



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



# A guide to auditing trust accounts —

Real estate agents, business agents, and settlement agents and business settlement 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.

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## Introduction

### Audit requirement of trust accounts

All real estate agents, business agents, settlement agents and business settlement agents (agents) who hold or receive money for or on behalf of others relating to a real estate, business or settlement transaction in Western Australia are required to open and maintain trust accounts. Section 70 of the *Real Estate and Business Agents Act 1978* (REBA Act) and section 51 of the *Settlement Agents Act 1981* (SA Act) require real estate agents who hold a current triennial certificate and persons who carry on business as a settlement agent to have their trust accounts audited according to the requirements determined by the Commissioner for Consumer Protection (Commissioner) and in accordance with accepted auditing practice.

It is the Department of Mines, Industry Regulation and Safety's (department) interpretation of section 87 of the REBA Act and section 68 of the SA Act that, if the trading body corporate or firm complies with the requirements of Part VI of the REBA Act or Part IV of the SA Act, then the directors/partners and/or branch manager and/or person in bona fide control of the trading entity are seen to have also complied with Part VI of the REBA Act or Part IV of the SA Act.

Wherever the term 'trust accounts' is used in this publication, it refers to trust accounts opened, maintained and/or closed by agents. Trust accounts are defined as accounts where money is received or held by an agent (this includes any member of an agency's staff) on behalf of another person in relation to a real estate, business or settlement transaction.

The REBA Act and SA Act give the Commissioner various powers in relation to the audit of trust accounts of agents. The Consumer Protection Division of the department (Consumer Protection) supports the Commissioner in this statutory role. Consumer Protection has released this revised version to guide auditors when examining and reporting on trust accounts held by agents. This guide is intended to help auditors produce high quality reports in the required format. To make the auditing process easier, templates for the main documents to be lodged with the Commissioner are provided in Appendix B and can be downloaded from the department's website at [Auditing real estate agents - forms and publications](#); [Auditing settlement agents - forms and publications](#) ("approved forms"). Audit reports based on other formats, will not be accepted.

### Related legislation and publications

Auditors need to read this publication in conjunction with legislation and the Australian Auditing Standards. Legislation relative to the business of real estate agents, business agents, settlement agents and business settlement agents are:

- a) Real Estate and Business Agents
  - *Real Estate and Business Agents Act 1978*
  - Real Estate and Business Agents (General) Regulations 1979 ("REBA Regulations")
  - Real Estate and Business Agents and Sales Representatives Code of Conduct 2016 ("REBA Code")
  - *Residential Tenancies Act 1987* ("RT Act")
  - *Corporations Act 2001*
  - Australian Consumer Law

b) Settlement Agents and Business Settlement Agents

- *Settlement Agents Act 1981*
- Settlement Agents Regulations 1982 (“SA Regulations”)
- Settlement Agents Code of Conduct 2016 (“SA Code”)
- *Corporations Act 2001*
- Australian Consumer Law

When auditing agents’ trust accounts, auditors should ensure they have a current copy of each of the above legislations. Appendix C contains links to the full text of the relevant sections.

The *Real Estate Industry e-Bulletins* and the *Settlement Industry e-Bulletins* are used to inform each industry about policy and best practice recommendations of the Department of Mines, Industry Regulation and Safety, and may be used to convey information about the Commissioner’s auditing requirements. Archived issues of the Real Estate Industry e-Bulletins and Settlement Industry e-Bulletins are available in the website’s publication section. Visit [Real estate bulletins](#) and [Settlement industry bulletins](#).

# 1. Role as Auditor of Trust Accounts

## 1.1 Appointment of an auditor of trust accounts

Section 72(1) of the REBA Act and section 53(1) of the SA Act require the person auditing an agent's trust account(s) to be registered as an auditor under Part 9.2 of the *Corporations Act 2001* of the Commonwealth. The Australian Securities and Investments Commission ("ASIC") provide agents with the ability to search online at [Search ASIC Registers](#) to determine if a particular auditor is a registered company auditor. In districts where the Commissioner is satisfied that there are no registered company auditors available, the Commissioner has the power to approve the appointment of a person as a statutorily appointed auditor even if they are not registered as a company registered auditor with ASIC.

Appointment of auditor forms can be found on the department's website however, they can be found on the second page to the "opening of trust account form" while the website is under review:

- Real estate agents and business agents  
[Auditing real estate agents - forms and publications](#)
- Settlement agents and business settlement agents  
[Auditing settlement agents - forms and publications](#)

Section 73(3) of the REBA Act and section 54(3) of the SA Act provide for the appointment of an auditor of a real estate agency, business agency or settlement agency to be continuous, unless the Commissioner approves a subsequent change in the appointment.

This means that an appointed auditor will be responsible for undertaking all audit functions required under the REBA Act and SA Act until a replacement auditor is approved by the Commissioner or an auditor is released from their appointment by the Commissioner.

Where an auditor retires, seriously ill, dies or ceases to trade as an auditor, agents are required to nominate a replacement auditor and to notify the Commissioner as soon as possible.

If an auditor wishes to resign, the auditor is required to inform the Commissioner in writing including the agent with reasons for the resignation and the resignation date. Where the Commissioner is satisfied that proper cause exists, it may consent to the auditor's resignation.

Change of auditor requests are to be submitted by the agents within one month of the audit due date. If not they will be rejected except in circumstances where the auditor is unable to complete the audit, or in other circumstances deemed exceptional. For example, where the auditor cannot be contacted or unreasonable fees are being charged.

Where the auditor qualifies an audit report and the qualifications are deemed serious in nature or the qualifications are for a repetition of minor offences, then a change of auditor request would most likely be rejected.

Change of auditor request forms can be found on the department's website:

- Real estate agents and business agents  
[Change of auditor request - real estate and business agent](#)
- Settlement agents and business agents  
[Change of auditor request - Settlement agent](#)

Section 75 of the REBA Act and section 56 of the SA Act enable the Commissioner to suspend or cancel an auditor's appointment to audit an agent's trust accounts. In some circumstances, the Commissioner may prosecute an auditor for non-compliance.

Section 72(3) of the REBA Act and section 53(3) of the SA Act provide that an auditor must disclose to the Commissioner any de facto relationship or any close relationship by blood or marriage that they have with the agent or any business dealings that he has with the agent. Paragraph 1.6 below provides further information on this disclosure.

## 1.2 Costs of audits

An auditor that consents to be appointed as an agent's auditor is required to conduct all audits of the agent. This includes annual audits, quarterly audit for new settlement agents, termination audits, interim audits and other audits if and when required by the Commissioner, regardless of the agent's capacity to meet the costs of such audits. When approached by agents to be the statutorily appointed auditor, auditors are advised to exercise due diligence as to the agent's financial ability to meet auditing fees. Section 85 of the REBA Act and section 66 of the SA Act provides that reasonable fees and expenses shall be payable by the agent.

## 1.3 Delivery of audit reports

### 1.3.1 Annual audit

The statutory reporting requirements for auditors of real estate agents and business agents are set out in sections 70, 72 and 79–81 of the REBA Act. The statutory reporting requirements for auditors of settlement agents and business settlement agents are set out in sections 51, 53 and 60-62 of the SA Act.

Section 70(3) of the REBA Act and section 51(3) of the SA Act require auditors to deliver their audit reports to the Commissioner within three months after the end of the audit period.

Section 86 of the REBA Act and section 67 of the SA Act provide that if an agent did not hold or receive moneys for or on behalf of others during the annual audit period, they are able to submit a declaration of no receipt of trust funds.

Templates of the declaration of no receipt of trust funds are available on the department's website

- Real estate agents and real estate business agents

[Declaration of no receipt trust funds - real estate and business agents](#)

- Settlement agents and business settlement agents

[Declaration of no receipt of trust funds - Settlement agents](#)

At any time during the year, the Commissioner may require auditors to provide additional information or carry out a further audit; associated costs of the audit are the responsibility of the agent.

### 1.3.2 Quarterly audit for new settlement agents

Section 51(8)(a) of the SA Act requires a quarterly audit in respect of the trust account(s) of a settlement agent for the first three months during which he first carries on business, and the auditor shall within two months after the end of the first three months deliver to the Commissioner a report of the result of such quarterly report.

Section 51(9) of the SA Act allows the Commissioner discretion to waive the requirement to lodge a quarterly audit. For example the requirement for an initial quarterly audit may be waived if it is due in July, August, September or October because this is close to the date that the annual audit report is due. A licensee may seek to have the quarterly audit waived by application in writing to the Commissioner.



### 1.3.3 Termination audit

Section 70(8) of the REBA Act and section 51(8)(b) of the SA Act requires a termination audit report to be arranged within three months of the agent's triennial certificate ceasing to have effect and submitted to the Commissioner within two months after the end of that three month period. Further information on termination audits is provided in 2.10 below in this document. Section 86 of the REBA Act and section 67 of the SA Act provide that if an agent did not hold or receive moneys for or on behalf of others during the termination audit period, they are able to submit a declaration of no receipt of trust funds. This declaration of no receipt of trust funds can be obtained by contacting the Trust and Audit team within the Department of Mines, Industry Regulation and Safety.

## 1.4 Audit periods

Unless determined otherwise under section 71 of the REBA Act or section 52 of the SA Act, calendar year annual audit reports for real estate and real estate business agents must be lodged by 31 March of each year, while financial year annual audit reports for settlement agents and business settlement agents must be lodged by 30 September of each year.

The audit period for the quarterly audit, and termination audit, vary for each agent and is detailed in 1.3 above.

## 1.5 Late lodgement of audit reports

The Commissioner may, in circumstances the Commissioner considers appropriate, extend the time limit for lodging all types of audit reports, however generally this will only be under exceptional circumstances and where the auditor already has access to the agent's trust account records (section 70(5) of the REBA Act and section 51(5) of the SA Act). If an auditor requires an extension to lodge an audit report, it must be made in writing, detailing the exceptional circumstances, and confirming that the auditor has access to the trust account records.

## 1.6 Auditors independence

The Act and Regulations contain provisions in relation to the independence of the appointed auditor. Section 72(1) of the REBA Act and 53(1) of the SA Act requires agents that the audit is conducted by a registered auditor under Part 9.2 of the *Corporations Act 2001* of the Commonwealth.

Section 72(3) of the REBA Act and section 53(3) of the Act requires an auditor to disclose any de facto relationship or any close relationship by blood or marriage with the agent whose trust accounts he/she has been appointed as auditor. The *Corporations Act 2001* (Cwth) provides for specific requirements in relation to the independence of registered company auditors. Further guidance in relation to an auditor's independence are provided for in the Auditing Standards issued by the Auditing and Assurance Standards Board, which are given legislative force by the *Corporations Act 2001* (Cwth).

