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ISSUE 28

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CURRENT LEGISLATION

PROPERTY AGENTS AND LAND TRANSACTIONS ACT 2016  
 PROPERTY AGENTS AND LAND TRANSACTIONS REGULATIONS 2017  
 CODE OF CONDUCT - VERSION 3

Fee units are automatically indexed every financial year and are \$1.62 for the 2020-2021 financial year.  
 One Penalty unit is \$172.00 for the 2020-2021 financial year.

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# Right Now

## COVID- 19 Safe Workplace Framework

The Tasmanian Government's COVID-19 Safe Workplaces Framework supports workplaces as they re-open or expand their business activities during the pandemic, while ensuring the health and safety of all Tasmanians. Click link [here](#)

The Framework encompasses Safe Workplaces Guidelines and minimum standards. To comply with the new minimum standards, you should complete a safety plan and/or checklist. The Safe Workplace Guidelines will help you complete your safety plan/checklist.

COVID-19 Safe Workplace Guidelines have been developed for the property industry the link is [here](#)

## Licence Renewal 2020-2021

Due to COVID-19 all licences issued before 30 June 2020 have been extended until 30 September 2020. Renewal documentation has been forwarded in June and Application for Licence (Renewal) forms should be lodged by **31 July 2020**.

The Board forwarded via email in the first week of June the necessary paperwork to all licensed property agents to apply to renew his or her licence.

The Application for Licence (Renewal) form for a company was forwarded via email to the property agent nominated to manage the authorised place of business.

Property Agents are required to lodge the Application for Licence (Renewal) form, prescribed fees and any documents or information that the Board requires by **31 July 2020**.

All information about the renewals for this year can be found on the Board's website or click [here](#)

## Continuing Professional Development (CPD) - now and in the future

The Board for the current renewal period has moved away from its CPD policy in response to the COVID-19 pandemic and the impact on the property industry.

This has been communicated through emailed correspondence to all licence holders. If you have any concerns regarding the CPD you are required to undertake to renew your licence please review the information under Renewals on the Board's website [here](#) and if you are still unsure please contact the Board's office.

Licence holders should consider that the CPD requirements for 2020-2021 licence year will be based on the Board's usual CPD Policy.

## Fees and Charges from 1 July 2020

EXAMINATION FEE	\$147.40
APPLICATION ASSESSMENT FEE	\$147.40
LICENCE FEES	Full Year Fees
	1 July – 30 June
Real Estate Agent carrying on business (P1D1)	\$442.20
Real Estate Agent (P1D2)	\$147.40
Property Manager carrying on business (P2D1)	\$369.30
Property Manager (P2D2)	\$147.40
General Auctioneer carrying on business (P3D1)	\$442.20
General Auctioneer (P3D2)	\$147.40
Property Representative (P4)	\$74.50
LATE PROVISION REPORTS PROVIDED TO THE BOARD	\$74.50

# Trust Accounting

## Trust Account Report

If a property agent who conducts business holds money in trust the property agent is required to lodge with the Board by 31 July 2020 a Trust Account Report for the six months ended 30 June 2020.

**A separate Report must be completed for each trust account held.**

The Trust Account Report is for completion by the managing property agent named on the Board's Register. Copies are available on the Board's website [here](#)

**Warning** – A fee of \$74.50 applies for late lodgement of each Trust Account Report.

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## Annual Audit Report and Checklist for the year ended 30 June 2020

Has your business held any money in trust during the last audit year? "Audit Year" means a period of 12 months ending on 30 June.

**Regulation 31** of *Property Agents and Land Transactions Regulations 2017* (the Regulations) provides that a property agent **must**, within three months after 30 June of each year, cause an audit to be made by **an auditor** of the trust accounts and accounting records kept by that property agent in respect of the audit year.

A separate Report and Checklist must be completed for each trust account held.

The Audit Report forms, including Audit Check-lists and Information for Auditors, can be accessed on the Board's website or hard copies are available on request.

The property agent must provide their trust account records to their auditors within sufficient time for the audit to be completed and the report lodged with the Board **by 30 September 2020**.

Please be aware that there is a late fee of \$74.50 payable for each audit report received by the Board after 30 September 2020.

The Annual Trust Account Audit is completed by an external auditor. Copies have been sent to most auditors.

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## Audit Exemption

If your business has not held money in trust Regulation 32 provides for an exemption to property agents from having to lodge an audit report if they lodge a declaration stating that they did not receive, or hold, any trust money during the audit year. That exemption declaration is available on the Board's website [here](#).

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## By whom and by when?

**Trust Account Report** is to be completed by the managing property agent and submitted to the Board no later than 31 July 2020 (**required if trust money held**).

