closure and surrender of the licence and triennial certificate of the business must be given to the Commissioner. Where a business is licensed as a partnership or body corporate, and no longer complies with paragraph (c) or (d) of section 28 or 29 (as relevant), the licensee must surrender the licence and triennial certificate within five days after the day the paragraph no longer applies, unless they are to carry on business under Schedule 1 clause 6.

If the business is being conducted by a sole trader, written notification of the cessation of use of the business name must be given to the Commissioner. The agent's triennial certificate should also be returned to the licensee.

As well as advising the Commissioner, the appointed trust account auditor must also be advised of the closure of the business. All current clients of the business should also be notified.

In addition:

- Where there is a change of the entity which owns the business, and transfer or closure of a business, a termination audit must be carried out within three months of the change occurring (i.e. when the triennial certificate ceases to have effect) and the auditor must deliver a termination audit report to the Commissioner within two months after the end of the three-month period.
- If funds held in the trust account cannot be disbursed within three months following the closure of the agency, they may be disbursed to another agent or solicitor's trust account provided there is written agreement from the parties who own the funds, which authorises the agent to deal with the money as instructed.
- If funds are still held in the trust account after a termination audit report has been delivered to the Commissioner, the auditor is required to deliver a final clearance letter to the Commissioner when the trust account has reached a nil balance.
- If unclaimed moneys remain in the trust account, they may be disbursed in accordance with the provisions of the *Unclaimed Money Act 1990*.
- All accounting records must be kept for not less than six years from the date on which the money was received.

Reference: section 70(8)(b) of the Act.

4:2 Unclaimed trust money

Under the *Unclaimed Money Act 1990*, agents must comply with the following process through which they transfer moneys they owe to another organisation or person to the Department of Treasury (Treasury).

- In January each year, agents must provide Treasury with a summary of the unclaimed moneys they hold.
- In the second half of the year, Treasury will make a Register of Unclaimed Money available for public inspection.
- The public will have until 31 July the following year in which to claim moneys from the dealer concerned.
- In August, following the aforementioned 31 July, dealers must transfer the balance of any moneys remaining unclaimed to Treasury.

For further details on lodging moneys with Treasury, please refer to the unclaimed moneys section of the Department of Treasury website at

www.treasury.wa.gov.au/Unclaimed-money/Lodging-Monies-with-Treasury/

Please note, where information is not available, an agent is to state 'unknown' on the covering letter to Treasury. Agents should be aware that it is a requirement of section 68 of the Act to keep full and accurate records of all money received and paid.

4:3 What must an agent do on becoming aware of fraud or theft?

If an agent becomes aware that money has been stolen from the trust account, the agent must:

- notify the Commissioner, advising the date on which the theft occurred, the amount involved, the reason for it and any action taken to correct it;
- contact the auditor to conduct a special trust audit to attempt to quantify the amount of the misappropriation and possibly identify the culprit;
- notify the police of the misappropriation of trust money and that a special audit is being conducted;
- replace the misappropriated amount immediately; and
- alert the agent's professional indemnity insurer.

Refer to section 1.11 about what to do on becoming aware that a trust account is overdrawn.

4:4 "Off-the-plan" properties

If an agent is appointed to sell properties "off-the-plan", such as in a new subdivision, or a development yet to be built, the agent must comply with all of the relevant legislation. Particular attention should be paid to deposits and other moneys to be held in trust and when they can be released.

The Sale of Land Act

Following the 2014 Supreme Court case of *Barker v Midstyle Nominees Pty Ltd*, significant amendments to the *Sale of Land Act 1970* (the SLA) were made on 3 April 2017. These include that where the developer does not yet own the land, the seller, or developer, must warn buyers in writing that the developer does not own the land. There are also time limits imposed on when the developer can become the registered owner of the land. This will normally be a six-month period or a specific date detailed in the sales contract.

If there is no warning, or if time limits are not adhered to, the sales contract becomes illegal and void.

Section 13D of the SLA specifies that a **deposit or other amount payable** by a purchaser under a future lot contract **must be paid to a deposit holder**, such as a real estate agent, settlement agent or solicitor, **and held in trust**.

Section 13E of the SLA requires that deposit or other amount to be held in a trust account with an authorised deposit-taking institution (ADI) and specifies when the amounts can be released.