## 1.7 Conflict of interests

Section 72(3) of the REBA Act and section 53(3) of the SA Act require auditors to disclose to the Commissioner any factors that may be construed as a conflict of interests. Such factors include close relationships between auditors and the agent based on blood, marriage (including de facto arrangements) or certain business dealings. The Commissioner will consider all circumstances and make a determination as to whether the close relationship disqualifies the auditor. The following definitions are used for such relationships.

- De facto relationship means a relationship as defined in section 13A of the *Interpretation Act 1984*. This includes a relationship between two people of the same or opposite gender. An auditor who enters into a de facto relationship with an agent must disclose that relationship to the Commissioner.
- Close relationship by blood means where the auditor is related to the agent by birth. For example, if an auditor is a parent, sibling, half-brother or half-sister, daughter or son, cousin, aunt or uncle, nephew or niece, of the agent, then this would constitute a close relationship by blood. An auditor with a close blood relationship with an agent must disclose that relationship to the Commissioner.
- Close relationship by marriage means where the auditor and agent are married to each other, or one party is married to a person related to the other party by blood (as defined above). For example, if the auditor married the agent's brother or sister, then this would require disclosure and approval from the Commissioner.

The Commissioner will only consider allowing an auditor who is related to an agent by blood, marriage or de facto relationship to audit that agent's trust accounts in exceptional circumstances, such as when the agent and auditor are in a remote location and the agent cannot find a suitably qualified auditor locally who is independent from the agent. Even in such situations, the circumstances will be carefully examined before a decision is made on whether to allow the auditor to audit the agent's trust accounts. Each situation will be individually assessed.

Section 72(3) of the REBA Act and section 53(3) of the SA Act also require auditors to disclose to the Commissioner any business dealings with agents. There are a number of different types of business dealings that could constitute a conflict of interest. Some examples of conflicts of interest include:

- acting as the general accountant for the agent;
- performing any type of taxation or other financial services for the agent;
- preparing any form of financial documentation (e.g. Business Activity Statements) for the agent;
- supplying any form of general financial advisory service to the agent;
- having a financial interest in the agent's business, including the agent's properties in which the agent also has financial interests;
- being a business partner of the agent, regardless of whether the business interest is related to real estate or settlement;
- being an employee of the agent, whether employed as a licensed person, clerk or servant of the agent;
- being a tenant of a property owned or managed by the agent;
- being a partner, clerk or servant of a company in which the agent has a financial interest; or
- being a partner, clerk or servant of a company or individual that provides a general accounting and/or taxation service to the agent.

An auditor must disclose to the Commissioner any business dealings he/she has with or through an agent at any time during the appointment as auditor. The Commissioner may cancel or suspend the right of a person to act as an auditor or revoke their appointment as auditor to an agent. It is a criminal offence to contravene a requirement to disclose a conflict of interests.

Disclosing a conflict of interests under section 72(3) of the REBA Act and section 53(3) of the SA Act is an ongoing requirement prior to the auditor's appointment and throughout the auditor's appointment period, not one that only arises annually when an audit report is submitted to the Commissioner.

Further information on auditor independence can be found in the *Corporations Act 2001*, APES 110 Code of Ethics for Professional Accountants and various Auditing Standards.

## 2. Scope of Audit of Trust Accounts

### 2.1 Guidance for Auditors

While recognising auditors may use selective testing when auditing trust accounts, there are inherent risks with such an approach. If selective testing is used, it is expected that a range of transactions, indicative of an agent's business, will be examined.

When auditing an agent's trust accounts, it is essential for the auditor to be aware of:

- the nature of the agent's business;
- the workings of trust accounts;
- the reporting requirements and statutory obligations placed on trust accounts and on the agent; and
- the legislation governing agents in respect of the matters being audited.

The purpose of the audit is to establish whether the agent has complied with their legislative responsibilities. In such audits, materiality does not apply. This means every irregularity in an agent's trust account must be reported to the Commissioner. Auditors must report all irregularities within their audit reports regardless of whether they were errors made by an agent or by an agent's financial institution, if the errors were rectified immediately by the agent or their financial institution or if the errors had already been reported by the agent to the Commissioner. Trust account irregularities include but are not limited to overdrawn accounts, dishonoured payments and incorrect deposits or payments made into and out of trust accounts.

When performing an audit, the agent is required to provide the auditor with all relevant information and documents held by them (section 77 of the REBA Act and section 58 of the SA Act). This also applies to relevant documentation held by the agent's financial institution.

Should an auditor identify a breach of legislation or evidence of criminal activity during an audit, they must inform the Commissioner as soon as practicable. To assist in any investigation or proceedings that may eventuate (e.g. giving evidence in court), appropriate supporting documentary evidence of any breaches of legislation or evidence of criminal activity must be retained by the auditor. For this reason, an auditor should make notes throughout the audit and retain copies of all working papers. Auditors are reminded of their obligations in respect to compliance with the Australian Auditing and Assurance Standard in particular, ASA500 - Audit Evidence.

### 2.2 Documents to provide to the Commissioner

The appointed auditor of an agent's trust accounts is required to provide to the Commissioner the following documents each year:

- statutory declaration by auditor (also known as the audit report), including any management letters;
- declaration by the auditor regarding their qualification and relationship with the agent; and
- declaration by the agent, signed by the auditor, verifying the statement of trust money.

## 2.3 Contents of the documents to provide to the Commissioner

The auditor should report on whether the agent has complied with the requirements of section 68 of the REBA Act and section 49 of the SA Act. Section 68(6) of the REBA Act and section 49(6) of the SA Act require agents to keep full and accurate records of moneys paid into trust accounts, and to ensure that trust accounts are correctly balanced at the end of each month. Agents must also keep their trust accounts in such a manner that they can be conveniently and properly audited.

Section 79 of the REBA Act and section 60 of the SA Act relate to the contents of the documents to be provided to the Commissioner. The auditor must include in their statutory declaration a statement relating to the proper maintenance and recordkeeping of the trust accounts. The auditor must notify the Commissioner of any matter they believe should be brought to the Commissioner's attention.

Section 81 of the REBA Act and section 62 of the SA Act require an auditor to fully set out any evidence of the agent behaving dishonestly or breaching the law in relation to trust accounts.

Section 80 of the REBA Act and section 61 of the SA Act require an agent to prepare a statement of trust money on the last day of the accounting period. The accounting period is from 1 January to 31 December each year for real estate and business agents, and 1 July to 30 June for settlement agents, unless otherwise determined by the Commissioner. This statement needs to contain particulars of all trust moneys, negotiable or bearer securities, and deposit receipts held on that date. The statement made by the agent is required to be verified by a statutory declaration made either by the agent, or by one of the partners in the firm, or by the person in bona fide control where the agent is a body corporate. The auditor must examine the statement prepared by the agent and sign it to verify its accuracy.

The agent is required to provide full details of the trust accounts to the auditor, including:

- details of the names, account numbers and financial institution name and branch name where trust accounts are maintained (which also applies to a client's separate interest bearing trust accounts ("IBTA")); and
- the correctly reconciled balances held in each trust account at the end of the audit period.

## 2.4 Important items to consider

When auditing an agent's trust accounts, the auditor needs to include the following important items in the scope of the audit, as they form an integral part of real estate, business broking or settlement transactions:

- details of the licence and triennial certificate status of the agent;
- level of fees paid to the agent;
- drawing of commission and fees after a transaction has settled;
- the authority for the agent to perform the service; and
- details of disbursements in accordance with the client's authority.

## 2.5 Licence and triennial certificate of the agent

A real estate and business agent or settlement agent licence can be granted to a natural person (individual), a firm (partnership) or a body corporate (company). The entity is referred to as the 'licensed agent' in the documents to be provided to the Commissioner. In order to trade as a real estate agent, business broker or settlement agent, a licensee must also hold a current triennial certificate.

The person in *bona fide* control of an agency, as well as the managers of any branches it may have, must also be licensed and must hold a current triennial certificate. If there is a change to the person in bona fide control or in the directorship of a company, the agent must notify the Commissioner within one month of the change.

Subject to the agreement between partners, a partnership is dissolved on death or withdrawal of a partner (*Partnership Act 1895*). If a partnership is dissolved, the licence ceases to have effect and the firm is no longer permitted to continue trading and will need to apply for a new licence.

Licence details of agents can be searched from the department's website through the Consumer Protection Licence and Registration Search. [Licence and registration search](#).

If the auditor finds any irregularities relating to the agent's licence or triennial certificate, **the auditor must inform the Commissioner immediately**, as the agent may be trading unlawfully without a licence or a current triennial certificate or the agent may be trading under a business name that is not endorsed on the triennial certificate.

## 2.6 Level of fees

The level of fees that an agent can charge is not regulated in Western Australia. The fees an agent can receive are limited to that agreed in writing between the agent and their client. While the level of fees is primarily a matter between the agent and the agent's principal, a real estate agent must have a valid appointment to act (section 60 REBA Act) and cannot charge an unjust fee (section 61(3c) of the REBA Act). A settlement agent must have a valid appointment to act and must have provided the client with a *bona fide* estimate of the cost of the services (section 43 of the SA Act).

During the audit process, the auditor should examine a sample of different types of transactions from start to finish ensuring the agent has received the correct fees. Types of transactions undertaken by real estate agents and business agents include residential property sales, business sales, commercial leasing, residential property management and strata management. If the agent does not have an *appointment to act* from the client or has charged fees in excess of the agreed amount, the auditor must include this in the report to the Commissioner.

## 2.7 Drawing of commission and fees

Real estate agents and business agents are not entitled to receive fees for a real estate or business sales transaction until the settlement has occurred. When sampling these transactions, the auditor must check the real estate agent or business agent has not pre-drawn their commission. The appointment to act may provide that when there is failure to settle the transaction due to the fault of the agent's client, the real estate agent and business agent may be entitled to receive their fees. Auditors should contact Consumer Protection for clarification on these matters.

Real estate agents and business agents are not entitled to receive any fees for residential, commercial or strata management transactions until these services are performed in accordance with the appointment to act. If the real estate agent or business agent has drawn their fees before settlement, or if a management or service fee is charged contrary to the appointment to act, the auditor must include this in the report to the Commissioner.

If the real estate agent or business agent is obtaining vendor-paid advertising, the appointment to act should specify how and when moneys are to be collected and the maximum amount which the principal has agreed to pay (refer to rule 20 of the Code of Conduct). It is important that the real estate agent or business agent deposits money received for advertising into a trust account and that such money should not be withdrawn until the expense has been incurred.

## 2.8 The authority for the agent to perform the service

Real estate agents and business agents are required to have an appointment to act to perform a real estate, business or strata management transaction. This includes but is not limited to any property or business sale/purchase, residential, commercial or strata management property transaction.

If the real estate agent or business agent does not have a valid appointment to act from their client to perform a service, then the real estate agent or business agent is not entitled to receive any remuneration for the service performed. The auditor must include this in the report to the Commissioner if any such instances occur.