**Special purpose Audit Report and Checklist** is to be completed by the external auditor.

It is the property agent's responsibility to ensure that a copy of the Audit Report and Checklist is received by the Board no later than 30 September 2020 (**required if trust money held**).

**Annual Audit Exemption** is completed by the managing property agent and submitted to the Board no later than 30 September 2020 (**required if no trust money held**).

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## Closing a trust account?

The Board has developed a final audit report and checklist for use when closing a trust account and/or winding up a business – see trust account tab on the website.

# Trust Accounting

## Monthly Reconciliations

Do you know what to look for with the Monthly Reconciliation?

Regulation 21 provides that the trust account must be reconciled at least once in each calendar month. The trust account is reconciled by calculating the balance of the trust account cash books, preparing a schedule to reconcile the balance of the cash books with the balance of the trust bank account and preparing a schedule of the ledger accounts.

There is different software available for use in the property industry and the format may look different however there are legislative requirements to be complied with.

As an example, a simple reconciliation report will look like

–

### 1 Bank Statement

Balance as per statement 30 June 2019		\$135,000.00
add	deposits in transit	\$0.00
less	unpresented cheques	\$0.00
Adjusted Statement balance		\$135,000.00

### 2 Cashbook Journals

Balance brought forward 31 May 2019		\$170,500.00
add	total receipts	\$25,000.00
deduct	total payments	\$60,500.00
Closing Balance as at 30 June 2019		\$135,000.00

### 3 Client Ledger/Trial Balance

Total balance from individual client ledgers as at 30 June		\$135,000.00
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The adjusted bank statement balance, the closing balance of the cashbook and the client ledger should all agree (be the same).

It is the property agent authorised to manage the business who must supervise the keeping of the trust account records and ensure the reconciliation records and schedule of ledger accounts are accurate and within 2 days after the making of the reconciliation record endorse the records with a statement that the record is complete and accurate and sign and date the document.

Do not sign off on reconciliations, etc. that “look alright”. Instead of giving the figures a brief overview, devote time to substantiate each line of the reconciliation.

So, before signing the reconciliation document here are some things to consider –

- Does this month’s opening balance agree (is the same) with the last month’s closing balance?
- Have you looked at the bank statement?
- What do you know about any unpresented deposits?
- What do you know about any unpresented cheques?
- What are the adjustments?
- Are there any reverse receipts or payments?

## Dealing with unclaimed Moneys

Unclaimed moneys are funds that are due to a person, company or organisation that have not been received or claimed and, after a statutory period of time, become unclaimed.

From 1 July 2016, amounts of money that are equal to or greater than \$50 and which have been unpaid for a period of 12 months are deemed to be general unclaimed money.

The Treasurer is the holder of unclaimed money in Tasmania under the provisions of the [Unclaimed Money Act 2015](#).

When you lodge unclaimed money with Treasury, you must provide a return containing as much information as possible relating to that money including:

- the name of the money’s rightful owner
- their last known address
- date of birth (if known)
- the amount owed to the rightful owner
- the reason that the money is being held (eg dividends, unclaimed salaries etc).

The more information provided means there is a better chance of repaying the rightful owner.

Where possible, unclaimed money returns should be submitted using the blank Excel spreadsheet template that can be downloaded at [www.treasury.tas.gov.au](http://www.treasury.tas.gov.au).

The spreadsheet contains the following fields for each item of unclaimed money:

- Transaction Date
- Title
- Given Names
- Surname
- Date of Birth
- Address
- Gross Amount
- Costs
- Description

Treasury accepts unclaimed money on behalf of the Treasurer and makes payments to the legal owners of the unclaimed money on receipt of appropriate proof of entitlement.

If you are holding unclaimed money refer to the Guidelines and template for lodging unclaimed money with Treasury. For more information visit [Treasury](#).

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## Stealing v Cyber Crime

The possibility of an employee stealing any money, let alone trust money, is a daunting thought, especially when you believe you know all your employees quite well.

A recent case in Queensland found a person working in property management had stolen \$11,730 from the trust account over 5 months by creating a property maintenance creditor with her own bank account for payment.

A friend undertook the repairs and maintenance to rental properties that she ordered. Invoice payment would be made into her bank account and she would pay the friend keeping a cut for herself.

The result - she was found guilty of stealing, fined almost equal to the total money stolen and she was disqualified from holding or obtaining a licence for a period of 10 years.

There are many measures you can take to improve your chances of not falling prey to stealing such as: -

- Implement internal controls such as effective management oversight, regular bank reconciliations, separation of responsibility for cash receipt and banking functions.

- Share tasks among employees or subject to regular review by an independent party or ensure, as far as possible, that bookkeeping work is shared among individuals and is not constantly the sole responsibility of one person.