If the release is dependent on a vendor's condition, such as obtaining the necessary regulatory approvals for the subdivision or proposed subdivision and creating and lodging the necessary plans, then the vendor must give the purchaser notice in writing that the vendor's condition has been satisfied within 10 working days after the date on which the vendor's condition is satisfied.

If this is not done, then the vendor's condition is taken not to have been satisfied and the purchaser may terminate the contract and recover from the deposit holder any deposit or other amount paid by the purchaser under the contract.

The Registrar of Titles may from time to time require an audit of a deposit holder's trust accounts to determine compliance with Section 13E of the SLA.

The Strata Titles Act

If the future lot is to be strata-titled, section 70(1) of the *Strata Titles Act 1985* (the STA) requires that the contract of sale for a lot in a proposed scheme provides that **any deposit and all other moneys payable** by the purchaser prior to the registration of the strata/survey strata plan are to be paid to a solicitor, real estate agent or settlement agent and **held on trust** for the purchaser **until the strata/survey strata plan is registered**.

Any deposit and other moneys payable and paid by the purchaser prior to the registration of the strata/survey strata plan shall be paid by the purchaser to the solicitor, real estate agent or settlement agent named or specified in the contract of sale.

Failure to comply with these requirements means the purchaser may, at any time before the strata/survey strata plan is registered, void the sale, in which case all moneys, including the deposit, shall be recoverable from the solicitor, real estate agent or settlement agent or other person to whom they were paid.

Section 70A(1) of the STA provides that any contract or arrangement that purports to restrict or exclude the operation of section 70(1) of the STA is of no effect.

In the matter of *Wilson and Commissioner for Consumer Protection* [2012] WASAT 200, the developer and seller had not yet completed the purchase of the land to be subdivided and had not registered a strata/survey strata plan for the development. The contracts contained a clause which allowed the deposit moneys to be released to the seller for the purpose of the acquisition and development of the land to be subdivided. This clause breached section 70 of the STA.

Shoalwater Settlements released the funds to effect the seller's acquisition of the land. Whilst the developer successfully purchased the land, the development failed and the strata lots were never created. The developer went into liquidation and each applicant lost their deposit.

The State Administrative Tribunal concluded the STA required the deposits be held in trust pending the registration of a strata plan for the proposed lots and that the release of the deposits amounted to a defalcation by Shoalwater Settlements.

In the recent matter of the *Commissioner for Consumer Protection and KDD Conveyancing Services Pty Ltd* [SAT - VR:163/2017], a developer entered into contracts to sell units "off-the-plan" in two proposed developments, neither of which was built, nor were strata or survey-strata plans registered in respect of either development.

A number of these contracts incorporated a "mezzanine agreement" which authorised the moneys paid to KDD Conveyancing Services Pty Ltd (KDD) by purchasers to be released to the developer by KDD including to settle the purchase of each of the parent lots. As none of the funds received from the purchasers of the off-the-plan units could be released in accordance with section 70(1) of the STA, despite the contractual terms contained in the contracts, KDD had breached section 49(5) of the *Settlement Agents Act 1981*.

KDD was fined a total of \$14,000 and ordered to pay costs of \$1000.

This means that "mezzanine agreements" forming part of a contract of sale and purporting to allow the release of the deposit and other moneys to the developer, to assist or fund the purchase of the parent lot to be subdivided, are prohibited.

While these two case studies relate to the conduct of settlement agents, section 68(5) of the Act is the corresponding provision for real estate agents. The same principles apply equally to real estate agents.

Real estate agents instructed by developers to act in the sale of "off-the-plan" units or land yet to be subdivided, must ensure that they comply with all of the relevant legislation, irrespective of instructions they might receive from their client or conditions which might be contained in the contracts for sale. Where any uncertainty exists, the agent can contact Consumer Protection for general advice, and for further information should obtain their own independent legal advice.

Glossary

Act (the)

The Real Estate and Business Agents Act 1978

Agent

A natural person who is a real estate agent and/or a business agent within the meaning of the Act.

Approved

Approved by the Commissioner for Consumer Protection.

Auditor

A person appointed under Section 73 of the Act to audit the trust accounts of a real estate agent.

Authorised financial institution

A bank or other body that is prescribed or that belongs to a class of bodies that is prescribed.

Banker

The manager, or other officer, for the time being in charge of the office of a bank or other body in which any account of an agent is kept.