This is the same for a settlement agent in that he/she is not entitled to receive any reward in respect of his/her services in that capacity unless he/she has a valid appointment to act in that capacity which is in writing signed, before the services are rendered, by the party to the transaction for whom the services are to be rendered.

## 2.9 Charging actual disbursements in accordance with principal's authority

Agents are required to have an appointment to act to charge disbursements to their client and must have incurred those costs before they can be charged. The auditor should check that those costs have actually been incurred prior to the agent charging the disbursement.

For example, in property management transactions, a real estate agent's trust account software may initiate quarterly property inspection payments from the trust account to the real estate agent's general account by default, even though the service may not have been performed. The auditor should not assume the service was carried out, unless they see a property inspection report for the property. Another example includes where an agent incorrectly charges labour for photocopying as a disbursement.

As agents are holders of trust money, government statutory charges (such as GST) may be recovered from the agent's client as a disbursement. An authority from the agent's client is required to recover these charges. The auditor must include in the report to the Commissioner situations in which an agent does not have a valid appointment to act and charges a disbursement, or does have an appointment to act but charges in excess of the actual expenditure incurred.

## 2.10 Termination audit

In cases where an agent's triennial certificate ceases to have effect, by way of surrender, cancellation or the non-renewal of the agent's triennial certificate, or if the sole trader agent dies and three months have passed, or if a partnership is dissolved, auditors are required to provide a termination audit report to the Commissioner within five months of the agent's triennial certificate ceasing to have effect. The termination audit requirement must be read in conjunction with Part VI of the REBA Act and Part IV of the SA Act, detailed in the Introduction section of this guide.

The termination audit period commences from the previous annual audit report date and ends on the date that the agent's triennial certificate ceases to have effect. The agent must ensure that all previous annual audit reports or statutory declarations have been submitted and accepted by the Commissioner.

If at the date that the agent's triennial certificate ceases to have effect the agent holds an open trust account with or without funds, the agent will need to finalise all transactions and close all of their trust accounts to prepare for a termination audit.

After closing all trust accounts, if the agent held or received money for or on behalf of others during the termination audit period, the agent must cause a termination audit to occur. If however the agent did not hold or receive money for or on behalf of others during the termination audit period, instead of a termination audit report, the agent may submit a final statutory declaration.

An auditor must disclose within their termination audit report if they discover that the agent was trading while they did not hold a current triennial certificate.

An auditor may request an extension from the Commissioner to submit their termination audit report under exceptional circumstances pursuant to section 70(5) of the REBA Act and 51(5) of the SA Act. Please refer to paragraph 1.5 in respect to late lodgement of audit report if an extension request is not received or further details.

Agents who wish to surrender their licence and triennial certificate can undertake the following steps.

- Cease trading and advise Consumer Protection's Licensing Branch within 14 days of ceasing to trade.
- Finalise all transactions (deposits and payments to and from their trust account(s)) within the period of three months from the date agent ceased to trade. Any trust money remaining in the trust account after the three-month period may be disbursed to another agent's trust account or a solicitor's trust account provided there is written consent from the parties whom the money belongs. Failing this the trust moneys should be paid to the unclaimed monies clerk at the Department of Treasury. Close their trust accounts and advise Consumer Protection's Trust and Audit Team within five business days of closing their trust accounts.
- Surrender their licence and triennial certificate by contacting Consumer Protection's Licensing Branch; and
- Arrange and submit a termination audit or a final statutory declaration if they did not receive and/or hold trust account moneys during the termination audit period to the Commissioner within 5 months of the date that they surrendered their licence and triennial certificate.

Under section 70(2) of the REBA Act and section 51(2) of the SA Act, the Commissioner requires audit reports to include a copy of any management letter that an auditor provided to the agent.

## 2.11 Key legislative provisions

Listed below are key legislative provisions auditors need to be aware of when auditing trust accounts. (See **Appendix C** for the full text of the legislation.)

Description	Legislative Reference
Agents to be licensed	Section Section 26 of the REBA Act Section 26 of the SA Act
Entitlement to commission	Section 60 of the Act Section 43 of the SA Act
Trust accounts	Section 68 of the REBA Act Section 49 of the SA Act
Person may request separate trust account	Section 68A of the REBA Act Section 49A of the SA Act
Payment of interest on trust accounts	Section 68B of the REBA Act Section 49B of the SA Act
Consumer Protection to be given certain information about trust account	Section 68C of the REBA Act Section 49C of the SA Act
Agent's duties for moneys received and accounting	Section 69 of the REBA Act Section 50 of the SA Act

Description	Legislative Reference
Duty of agent to have trust accounts audited	Section 70 of the REBA Act Section 51 of the SA Act
Variation of audit date	Section 71 of the REBA Act Section 52 of the SA Act
Qualification and approval of auditors	Section 72 of the REBA Act Section 53 of the SA Act
Appointment of auditor	Section 73 of the REBA Act Section 54 of the SA Act
Audits of business carried on at more than one place	Section 74 of the REBA Act Section 55 of the SA Act
Duties of agents to their auditors	Section 77 of the REBA Act Section 58 of the Act
Duty of banker with respect to audit	Section 78 of the REBA Act Section 59 of the SA Act
Contents of an audit report	Section 79 of the REBA Act Section 60 of the SA Act
Statement of moneys etc. held by agent on trust	Section 80 of the REBA Act Section 61 of the SA Act
Auditor's report where agent has not complied with Act, etc.	Section 81 of the REBA Act Section 62 of the SA Act
Auditor's duty of confidentiality	Section 82 of the REBA Act Section 63 of the SA Act
Penalty for breach	Section 84 of the REBA Act Section 65 of the SA Act
Auditor's remuneration	Section 85 of the REBA Act Section 66 of the SA Act
Agents with no trust accounts to audit	Section 86 of the REBA Act Section 67 of the SA Act
Trust accounts of firm or body corporate or agent with branch office	Section 87 of the REBA Act Section 68 of the SA Act
Commissioner may call for trust account audits	Section 88 of the REBA Act Section 69 of the SA Act
Commissioner's powers to obtain information about trust accounts	Section 100A of the REBA Act Section 81A of the SA Act
Trust accounts must be correctly designated	Regulation 6D of the REBA Regulations Regulations 6B of the SA Regulations
Requirements for separate accounts	Regulation 6E of the REBA Regulations Regulation 6C of the SA Regulations
Contents of receipts by agents	Regulation 6G of the REBA Regulations Regulation 6E of the SA Regulations
Receipt recordkeeping by agents	Regulations 6H of the REBA Regulations Regulations 6F of the SA Regulations
Restriction on agent's fees	Rules 19 and 18 of the REBA Code of Conduct
Client must agree to pay for agent's expenses	Rule 20 of the REBA Code of Conduct



## 3. Trust Accounting Requirements

### 3.1 Trust accounts – real estate agents and business agents

The three general types of trust accounts used in the real estate and business broking industries that an auditor will come across are:

- general trust accounts;
- variable outgoings trust accounts; and
- interest-bearing trust accounts for individual clients.

### 3.2 Trust accounts – settlement agents and business settlement agents

The two general types of trust accounts used in the settlement industry that an auditor will come across are:

- general trust accounts; and
- interest-bearing trust accounts for individual clients.

Whatever the type of trust account audited, the money in those accounts is not to be used for security or for other purposes other than a purpose authorised by the authority to act, contract or by law.

### 3.3 General trust account

A trust account is often referred to as the general trust account. The REBA and SA Acts allow agents to maintain more than one trust account. Accordingly, some real estate agents and business agents maintain separate general trust accounts for different real estate activity, such as sales and property management. Interest from such accounts is paid by the financial institution to the Real Estate and Business Agents Interest Account established under the REBA Act and administered by the Director General of the Department of Mines, Industry Regulation and Safety.

Some settlement agents and business settlement agents maintain separate general trust accounts when they have a large number of transactions with a client on a development project and consider this more manageable. Interest from such accounts is paid by the financial institution to the Settlement Agents Interest Account established under the SA Act and administered by the Director General of the Department of Mines, Industry Regulation and Safety.

### 3.4 Tenancy bond trust accounts

#### 3.4.1 Residential tenancy bonds

Tenancy Bond Trust Accounts are now obsolete following the amendments introduced by the RT Act. It is a requirement that all residential tenancy bonds be lodged and held with the Bond Administrator.

However, if a real estate agent receives a bond or a partial payment of a bond, they must deposit the bond moneys in the agency's trust account (e.g.: general trust account) then transfer the bond moneys to the Bond Administrator as soon as practicable and in any event within 14 days of receiving the bond.

### 3.4.2 Commercial tenancy bonds

The REBA Act requires that real estate agents and business agents deposit commercial tenancy bonds into a trust account. They may use their general trust account or, if they receive a written request, may open a separate interest bearing trust account for the individual client. The interest bearing trust account requirements of a transaction, detailed in regulation 6E(1) of the REBA Regulations and regulation 6C of the SA Regulations, involving more than \$20,000 or the settlement period of more than 60 days in paragraph 3.6 below do not apply to commercial tenancy bonds. However, the agent is still required to adhere to section 68A of the REBA Act and section 49A of the SA Act prior to maintaining commercial tenancy bonds within a separate interest bearing trust account for the individual client. Further information on separate interest bearing trust accounts are provided in paragraph 3.6 below.

### 3.5 Variable outgoings trust account

Auditors are required to audit trust accounts that are maintained by real estate agents and business agents to pay various expenses incurred. Variable outgoings trust accounts are widely used in the areas of strata management and commercial tenancy.

### 3.6 Interest bearing trust accounts established for individual clients

Section 68A of the REBA Act and section 49A of the SA Act allow agents to open separate interest bearing trust accounts for individuals if a request is received in writing from the person paying the money. Before agents can comply with a request for an individual interest bearing trust account, the commercial bond or purchase deposit must either involve more than \$20,000 or the transaction is not to be settled within 60 days (regulation 6E(1) of the REBA Regulations and regulation 6C of the SA Regulations).

Regulation 6D(3) of the REBA Regulations requires the title of an individual interest bearing trust account to include the words 'REBA Trust Account – IB'. The 'IB' component of the designation denotes that the account is interest bearing. Interest paid on the account should be credited to the person who requested the creation of the account.

Regulation 6B(3) of the SA Regulations requires the title of an individual interest bearing trust account to include the words 'SA Trust Account – IB'. The 'IB' component of the designation denotes that the account is interest bearing. Interest paid on the account should be credited to the person who paid the money (i.e. commercial tenant or buyer).

The auditor must include in the audit report to the Commissioner information as to whether an agent is found to have:

- opened a separate interest bearing trust account without receiving a request in writing from the person paying the money; or
- opened a separate interest bearing trust account when the money received is/was less than \$20,000 or settlement has occurred or will occur in less than 60 days.

The auditor must list and audit each separate interest bearing trust account of the agent in the audit report to the Commissioner whether opened, closed or maintained for part of the period.

### 3.7 Auditing considerations

Agents need to keep their trust accounts up-to-date, correctly designated and have them audited when required in accordance with section 70(1) of the REBA Act and section 51(1) of the SA Act. Every agent who holds a triennial certificate and provided that they also hold or receive money on behalf of others, is required to maintain one or more trust accounts in accordance with section 68(1) of the REBA Act and section 49(1) of the SA Act.

An agent must not allow a trust account to be overdrawn, either at the bank, in the agent's records or in a client's trust ledger account. The auditor is required to mention any such instances in the audit report to the Commissioner regardless of the amount that the trust account is overdrawn by, whether it was overdrawn due to an error made by the agent or the agent's authorised financial institution (further details in 4.6).

### 3.8 Designation of trust accounts

Regulation 6D of the REBA Regulations and regulation 6B of the SA Regulations require an agent to designate their trust accounts in a prescribed manner. The auditor needs to check whether the agent has applied the correct title/s to the trust account(s).

In recent years, issues have arisen in the titling of trust accounts resulting from character limitations with the financial institution systems being unable to include all of the details required in a trust account title (licensee name, business name, TC #, etc.). This is mainly exacerbated where licensees have lengthy names, which are operating as a trustee of a trust and to a greater extent where separate interest-bearing trust accounts are set up at the request of a client (and must therefore include that client's potentially lengthy name, in addition to all other details. Often ITF is used to shorten (*"in trust for"*) followed by the client name. This is not correct as Regulation 6D(3) (c) expressly requires that the title "include the words *"in trust for"*". Therefore, the full words *"in trust for"* must be included in the title.

Both the REBA Act and SA Act does not recognise trusts, as they are not a legal entity. For the purposes of Regulation 6D(3) and SA Regulation 6B(3) expressly requires that an entity's full legal name is prescribed. It important to note that where the holder is a company (ABC Pty Ltd), the holder may carry on business in its own right, or may do so as a trustee of a trust and in either case, the holder of the licence (and therefore the triennial certificate) is the company. This is why the department's system treats this as a ABC Pty Ltd t/as ABC Realty and not *"ABC Pty Ltd ATF..."*.

Therefore, in this situation the capacity in which the holder subsequently carries on business either in its own right or as a trustee it is not material as trustees are not distinct legal persons in a representative capacity, separate from themselves in their personal capacity.

To assist auditors, examples of how different types of trust accounts should be designated including an example of how to are provided below.

#### 3.8.1 General trust accounts

The titles of General Trust Accounts need to:

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

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

<b>Sole trader</b>
Mary Smith T/A XYZ Real Estate
REBA Trust Account TC54321
<b>Partnership</b>
Mary Smith and Bill Jones T/A XYZ Real Estate
REBA Trust Account TC54321
<b>Body corporate</b>
ABC Pty Ltd T/A XYZ Real Estate
REBA Trust Account TC54321
* If applicable

Should an agent have more than one type of trust account (i.e. sales, rental etc.), the account identifier should appear after the words 'REBA Trust A/c'. The examples below show typical account titles for an agent maintaining more than one trust account.

ABC Pty Ltd T/A XYZ Real Estate
REBA Trust Account– Sales TC12345
Or
ABC Pty Ltd T/A XYZ Real Estate
REBA Trust Account– Rental TC12345
Or
ABC Pty Ltd T/A XYZ Real Estate
REBA Trust Account– Strata TC12345

**Examples of titles for typical general trust accounts for settlement agents are shown below:**

<b>Sole trader</b>
Mary Smith T/A XYZ Settlements
SA Trust Account TC54321
<b>Partnership</b>
Mary Smith and Bill Jones T/A XYZ Settlements
SA Trust Account TC54321
<b>Body corporate</b>
ABC Pty Ltd T/A XYZ Settlements
SA Trust Account TC54321
* If applicable

### 3.8.2 Interest bearing trust accounts

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

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

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

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

The following example shows a title that has been abbreviated from:

Bronsen Tyler (WA) Pty Ltd As Trustee for the Bronsen Tyler Unit Trust t/as Bronsen Tyler (Western Australia) ITF Department of Transport REBA Trust Account – IB TC 123 to:

Bronsen Tyler (WA) Pty Ltd t/as Bronsen Tyler (Western Australia) in trust for DT REBA Trust Account – IB TC 123
Bronsen Tyler (WA) Pty Ltd t/as Bronsen Tyler (Western Australia) in trust for DT SA Trust Account – IB TC 123

### 3.9 Trust account reconciliations

A trust account reconciliation is a reconciliation of the trust account Bank Statement to the Trust Ledger Cash at Bank Account, which is either performed manually or computerised. Section 68(6) (d) of the REBA Act and section 49(6)(d) of the SA Act require agents to “correctly balance the accounts at the end of each month”. This is often confused by all agents. What it means is that the trust account reconciliation is conducted up to the last day of each month.

In accordance with the Consumer Protection trust account policies an agent is required to reconcile the trust account within 10 days from the last day of each month. Any adjustments must be cleared by the following month.

The person in bona fide control must sign the bank reconciliation statement to verify that all items entered in the cashbook have been reconciled to the trust bank account and the individual ledger balances in the trust account.

## 4. Problem Areas Identified by Consumer Protection

Consumer Protection has identified a number of common problem areas in auditors' reports. Auditors need to be aware of these problem areas to ensure their audit reports meet the requirements of the REBA Act and SA Act and are prepared in accordance with the auditing guidelines. In accordance with section 81 of the REBA Act and section 62 of the SA Act, auditors must report all cases of non-compliance to Consumer Protection.

### 4.1 Use of buffer funds by agents and undrawn commission

The trust ledger is the most important component of the trust accounting system as it summarises all of an agent's trust account transactions. The trust ledger contains a ledger account for each client showing the details and amounts of money held by the agent on their clients' behalf.

Consumer Protection is aware some agents would prefer to maintain a surplus amount within the trust ledger to absorb any inadvertent deficiencies that may arise from dishonoured bank cheques and bank charges. This is commonly known as a 'buffer fund'. A buffer fund sometimes includes undrawn commissions. Agents should not continue to maintain undrawn commissions in the trust account and these commissions should be deposited into general accounts upon settlement. Auditors should disclose within the audit report instances where the agent maintained undrawn commissions within the trust account.

The Commissioner holds the view that agents who utilise buffer funds in their trust accounts may not be conducting their business in accordance with the REBA Act or SA Act, particularly in relation to section 68 of the REBA Act and section 49 of the SA Act. It is the Commissioner's interpretation of sections 67 and 68(1) of the REBA Act and sections 48 and 49(1) of the SA Act that, only funds received for or on behalf of others in relation to a real estate or settlement transaction should be held or received in an agent's trust account.

The use of buffer funds effectively masks any deficiency, disguises overdrawn trust accounts and reduces the likelihood that poor trust account management practices and other errors will be easily identified. **Buffer funds must not be kept in the trust account.** The auditor must request from the financial institution records of all trust accounts identified as holding buffer funds. Should the auditor identify buffer funds being maintained by an agent, the auditor must disclose this within the audit report.

### 4.2 Use of suspense accounts to maintain unidentified deposits

Many agents utilise suspense accounts (either a trust account held in the bank or trust account ledgers in their accounting software). These suspense accounts are set up to hold and / or receive moneys, usually by electronic funds transfers, for which the agents cannot determine the purpose of the moneys. For example, when the payer of the moneys fails to provide sufficient reference details as part of their electronic funds transfer, the agent would hold the moneys within a suspense account until the purpose is determined.

The payers can include but may not be limited to sellers, buyers, landlords, and tenants.

In recent times, the department has noticed moneys in trust accounts that have not been trust moneys resulting from real estate or real estate business transactions. The trust accounts have held moneys such as proceeds of crime; moneys belonging to the Australian Taxation Office; Centrelink and clearing houses. In all these situations, the agent is holding moneys that do not belong in the trust account. Agents must ensure that the trust account is maintained exclusively for the purposes of the REBA Act and the SA Act.

Only moneys held for or on behalf of others in relation to a real estate or settlement agent transaction should be held or received into an agent's trust account. When an agent receives moneys for which they cannot determine the purposes of the moneys, the agent will need to make the relevant inquiries to identify the purposes.

If the agent is still unable to identify the moneys received within their trust account and all enquiries and efforts have been exhausted by the agent, the agent may need to consider notifying the Department of Treasury, in accordance with the *Unclaimed Money Act 1990*. Section 13(1) of the *Unclaimed Money Act 1990* provides that agents may pay the unclaimed moneys within their trust account to the Department of Treasury within 2 years after the money has been held. Agents are advised to liaise with the Department of Treasury for information on their timelines and procedures relating to the payment of unclaimed moneys.

The agent can continue to reconcile their trust accounts on a monthly basis, regardless of the unidentified deposit amounts. Agents may need to consider changes in their procedures to require payers to provide reference details which would assist in identifications and at the time of entering a management agreement, they could request from the owners the names of all persons who may be depositing money into the trust account for payments relating to the property.

The auditor must ensure that they examine all suspense accounts and disclose amounts that have remained in the trust account for a significant period. The auditor must request from the financial institution records of all trust accounts identified as suspense accounts. The auditor must also provide comments within the audit report on all transactions originating and / or emanating from suspense accounts. During the course of an investigation, the department has identified fictitious deposits being created in the trust account so that a payment can be drawn against an owner account. To avoid this situation the licensee should verify the listing of the trust account balances and then check the balance of each account to ensure that they agree. Both, the auditor and the agent should check all items in the suspense accounts and should correct them immediately.

### 4.3 Client's trust ledger account in debit

An agent must not allow a client's trust ledger to be overdrawn. The auditor is required to report any debit balance identified in a client's trust ledger account. If the debit balance has been dealt with by the department during the course of the year the auditor is still required to report the matter in the audit report to the Commissioner. To avoid a debit balance the agent should check all the items in the ledger accounts to ensure there is sufficient funds in the account before drawing the funds. The agent should also check that the receipts posted to the ledger account are not fictitious. Unclaimed moneys in trust account.

In accordance with section 8(1) of the *Unclaimed Money Act 1990*, agents who are in possession of unclaimed money on 31 December of any year must notify the Department of Treasury of this money (in the prescribed manner), not later than 31 January in the succeeding year. In the event that the money (which is notified to the Department of Treasury as unclaimed) is subsequently paid to the rightful owner, the agent must notify the Department of Treasury by 31 July of this payment. The auditor must check that the agent is notifying the Department of Treasury by 31 January of all unclaimed money.

Further information on unclaimed moneys, including timelines and notification forms, for lodging moneys with the Department of Treasury can be found on their website. <http://www.treasury.wa.gov.au/Unclaimed-money/Lodging-Monies-with-Treasury/>.

### 4.4 Errors in statutory declarations

Many agents appear not to understand the importance of a statutory declaration in an audit report. Section 80 of the REBA Act and section 61 of the SA Act require an agent to prepare a statement of trust money on the last day of the audit period. The statement made by the licensee is required to be verified by a statutory declaration made either by the agent, or by one of the partners in the firm, or by the person in *bona fide* control where the agent is a body corporate. The auditor must examine the statement prepared by the agent and sign it to verify its accuracy.