Business agent

A person whose business, either alone or as part of or in connection with any other business, is to act as agent for consideration in money or money's worth, as commission, reward, or remuneration, in respect of a business transaction as defined by this section, but does not include a person whose business is to so act by reason that:

- (a) they are appointed by a court as a receiver or receiver and manager of the business of another; or
 - (b) they are an official receiver or trustee within the meaning of the *Bankruptcy Act 1966* of the Commonwealth or any Act in amendment or substitution of that Act.
-

Business day

A day that is not a Saturday, Sunday or public holiday.

Business transaction

Means:

- (a) a sale, exchange or other disposal and a purchase, exchange or other acquisition of a business and any share or interest in a business or the goodwill thereof; and
- (b) includes any sale, exchange, or other disposal and any purchase, exchange, and other acquisition of goods, chattels or other property relating to a business transaction of the kind specified in paragraph (a); and
- (c) also includes an option to enter into a business transaction; but
- (d) does not include the sale, exchange, or other disposal or a purchase, exchange, or other acquisition of a share in the capital of a body corporate carrying on a business or an option in respect thereof.

Code of conduct

The Real Estate and Business Agents and Sales Representatives Code of Conduct 2016.

Commissioner

The Commissioner for Consumer Protection.

Consumer Protection

The Consumer Protection division of the Department of Mines, Industry Regulation and Safety.

Defalcation by a licensee

Includes criminal or fraudulent conduct:

- (a) of a licensee;
 - (b) of any one or more of the servants or agents of the licensee;
 - (c) of a person who is a partner in the business of the licensee; or
 - (d) where the licensee is a firm and a body corporate is a partner in the firm or where the licensee is a body corporate, of any one or more of the directors, officers, servants, or agents of the body corporate, in the course of the business of the licensee and from which arises pecuniary loss or loss of property to any other person.
-

Licensed agent

A real estate agent who holds a real estate licence and a current triennial certificate under the *Real Estate and Business Agents Act 1978*.

Licensee

A person licensed under the *Real Estate and Business Agents Act 1978*.

Person in bona fide control

A licensed person in a real estate business who is responsible for the administration of real estate transactions, and the supervision of persons involved in those transactions. Sometimes described as agent in *bona fide* control.

RA

Abbreviation for Real Estate Agents, as used in titles of trust accounts as required by the legislation.

Real estate agent

Means a person whose business, either alone or as part of or in connection with any other business, is to act as agent for consideration in money or money's worth, as commission, reward or remuneration, in respect of a real estate transaction as defined by this section but does not include a person whose business is to so act by reason that –

- (a) they are appointed by a court as a receiver or receiver and manager of the business of another person; or
- (b) they are an official receiver or trustee within the meaning of the *Bankruptcy Act 1966* of the Commonwealth or any Act in amendment or substitution of that Act.

Real estate transaction

Means:

- (a) a sale, exchange, or other disposal and a purchase, exchange, or other acquisition of real estate and any exclusive right whether deriving from the ownership of a share or interest in a body corporate or partnership, or otherwise, to the use or occupation of real estate including the leasing, and letting, and the acquisition under lease or letting of tenancy or occupation of real estate; and
- (b) includes any sale, exchange, or other disposal and any purchase, exchange, or other acquisition of goods, chattels or other property relating to a real estate transaction of a kind specified in paragraph (a); and
- (c) includes the collection of rents or other payments for use or occupation; and
- (d) also includes an option to enter into a real estate transaction.

STA (the)

Abbreviation for the *Strata Titles Act 1985*.

TC

Denotes triennial certificate as used in titles of trust accounts followed by the certificate number of the agent.

Transaction

A real estate transaction or a real estate business transaction, or both a real estate transaction and a business transaction.

Triennial certificate

The certificate granted by the Commissioner to a licensee which permits the licensee to carry on business as a real estate agent. A triennial certificate is granted for three years and may be renewed for further three year periods for as long as the licensee continues to trade.

Trust account

Accounts where money is received or held by an agent for or on behalf of another person in relation to a real estate transaction.

Working day

A day that is not a Saturday, Sunday or public holiday.

Year

A period of 12 months ending on 31 December.

Government of Western Australia

Department of Mines, Industry Regulation and Safety

Consumer Protection

Contact Centre 1300 304 054
(for the cost of a local call statewide)

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9.00am – 4.30pm Thurs

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