## 4.5 Delay in banking of trust money by agents

Section 68(1) of the REBA Act and section 49(1) of the SA Act require agents to deposit funds held on behalf of others into their trust account as soon as practicable.

In order to comply with this requirement, it is the view of the Commissioner that funds must be deposited by close of business of the next working day. When conducting an audit it is important to verify banking times and to report any delays to the Commissioner.

## 4.6 Failure of agents to report when a trust account is overdrawn

Section 68C(3) of the REBA Act and section 49C(3) of the SA Act require the agent and the authorised financial institution to advise the Commissioner, as soon as practicable, in writing, if a trust account at the authorised financial institution is overdrawn. The Commissioner's view is "as soon as practicable" will mean that the report will be provided within five working days. Some agents are not doing this when their trust accounts become overdrawn due to errors made by their authorised financial institutions or if the agent subsequently corrected the errors. As a probity check, the auditor is to include details of every instance of debit balances occurring in the agent's trust accounts in their audit report. The audit report should include details of any trust account money overdrawn from the authorised financial institutions.

## 4.7 Incomplete audits

### *Auditors not identifying the licensed entity correctly*

The agent (and person in bona fide control and licensed director or partner) must have a licence and current triennial certificate, and must be trading in accordance with that certificate.

### *Auditors not identifying and reporting trust account titles correctly*

Auditors must check that trust accounts are correctly designated in accordance with regulation 6D of the REBA Regulations and regulation 6B of the SA Regulations (refer to the section 'Designation of trust accounts' for examples). The full trust account titles should always be included in the audit report. (See Appendix B for a guide to how this should appear in 'Example of statement of trust account money held'.)

The auditor should ensure the agent has included their triennial certificate number in the title of the trust account. These identifying details are used by the department in its interest reconciliation program.

Auditors should qualify the audit report if the trust account is not correctly designated as a REBA Trust Account or a SA Trust Account.

### *Auditors not checking trust account reconciliations*

Some auditors do not check whether the agent has correctly balanced the trust accounts at the end of each month in accordance with section 68(6) of the REBA Act or section 49(6) of the SA Act. Auditors must check that trust account reconciliations are correctly completed for all trust accounts including separate interest bearing trust accounts, signed and dated by the person in bona fide control of the business. References made to 'unreconciled bank deposits' in trust account reconciliations may indicate a deficiency in the trust account funds at the bank and such instances must be reported to the Commissioner.



### *Auditors giving insufficient information in qualified audit reports*

The Commissioner requires auditors to provide detailed information whenever a qualified audit report is submitted. The auditor must also retain any evidence in the working papers to support their opinion and, if required, to give evidence in court. Qualified audit reports can indicate a lack of internal controls on the part of the agent or the possibility of defalcation.

Auditors not reporting long-standing ledger accounts with un-presented cheques.

Check that the un-presented cheques have been followed up on a regular basis. Make sure that at the end of each month any un-presented cheque holders have been contacted and reminded to deposit their cheque. Any lost cheques should be cancelled and re-issued.

### *Management letter not being submitted with the audit report*

The Commissioner requires the auditor to attach to the audit report a copy of any management letter issued to the agent. A copy of the management letter is important as it indicates any weaknesses or suggestions for improvements of the system in place. It also indicates the quality and detail of the audit undertaken.

### *Documentation submitted with audit reports not in an approved format*

Section 70(2) and (3) of the REBA Act and section 51(2) and (3) of the SA Act provide the Commissioner with authority to determine the requirements for auditing of trust accounts, including the format of audit reports. Some declarations made by the auditor and agent must be in the form of a statutory declaration. An auditor is required to submit the audit reports to the Commissioner using the approved format. Approved templates are provided in Appendix A and can be downloaded from the department's website at [Auditors](#).

### **Auditor unable to complete audit due to agent not providing trust books and all papers, accounts, documents and securities**

Where an auditor is frustrated from completing an audit report due to the agent not producing all books and all papers, accounts, documents, and securities pursuant to section 77(1) of the REBA Act and section 58(1) of the SA Act the auditor has no choice but to complete an interim report to the Commissioner in accordance with section 70(6) of the REBA Act and section 51(6) of the SA Act. These sections require the auditor to deliver an interim report to the Commissioner if at any time he/she discovers any irregularity in the trust accounts of the agent or discovers any other matter in respect of those accounts which the auditor considers should be reported to the Commissioner verified by a statutory declaration and deliver a copy of the report to the agent.

## **4.8 Off-the-Plan" Properties**

If an agent is appointed to settle properties that have been sold "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.

### **4.8.1 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 seller'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.

#### 4.8.2 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, avoid the sale, in which case all moneys, including the deposit, shall be recoverable by him 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 that 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 \$1,000.

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.

Settlement 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.

Where any uncertainty exists, the settlement agent can contact the Department for general advice, and for further information should obtain their own independent legal advice.

## 5. Trader Intervention Program – Compliance checks at regulated person's business premises

The Commissioner has powers under the Fair Trading Act 2010 (FTA) to instruct investigators to conduct unannounced compliance visits on regulated participants, namely real estate and business agents and settlement agents. Investigators engaged in conducting the unannounced compliance visits have access to powers under Section 88E of the FTA.

Section 89(2A) and (2) of the FTA prohibits any person from obstructing an authorised person in their exercise of Section 88E of the FTA Act, and reads in part as follows:

### *Sub-Section 2A*

A person must not prevent or attempt to prevent an authorised person from entering business premises in the exercise of the authorised person's powers under section 88E.

Penalty: a fine of \$2 000.

### *Sub-section 2*

A person must not obstruct or impede an authorised person in the exercise of the authorised person's powers under section 69 or 88E.

Penalty: a fine of \$2 000

If during the course of the visit, the investigators identify apparent breaches that the auditor has not brought to the attention of the Commissioner, the matter will be investigated and the auditor will be requested to provide a reason for the omission of the breach in the audit report. Should a satisfactory reason not be supplied by the auditor, the Commissioner may report the matter to the auditor's professional body.

Should the breach or omission by the auditor be of a serious nature, the Commissioner, if in his or her opinion just cause exists for doing so, will cancel or suspend the right of that person to act as auditor, or may vary or revoke any other approval, direction permission or authority granted or given by the Commissioner pursuant to section 75(a)-(b) of the REBA Act or section 56(a)-(b) of the SA Act. The Commissioner may report the auditor to the Australian Securities and Investment Commission

## 6. Example of an Audit Checklist

This checklist will assist auditors when auditing trust accounts that have been opened, maintained and/or closed by agents. The checklist deals with general matters and trust account matters.

**Important note:** This checklist includes a range of matters auditors should consider when auditing an agent's trust accounts. Do not treat the checklist as being comprehensive or a replacement for the auditing requirements contained in the *Australian Auditing Standards*.

### 6.1 Part 1 - General Matters

Audit Checklist	
Item	Checks to be conducted
<p><b>Licence of the dealer</b></p> <p>Section 60(1)(a) of the REBA Act and section 26(1) of the SA Act</p>	<p>The agent is licensed and the holder of a current triennial certificate.</p> <p>Identify the person in bona fide control (where relevant).</p> <p>Identify the people who comprise the business.</p> <p>Identify the branch manager of any branch offices maintained.</p>
<p><b>Register of files</b></p> <p>Section 68(6) of the REBA Act, regulation 6H of the REBA Regulations and section 49(6) of the SA Act and regulation 6F of the SA Regulations.</p>	<p>Check that records are properly maintained and can be conveniently and properly audited.</p> <p>Check that records are being maintained for a minimum of 6 years.</p>
<p><b>Summary of receipts and disbursements attached to each file</b></p> <p>Section 23G(3) of the Act.</p>	<p>Check that full and accurate records of receipts and payments are maintained. A summary of receipts and disbursements on each file assists in the auditing function.</p> <p>The agent can also ensure any expenses incurred are recouped. The balance outstanding on the file summary should reconcile to the amount held in trust for the principal.</p>
<p><b>Drawing of fees, commission and timing</b></p> <p>Section 60 and 61(4) of the REBA Act and section 43 of the SA Act</p>	<p>Check the agent is entitled to receive payment of their commission or fees i.e. they are licenced and validly appointed.</p> <p>Check the agent is entitled to receive payment of their commission or fees i.e. settlement has occurred or the service has been performed.</p>
<p><b>Remuneration of agent</b></p> <p>Section 61 of the REBA Act and section 43 of the SA Act</p>	<p>Check fees charged are in accordance with the fees agreed between the principal and the agent.</p> <p>Check only the actual costs are recouped for postage and petty expenses such as telephone calls, faxes and GST.</p>

Audit Checklist	
Item	Checks to be conducted
<b>Support for expenses</b>	Check that documentation is maintained on the client's file for any fees charged (e.g. rates and taxes, title searches, faxes and phone calls).
<b>Valid appointment to act</b>  Section 60 of the REBA Act and section 43 of the SA Act	<p>The agent has a valid appointment to act in writing signed by the person for whom the services are being provided (sub section 60 (1) and (2) of the REBA Act and sub section 43 (1) and (2) of the SA Act).</p> <p>The appointment clearly identifies the property, e.g. address of property, title details (section 60(2)(a)(ii) of the REBA Act and section 43(2)(a) of the SA Act).</p> <p>A true copy of the appointment to act has been given to the signatory (section 60(2)(c) of the REBA Act and section 43(2)(c) of the SA Act).</p> <p>The appointment must include a statement explaining commission charges are not pursuant to any scales fixed by law and are to be agreed upon between the parties. This statement must be placed immediately before any statement outlining any agreed commission charges (regulation 6BA(2) of the REBA Regulations).</p> <p>Where the agreed commission or reward to be paid to the agent is expressed in percentage terms, the basis on which the percentage is calculated is set out clearly e.g. 3 per cent or \$3,000 (regulation 6BA(1)(a) of the REBA Regulations).</p> <p>Where the calculation of remuneration depends on the use of certain services (e.g. property management services), the appointment to act shall provide a full explanation of the nature of the services provided e.g. gross rent, gross collections, letting fee for those services (regulation 6BA(1)(c) of the REBA Regulations).</p> <p>Where the agreed commission, reward or other valuable consideration in a sale transaction is expressed in hourly, weekly or periodic rates, the maximum sum payable is also expressed as a monetary amount e.g. \$500 per week to a maximum of \$3,000 (regulation 6BA(1)(b)(ii) of the REBA Regulations).</p> <p>Where any expenses are to be recovered by the agent, they must specify the nature of those expenses and clearly set out the method by which those expenses will be calculated. (regulation 6BA(1) (d) of the REBA Regulations)</p>

Audit Checklist	
Item	Checks to be conducted
<p><b>Valid appointment to act</b></p> <p>Section 60 of the REBA Act and section 43 of the SA Act</p>	<p>The appointment to act must contain a statement in plain language to the effect that the principal may seek assistance from the Commissioner for Consumer Protection if he/she has a dispute with the agent in relation to fees (regulation 6BA(3) of the REBA Regulations).</p> <p>The appointment to act is signed, states the agent's commission, reward or valuable consideration for a service and this must be initialled on the agreement by the principal (vendor/landlord) (rule 19 of the REBA Code). Any expense that the agent has incurred in respect of advertising, signboards, printed material and promotions must be stated in the appointment to act specified as a maximum amount, which the agent may seek as reimbursement; and initialled by the vendor/landlord (rule 20 of the REBA Code).</p>
<p><b>Security of documents</b></p>	<p>Ensure the agent maintains adequate security over documents and data. (How secure are the agent's records from fire, theft, etc.? Does the agent do regular computer back-ups and where are the back-ups kept?)</p>
<p><b>Verification of identity of property owners – agents due diligence obligations</b></p> <p>Rule 25 of REBA Code</p>	<p>Conduct a sample check to ensure agents fulfil their due diligence obligations. Has the agent made all reasonable efforts to verify the identity of the person who claims to be, or act for the person selling the real estate (i.e. has the seller been verified as the lawful owner of the property or as having the legal authority to deal with the property on behalf of the lawful owner)? If the agent has become aware of any fact material to a transaction, has the agent promptly communicated that fact to any person who may be affected by it?</p>

## 6.2 Part Two - Trust Accounting

Audit Checklist	
Item	Checks to be conducted
<p><b>All trust accounts audited</b></p>	<p>Obtain independent confirmation from the agent's financial institution by way of a bank confirmation letter for all trust accounts, negotiable or bearer securities and deposit receipts held by the agent at any time during the audit period.</p> <p>All trust accounts, including separate interest bearing trust accounts for clients, need to be examined.</p>

<b>Audit Checklist</b>	
<b>Item</b>	<b>Checks to be conducted</b>
<b>Title of trust account</b>	<p>Check trust accounts are titled in accordance with the Act and the Regulations.</p> <p>Check any separate interest bearing trust accounts are titled in accordance with the Act and Regulations and meet the criteria prescribed to open the account.</p>
<b>Receipt journals and payment journals</b>	<p>Check all receipts and payments are posted to the journals.</p> <p>Check appropriate details are recorded and correct.</p> <p>Check all receipts and payments are posted to the receipts and payments journals as soon as practicable.</p>
<b>Transfer journal</b>	<p>Check backdated entries.</p> <p>Check transfers between the principal's ledger accounts.</p> <p>Check journals have proper narrations.</p>
<b>Agent's records of money held by the Bond Administrator or financial institution</b>	<p>Ensure the agent's records of money held by the Department of Mines, Industry Regulation and Safety's Bond Administrator are correct. A schedule can be obtained from the Bond Administrator to check the agent's records.</p>
<b>Suspense accounts and buffer funds</b>	<p>Request from financial institutions records of all trust accounts identified as suspense and/or buffer.</p> <p>Examine all trust accounts and ledger accounts identified as suspense and/or buffer.</p> <p>Check that Department of Treasury is notified of all unclaimed moneys by 31 January each year.</p> <p>Check that agent has made all inquiries and efforts to identify the purposes of all deposits within their trust accounts. If the funds cannot be identified, the agent has notified the Department of Treasury accordingly.</p>



<b>Audit Checklist</b>	
<b>Item</b>	<b>Checks to be conducted</b>
<b>Housekeeping</b>	<p>Check outstanding credit balances in the principal's accounts are followed-up.</p> <p>Check unpresented cheques have been followed-up on a regular basis. Make sure unpresented cheque holders have been contacted and reminded to deposit their cheque at the end of each month. Any lost cheques should be cancelled and reissued.</p> <p>Check that agents notify the department within 5 business days of opening or closing a general trust account.</p> <p>Check that all trust account receipts are titled in accordance with regulation 6G of the REBA Regulations and regulation 6E of the SA Regulations.</p> <p>Check that the computer accounting software used by the agent complies with the Acts and Regulations.</p> <p>Check the internal controls and procedures of the agent to ensure that they comply with the Acts and Regulations, including adequate supervision of the agency and its employees by the person in bona fide control, proper separation of duties relating to trust account transactions and the maintenance of records relating to trust account transactions.</p>
<b>Banking / trust deposit forms</b>	<p>Check receipts are banked by the next working day.</p> <p>Check money received is banked in the same form as it is received (e.g. that cash is not substituted by a cheque).</p> <p>Check daily receipts reconcile to the daily banking deposit.</p> <p>Check daily banking to the bank statement.</p> <p>Identify and report deposits from agent's own funds/ staff (e.g. cheques issued from the agent's general account).</p> <p>Check for trust accounts that have been closed during the audit year.</p> <p>Check for unusual items.</p>
<b>Accounting controls</b>	<p>Check the licensee or the person in bona fide control of the agency understands the accounting systems and the controls in place.</p>

<b>Audit Checklist</b>	
<b>Item</b>	<b>Checks to be conducted</b>
<b>Trust ledger accounts</b>	<p>Check that separate ledgers are maintained for each owner.</p> <p>Check all ledger accounts with unusual transaction patterns.</p> <p>Check ledger accounts for debit balances and obtain an explanation and report to Consumer Protection.</p> <p>Check transactions are posted in chronological order.</p> <p>Check payments made to the agent that do not relate to commission.</p> <p>Review the trust account ledgers for all trust accounts that have remained dormant during the audit period.</p>
<b>Trust receipts</b>	<p>Check receipt details include the name of the holder of the triennial certificate and any business name of that holder as recorded by ASIC.</p> <p>Check receipts are banked by the next working day.</p> <p>Check receipts to the bank deposit book/record.</p> <p>Check receipts are entered in the books of account by the next working day.</p> <p>Check receipts to the general ledger and principal's ledger.</p> <p>Check the sequence of receipt numbers issued. Sight any cancelled receipts.</p> <p>Check for backdated or post-dated receipts and any alterations.</p> <p>Check for adequate narrations on receipts to identify the payment.</p> <p>Ensure the agent maintains adequate control over receipts and the issuing of receipts, e.g. the use of a register of trust account receipt forms. (What controls are there over the issue of receipts? Who issues receipts and are they stored securely?)</p> <p>Check for unusual deposits/receipts.</p> <p>If an interim receipt is issued, verify that an official receipt is subsequently issued.</p>

Audit Checklist	
Item	Checks to be conducted
<b>Cheques or payments</b>	<p>Verify cheque particulars include the same title details as the trust account.</p> <p>Verify cheques are entered in the books of account by the next working day.</p> <p>Check disbursements entered into the principal's trust ledger account to the bank account in the trust ledger.</p> <p>Verify sufficient funds were in the principal's trust ledger account to meet the payment when cheques were drawn.</p> <p>Check disbursements to the principal's ledger and general ledger.</p> <p>Verify cheque details against the bank statement.</p> <p>Check that signatories to the electronic funds transfers and cheques are current and authorised individuals within an agency.</p> <p>Ensure the agent maintains adequate control over cheques.</p> <p>What controls are there over the issue of cheques?</p> <p>Who issues cheques and are the cheques stored securely?</p> <p>Check the person in bona fide control signs all cheques or alternatively, there are adequate internal controls in place.</p> <p>Check there is appropriate supporting documentation for the issue of the cheque.</p> <p>Check the sequence of cheque numbers issued. Sight any cancelled cheques.</p> <p>Ensure cheques recorded on the principal's files are issued for the same amount.</p> <p>Check payee on duplicate cheque or computer records against the principal's files.</p> <p>Check for unusual payment types.</p> <p>Check payment where narration is inadequate.</p> <p>Check post-dated and backdated cheques.</p> <p>Check for alterations made to cheques.</p> <p>Verify unrepresented cheques. Outstanding cheques should not be older than 12 months. Where this occurs, follow-up action should be taken by the agent. See the 'Housekeeping' checklist item above for more information.</p>

Audit Checklist	
Item	Checks to be conducted
<b>Reconciliations</b>	<p>Check the trust account is reconciled on a monthly basis to the last business day of the month.</p> <p>It is Consumer Protection policy that reconciliations are performed within ten working days after the end of the month. The reconciliation must include the bank account, cashbook, and trust ledger accounts.</p> <p>Check the person in <i>bona fide</i> control verifies and signs the monthly trust account reconciliation.</p> <p>Check if a 'Confirmation Letter' is required.</p> <p>A 'Confirmation Letter' is not required if the auditor has sighted the original bank statement for the end of the year and the reported balance of the trust account is in order. The auditor must ensure all trust accounts are included in the audit report provided to Consumer Protection. This includes trust accounts that have been closed during the year.</p> <p>Check outstanding balances on the principal's trust ledgers. (Follow-up action should be taken by the agent.)</p> <p>Check adjustments are not continuously carried forward in reconciliations.</p> <p>(This indicates a problem in the trust account. If there is a shortfall, there may have been a defalcation or if there is an outstanding surplus, this can lead to a future defalcation.)</p> <p>Check any adjusting entries or balancing items.</p> <p>Check that large and unusual reconciling items have been followed-up appropriately.</p> <p>Check bank statements for continuity, for unusual entries, and whether they show a debit balance at any time during the year.</p> <p>Verify cheques issued to the bank statement.</p> <p>Check direct debits and credits.</p> <p>Check for consistency in the bank statement balance.</p> <p>Check for consistency in total receipts received during the month.</p> <p>Check the financial institution has not credited interest to the trust account or to the agent's general account.</p> <p>Check bank or government charges have not been debited from the trust account.</p>

### 6.3 Questions to be completed before the audit report is submitted

*Any incomplete or inaccurate reports may be returned to the auditor, causing delays in lodgement. Please ensure each of the following items is checked before the audit report is submitted.*

1.	Is the audit year correct and identical on all documents?
2.	Is the licensed agent's name correct?
3.	Is the licensed agent's name identical on all documents?
4.	Is the trading name correct?
5.	Is the business address correct?
6.	Has the business moved in the previous year?
7.	Is the number on the triennial certificate correct?
8.	Is the licence continuous and the triennial certificate current?
9.	Are the details of the person in bona fide control correct?
10.	Are the details of all staff correct?
11.	Are the declarations in the correct format?
12.	Are attached declarations correctly witnessed?
13.	Has a copy of the management letter been attached?
14.	If the agency has lodged audit reports previously, is the auditor the same auditor who previously lodged the prior year audit?
15.	If the agency has changed its auditor, has the Change of Auditor Request form been completed by the agent, the former auditor and the new auditor, and has been approved by the Commissioner?

## 7. Frequently Asked Questions

These are some common questions asked by auditors of trust accounts.

### **What is the procedure if a dealer wants to change their auditor?**

Dealers appoint their trust account auditors at the time of opening a trust account. This appointment is continuous unless an agent obtains written approval from the Commissioner to change their auditor. Agents wishing to change their auditor must apply to the Commissioner by submitting the Change of Auditor Request form. The agent must give reasons for the need to change, obtain agreement from their current auditor to relinquish their statutory responsibility and obtain consent of the nominated replacement auditor.

Each application will be considered on its merits. A Change of Auditor Request form can be downloaded from the [www.dmirs.wa.gov.au/CP/Auditors](http://www.dmirs.wa.gov.au/CP/Auditors).

### **What is the format of a final audit?**

The format is the same as the annual audit. The auditor should refer to it as a termination audit and record the termination audit period.

### **What should an auditor do if the final audit is due and there is still money held in the trust account?**

Regardless of any money still in the trust account, the auditor must deliver the termination audit report to the Commissioner within five months of the agent's triennial certificate ceasing to have effect under the REBA and SA Acts. The trust account is not required to have a nil balance for the termination audit report to be prepared. The auditor is to record any money held in the trust account as at the date of completing the report.

### **If a final audit is conducted, what should happen with any trust funds not disbursed by the finalisation date?**

The auditor should ensure money is paid by the agent to the rightful recipients as soon as possible. Unclaimed money may be dealt with under the *Unclaimed Money Act 1990* as at 31 December each year.

### **Can a dealer maintain additional funds to act as a 'buffer' in the trust account?**

Under no circumstances should extra funds be kept in the trust account. Buffer funds cannot be used to offset bank fees or for any other reason. Agents should clear their commission or fees to their general account at least weekly. Consumer Protection strongly recommends against the practice of retaining commissions and management fees in the trust account.

### **Can a dealer offset a debit balance in a client trust ledger account against a credit balance in another ledger account?**

Each client's trust ledger account is maintained as a trust account and should not go into debit balance. A debit balance in a client trust ledger account cannot be offset against a credit balance in another ledger account (e.g. the agent's fee account).

### **Does an auditor have to notify the Commissioner if they believe a conflict of interest has arisen between themselves and the dealer?**

Yes. In all such cases, the Commissioner must be notified. A decision will then be made as to whether the agent needs to seek a replacement auditor.

### **What are the components of a valid reconciliation?**

There are three components of valid trust account reconciliations, which are:

- bank statement balance;
- trust account balance; and
- total of client balances in the trust ledger.

The bank statement balance is the starting point and when the reconciliation is completed the balance shown as the trust account balance should be equivalent to the total funds held in the trust ledger.

### **When should trust account reconciliations be performed?**

Trust accounts must be correctly reconciled to the last day of each month. It is the Commissioner's view that trust accounts are reconciled within ten working days after the end of the month. Trust account reconciliations must still be performed even during public holiday periods.

### **Is an agent in bona fide control/licensee required to sign their trust account reconciliation?**

Yes. The Commissioner regards the agent in bona fide control/licensee as the appropriate person to sign. They are responsible for the reconciliation being done and for its accuracy.

### **Should cheques and receipts be numbered sequentially?**

Yes. The dealer should keep details of cheques and receipts with their monthly reconciliations or in an audit file to ensure that an auditor can verify the sequence.

### **What happens if the business structure of a dealership changes (i.e. a sole trader becoming a partnership or corporate body, or the business of a corporate body is taken over by another corporate body)?**

If the entity changes, then a new licence and triennial certificate needs to be obtained for the new entity. The agent is then required to finalise all existing trust accounts of the old entity and open new accounts in the name of the new entity. The agent will need to maintain proper records relating to any transfer of funds from the old trust accounts to the new trust accounts. The agent will also need to arrange a termination audit of the trust account of the old entity up to the date that the trust account is closed. Agents need to consider the transfer of existing property management agreements between the entities with the relevant written consent from their clients.

### **Is an audit required when a business changes its name?**

An additional audit is not required if a business changes its name but the entity remains the same. The designation of all bank accounts must be changed to reflect the new business name. The new business name must be endorsed on the triennial certificate.

### **What should an auditor do if fraud, theft or misappropriation from a trust account is indicated?**

The auditor should immediately notify the Commissioner of the circumstances of the missing money.

### **What are the most common forms of misappropriation encountered by auditors of trust accounts?**

Consumer Protection has identified the following common methods used to misappropriate trust money:

- kiting (whereby an overstatement of cash in a particular bank account is created by cash transfers between bank accounts);
- ghost accounts (keeping another set of books outside the trust account);
- manipulating of the balance of trust accounts;
- issuing fake receipts; and
- pre-drawn commissions.

### **What does 'as soon as practicable' mean in relation to banking of trust money?**

Section 68(1) of the REBA Act and section 49(1) of the SA Act require agents to deposit money into a trust account as soon as practicable. In most cases, the money is to be deposited by close of business the next working day. The auditor must verify banking times and report any delays.

### **Are strata management accounts required to be audited?**

Yes. Where strata management services are provided by a licensed real estate agent as part of the agency's business, section 68(1) of the REBA Act requires the agency to pay any moneys received in relation to strata management into the agency's trust account. Therefore, these funds will also be part of an audit.

### **When a dealer banks trust money, can the dealer replace cash received for a real estate transaction with a cheque?**

No. Money received in a consignment trust account transaction is required to be banked in the same form as it is received. For example, a dealer cannot replace cash from a daily banking transaction with a trust cheque or personal cheque to provide a cash refund.

### **Can an agent pay accounts by credit card on their clients' behalf?**

It is the Commissioner's view that agents ought not pay their clients' creditors by credit card and then reimburse themselves from the trust account unless they have consent from their client to do so. Without consent, the recouping of moneys from the trust account would be an unauthorised withdrawal and the agent would therefore breach section 68(4) of the REBA Act.

### **Should every agent who holds a triennial certificate have a trust account?**

No, agents are only required to have a trust account if they receive and/or hold trust moneys on behalf of others.

Section 68(1) of the REBA Act and section 49(1) of the SA Act provide that every agent who holds a current triennial certificate shall maintain a trust account; however, section 86 of the REBA Act and section 67 of the SA Act provides that an agent who holds a current triennial certificate but who, in the course of his business, has not held or received moneys on behalf of others shall be deemed to have complied with this Part if within the period of three months after the end of that year he makes a statutory declaration to that effect and delivers it to the Commissioner.

Therefore, as long as the agent provides the requisite statutory declaration to the Commissioner within three months of the end of the audit year, the agent is deemed to have complied with Part VI of the REBA Act and Part IV of the SA Act and does not have to maintain a trust account or if a trust account is maintained, it does not need to be audited.



**Should trust accounts that have been closed during the year be included in the audit?**

Yes. Trust accounts closed during the course of a year should be audited at the end of the year.

**Should branch offices have their own trust accounts?**

No. Except when the Commissioner has directed that a separate audit of the branch accounts is required (section 74 of the REBA Act and section 68 of the SA Act). The audit of the branch accounts may be included in the annual audit submitted by the agent.

**Is an audit required where part of an agency's business is sold (e.g. a rent roll)?**

Although not required under the REBA or SA Acts, it is recommended best practice that when part of an agency's business is sold, an audit of that part of the business should be conducted before the business records are handed over to the purchaser.

## 8. Appendix A: Format of Audit Reports

Auditors are to conduct audits in accordance with accepted auditing practice and, in addition, the Commissioner for Consumer Protection may impose additional requirements such as the nature of audit reports. The following pages show the templates/formats of audit reports that auditors should use for real estate agents, business brokers and settlement agents. These can also be downloaded from [Auditors](#) on the department's website.

The templates consist of:

- a covering letter from the auditor to the Commissioner for Consumer Protection for an audit report;
- a declaration by the auditor (section 72 of the REBA Act matters or section 53 of the SA Act matters);
- a statutory declaration by the person in bona fide control (verifying statement of balances held);
- a statutory declaration by the auditor (section 79 of the REBA Act or section 60 of the SA Act); and
- a statement of trust account money held (Annexure A).

### 8.1 Witnessing statutory declarations

The prescribed audit formats need to be supported by a statutory declaration, where required, and signed by an authorised witness. Professions listed as authorised witnesses by the *Oaths, Affidavits and Statutory Declarations Act 2005* are available by visiting the Department of the Attorney General's website at

[Authorised Witnesses for Statutory Declarations](#) or by calling (08) 9264 1600.

## 9. Appendix B: Sample letters and forms

### 9.1 B1. Example of an Auditor’s Covering Letter for an Audit Report

EXAMPLE ONLY	
<b>Your ref:</b>	
<b>Our ref:</b>	
<b>Enquiries:</b>	
<b>Date:</b>	

Commissioner for Consumer Protection  
 Department of Mines, Industry Regulation and Safety  
 Consumer Protection Division  
 Locked Bag 100  
 EAST PERTH WA 6892

Dear Sir/Madam

**RE: AUDIT OF TRUST ACCOUNT** – [name of licensed dealer]\*

Please find enclosed documents that relate to the audited trust accounts of the above mentioned agent for the year ended .....**(insert date)**

Enclosed are:

1. Declaration by auditor;
2. Statutory declaration by person in bona fide control;
3. Statutory declaration by auditor;
4. Statement of trust account money held; and
5. A copy of management letter (if one has been issued).

Yours faithfully

.....**(signature)**

\* The name of the agent is stated on the agent’s licence and triennial certificate.

## 9.2 B2. Example of Declaration by Auditor

<b>EXAMPLE ONLY</b>	
<b>DECLARATION BY AUDITOR</b>	
<b>REAL ESTATE AND BUSINESS AGENTS ACT 1978, SECTION 72(3)</b>	
<b>Name of auditor*:</b>	
<b>Registered number of auditor:</b>	
<b>Address of auditor:</b>	
<b>Email address of auditor:</b>	
I, the above named, do solemnly and sincerely declare that:	
1. I am a registered company auditor within the meaning of Part 9.2 of the Corporations Act 2001 (Cwlth).	
2. That in accordance with the <i>Real Estate and Business Agents Act 1978</i> , I have, with the assistance of my staff audited the trust account(s) of:	
<b>Name of agent**:</b>	
<b>Business name of agent</b>	
<b>Registered address of agent:</b>	
<b>Email address of agent:</b>	
<b>For the year ended:</b>	
3. That I am not a real estate and/or business agent carrying on business as such, nor a partner, clerk or servant of the above named real estate and/or business agent or any other real estate and/or business agency actually in practice.	
4. That I am not related by blood or marriage or in a de facto relationship with the above named real estate and/or business agent nor have I had any business dealings with that real estate and/or business agent during my appointment as the agent's auditor.	
Declared at ..... <b>(place)</b> this .....day of ..... 20.....	
..... <b>(signature)</b>	
..... <b>(signature)</b>	

\* An auditor must be registered as an auditor under Part 9.2 of the Corporations Act 2001 (Cwlth) and/or has been approved by the Commissioner for Consumer Protection.

\*\* The name of the agent is stated on the agent's licence and triennial certificate.

### 9.3 B3. Example of Statutory Declaration by Person in *Bona Fide* Control

<b>VERIFYING STATEMENT OF BALANCES HELD</b> <b>REAL ESTATE AND BUSINESS AGENTS ACT 1978, SECTION 80</b>	
<b>Person in <i>bona fide</i> control</b>	
<b>Home address:</b>	
<b>Email address:</b>	
I, the above named, do solemnly and sincerely declare that:	
1. I am the person in bona fide control of the business carried on by:	
<b>Name of licensed agent*:</b>	
<b>Business name of agent</b>	
2. That annexed hereto and marked as Annexure 'A' is a statement of:	
(i) money held on..... <b>(insert date)</b> by the above agent for or on behalf of any other persons; and	
(ii) negotiable or bearer securities or deposit receipts in the name of the above agent which represent money drawn from the trust account and which were held by the above agent on that day.	
3. That the particulars shown in the annexed statement marked Annexure 'A' are true and correct in every detail therein.	
This declaration is true and I know that it is an offence to make a declaration knowing that it is false in a material particular.	
This declaration is made under the <i>Oaths, Affidavits and Statutory Declarations Act 2005</i>	
at ..... <b>(place)</b> on ..... <b>(date)</b>	
by ..... <b>(signature of person making the declaration)</b>	
in the presence of ..... <b>(signature of authorised witness***)</b>	
..... <b>(name and qualification of authorised witness)</b>	

\* The name of the agent is stated on the agent’s licence and triennial certificate.

\*\* Authorised person under the *Oaths, Affidavits and Statutory Declarations Act 2005*

## 9.4 B4. Example of statutory Declaration by Auditor

Note: If the audit report is qualified, full details must be provided to the Commissioner in the audit report.

STATUTORY DECLARATION BY AUDITOR	
<i>REAL ESTATE AND BUSINESS AGENTS ACT 1978, SECTION 70(3)(a)</i>	
<b>Name of auditor*:</b>	_____
<b>Registered number of auditor:</b>	_____
<b>Address of auditor:</b>	_____
<b>Email address of auditor:</b>	_____
I, the above named, do solemnly and sincerely declare that:	
1. In accordance with the <i>Real Estate and Business Agents Act 1978</i> I have with the assistance of my staff audited the trust account of _____	
<b>Name of licensed agent*:</b>	_____
<b>Business name of agent</b>	_____
<b>Registered address of agent:</b>	_____
<b>Email address of agent:</b>	_____
<b>For the year ended:</b>	_____
2. That the audit of the above mentioned agent's trust account(s) has been completed for the above year ended ..... <b>(insert date)</b> in accordance with sections 70(2) and 79 of the <i>Real Estate and Business Agents Act 1978</i> and that in my opinion:	
(a) the trust account(s) have been kept regularly and properly written up;	
(b) the trust account(s) were ready for examination at the periods appointed by me;	
(c) the agent has complied with all my requirements as auditor;	
(d) the trust account(s) are and have been in order during the audit period; and	
(e) there is no other matter in relation to the trust account(s) that should, in my opinion, be communicated to the Commissioner for Consumer Protection.	
This declaration is true and I know that it is an offence to make a declaration knowing that it is false in a material particular.	
This declaration is made under the <i>Oaths, Affidavits and Statutory Declarations Act 2005</i>	
at ..... <b>(place)</b> on ..... <b>(date)</b>	
..... <b>(signature of person making the declaration)</b>	
in the presence of ..... <b>(signature of authorised witness***)</b>	
..... <b>(name and qualification of authorised witness)</b>	

\* An auditor must be registered as an auditor under Part 9.2 of the Corporations Act 2001 (Cwth) and/or has been approved by the Commissioner for Consumer Protection.

\*\* The name of the agent is stated on the agent's licence and triennial certificate.

\*\*\* Authorised person under the *Oaths, Affidavits and Statutory Declarations Act 2005*

## 9.5 B5. Example of Statement of Trust Account Money Held “Annex A”

<b>Name of licensed agent:</b>	
<b>Business name of agent:</b>	
<b>Registered address of agent:</b>	
<b>Person in bona fide control:</b>	
<b>Declaration date:</b>	

This is the statement marked Annexure ‘A’ referred to in the declaration of the above person in *bona fide* control of the business, being the person in bona fide control of the business carried on by the above licensed agent declared on the above date.

**Cash at bank**  
 (Insert details of trust account(s) held)  
 Details required:

- the name(s), account number(s) including BSB and authorised financial institution name(s) and branch name(s) where the trust account(s) is/are maintained. This reporting requirement applies to general trust accounts and clients’ separate interest bearing trust accounts, including those which have been closed during the audit year (Each client’s interest bearing trust account must be listed separately); and
- the reconciled balance held in each trust account as at the last day of the audit period.

**Types of trust accounts**  
 Note: See the section ‘Designation of trust accounts’ in this booklet for further details.

<p><b>General trust account</b>                  ABC Pty Ltd T/A XYZ Real Estate                  REBA Trust a/c-Sales TC12345                  ZYX Bank, Morley Branch                  Account number 6041 11111 \$x,xxx.xx</p>	<p><b>General trust account</b>                  ABC Pty Ltd T/A XYZ Real Estate                  REBA Trust a/c-Property Management                  TC12345                  ZYX Bank, Morley Branch                  Account number 6041 22222 \$x,xxx.xx</p>
<p><b>Strata title management trust account</b>                  ABC Pty Ltd T/A XYZ Real Estate                  Estate in trust for John Smith                  Trust Account - IB TC12345                  ZYX Bank, Morley Branch                  Account number 6041 44444 \$x,xxx.xx</p>	<p><b>Separate Interest bearing trust account</b>                  ABC Pty Ltd T/A XYZ Real Estate                  Estate in trust for John Smith                  Trust Account - IB TC12345                  ZYX Bank, Morley Branch                  Account number 6041 44444 \$x,xxx.xx</p>

**Securities**  
 (Insert details of negotiable or bearer securities or deposit receipts held)  
 Certified as a correct list of balances:

.....(**signature of person in bona fide control**)

I hereby certify that in my opinion, the above is a correct statement of any trust accounts held by the

.....(**insert the name of agent**) as at

.....(**insert date**) for or on behalf of other persons.

.....(**signature of auditor**) .....(**insert date**)

\* The name of the agent is stated on the agent’s licence and triennial certificate

\*\* The date is the last day of the audit period

## 10. Appendix C: References

The full text of the relevant statutes, Regulations and Code of Conduct mentioned in this publication is available from the State Law Publisher.

### Relevant Links

*Real Estate and Business Agents Act 1978*

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_a672.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a672.html)

Real Estate and Business Agents (General) Regulations 1979

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_s4732.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4732.html)

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

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_s47202.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s47202.html)

*Settlement Agents Act 1981*

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_a744.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a744.html)

Settlement Agents Regulations 1982

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_s4771.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s4771.html)

Settlement Agents Code of Conduct 2016

[https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_s47203.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_s47203.html)

Australian Consumer Law

<http://consumerlaw.gov.au/australian-consumer-law/legislation>

*Corporations Act 2001 (Cwlth)* - section 1280

[http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/s1280.html](http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1280.html)

Auditors can view the Reserve Bank of Australia Bulletin through the web site of the Reserve Bank of Australia

[www.rba.gov.au](http://www.rba.gov.au)



## Glossary

### **Agent**

A person who is a real estate agent, a business agent (or both) or a settlement agent.

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### **Approved**

Approved by the Commissioner for Consumer Protection.

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### **Auditor**

A person appointed under the REBA or SA Acts to audit the trust accounts of agents.

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### **Authorised financial institution**

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

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### **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.

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### **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) he/she is appointed by a court as a receiver or receiver and manager of the business of another; or
  - (b) he/she is 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**

- (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.
-

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### **Defalcation by a licensee**

Includes criminal or fraudulent conduct:

- (a) of a licensee; or
- (b) of any one or more of the servants or agents of the licensee; or
- (c) also includes an option to enter into a business transaction; but
- (d) of a person who is a partner in the business of the licensee; or
- (e) 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. Defalcation from a person who ceased to hold a license or triennial certificate may still be claimed, at the discretion of the chief executive officers, if the defalcation occurred within 6 months of the person ceasing to hold a license or triennial certificate.

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### **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* or a settlement agent who holds a settlement agent licence and a current triennial certificate under the *Settlement Agents Act 1981*.

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### **Licensee**

A person licensed under the *Real Estate and Business Agents Act 1978* or the *Settlement Agents Act 1981*.

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### **Person in bona fide control**

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

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### **Principal**

The term 'principal' refers to the client of the agent.

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### **Real estate agent**

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

- (a) he/she is appointed by a court as a receiver or receiver and manager of the business of another person; or
- (b) he/she is 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.

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### **REBA**

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

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### **SA**

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

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### **Settlement**

The completion of a real estate transaction or a business transaction (as the case may be) by payment of the balance of purchase price in respect to such real estate transaction or business transaction.

### **Settlement 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) he/she is appointed by a court as a receiver or receiver and manager of the business of another; or
  - (b) he/she is 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.
- 

### **TC**

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

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### **Transaction**

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

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### **Triennial certificate**

The certificate granted by the Commissioner to a licensee that permits the licensee to carry on business as a real estate agent or settlement 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.

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### **Trust account**

The certificate granted by the Commissioner to a licensee that permits the licensee to carry on business as a real estate agent or settlement 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.

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### **Working day**

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

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### **Year**

A period of 12 months ending on 31 December for real estate and business agents and a period of 12 months ending on 30 June for settlement agents.

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Government of Western Australia

## **Department of Mines, Industry Regulation and Safety**

### **Consumer Protection**

**Advice Line 1300 30 40 54**  
**(for the cost of a local call statewide)**

8.30am – 4.30pm Mon to Fri  
Gordon Stephenson House  
Level 2/140 William Street  
Perth Western Australia 6000

Administration: (08) 6251 1400  
Facsimile: (08) 6251 1401  
National Relay Service: 13 36 77

### **Online**

Website: [www.consumerprotection.wa.gov.au](http://www.consumerprotection.wa.gov.au)  
Email: [consumer@dmirs.wa.gov.au](mailto:consumer@dmirs.wa.gov.au)

### **Enquiries about auditing trust accounts:**

**Email:** [audits@dmirs.wa.gov.au](mailto:audits@dmirs.wa.gov.au)  
**Phone:** (08) 6552 9538

**@ConsumerWA**

### **Mailing address**

Locked Bag 100  
East Perth WA 6892

### **Regional offices**

Goldfields/Esperance	(08) 9021 9494
Great Southern	(08) 9842 8366
Kimberley	(08) 9191 8400
Mid-West	(08) 9920 9800
North-West	(08) 9185 0900
South-West	(08) 9722 2888



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