Most important of all in small business is to maintain a vigilant oversight of what your employees are doing because you should know your business better than anyone and therefore should be able to recognise warning signs.

You can have great internal controls over what your employees can do but due to the volume of transactions and the amount of money involved in property transactions, property agents are an increasing target for cyber criminals.

A moment to check the validity of emails and bank account details or reverting to making payment through a bank cheque are simple ways to ensure the funds are going to the intended recipient.

There are a few simple steps to consider that could save thousands of dollars. Such as:

- Before transferring money, bank account details should be checked by calling the agency/client/customer to verify they are correct.
- Introduce a dual authorisation/verification system.
- Do not use contact details contained in emails that ask for money to be deposited into a particular account as the contact details on the email may have been adjusted to be diverted to the scammers.
- Do not use words such as “money”, “trust account”, “bank account”, “deposit” etc in the subject line of the email.
- Educate clients and customers to be vigilant to fraud. Instruct clients/customers to phone if they receive an email requesting money be sent to a particular account in order to verify its authenticity.

# Case Study - Demanding advertising/marketing expenses

## Relevant Facts

The Complainant owned a property (the Property) which she listed for sale with the Real Estate Agency. The complaint was made against the Property Agent who was the listing agent.

The listing authority (the Authority) signed by the Complainant indicated that the Real Estate Agency was authorised to incur marketing and advertising expenditure, payment of which was to be made upon settlement.

Five days after the agreement was signed the Real Estate Agency's office administrator emailed the Complainant an invoice for the agreed advertising and marketing amount, payment of which was due the same day.

The Complainant terminated the Authority 20 days into the agreement and before a sale was achieved. The Complainant refused to pay the invoice on the basis that she had been told that payment was not required until the Property was sold/settled.

The Real Estate Agency lodged the debt with the Tasmanian Collection Service to recover their expenses.

## Grounds of complaint

- That the Property Agent failed to clearly explain the prospective client's rights and responsibilities under the listing authority in respect to payment of marketing and advertising costs before the prospective client entered into the contract; and
- That the Property Agent demanded payment for work undertaken for a client that exceeded the amount agreed to by the client and contrary to the Authority.

## Discussion

Clause 11 of the Authority was pre-printed as follows –

*“the Vendor hereby authorises the Agent to incur marketing and advertising expenditure up to the sum of \$.....”*

The Property Agent hand wrote the words, “2029.00 PAYMENT ON SETTLEMENT” immediately after the \$ sign.

The Property Agent claimed that he had been trained to use the words, “Payment upon settlement or withdrawal”.

He offered no explanation as to why the words used were not in line with his training.

The Property Agent claimed that the Complainant was verbally advised by the Principal of the Real Estate Agency that she would be required to pay the marketing costs in full if the Property was withdrawn, which was disputed by the Complainant. Given that it was a case of one party's word against the other it was not possible for the Board to ascertain whose account was correct but it was not considered to impact the outcome of the Complaint in any event.

The evidence indicated that the listing authority specified that payment of advertising and marketing costs was to be made upon settlement. Irrespective of what a representative from the Real Estate Agency may have verbally told the Complainant (which remains in dispute), there was no provision in the Authority to require immediate payment of marketing costs if the Property was withdrawn from sale, which was the basis upon which the Property Agent claimed that the Complainant was invoiced for the said costs. Regardless, it was noted by the Board that the demand for payment was made prior to the termination of the Authority, which occurred approximately two weeks after the invoice was issued.

## Finding by the Board and actions taken

The Board determined that the complaint was substantiated as the Property Agent's conduct of requesting payment for advertising and marketing costs was not in accordance with the provisions of the Authority and as such was not of a standard of competence and diligence that the public is entitled to expect from a reasonably competent property agent.

The Board cautioned the Property Agent pursuant to section 101(6)(a) of the *Property Agents and Land Transactions Act 2016*.

# Case Study - property management failure to ensure bond was received

## Relevant Facts

The Complainant owned a commercial property (the Property). The Property was managed by the Real Estate Agency on the Complainant's behalf and the Property Agent against whom the complaint was made was responsible for the day to day management of the Property.

The Property Agent located a tenant, who signed a three-year commercial lease agreement (the Agreement). Pursuant to the Agreement the tenant was required to pay a security bond (the Bond) before access would be allowed to the Property.

The Property Agent advised the Complainant by email that the tenant had paid the Bond and had been given the keys to the Property.

The tenant defaulted on the Agreement by failing to pay the rent. The tenant also damaged the Property, misappropriated equipment and had abandoned the Property within the first year of the lease.

The Complainant requested the return of the Bond as partial compensation for the financial loss. The Complainant was advised by the Property Agent that the Bond had not been received by the Real Estate Agency due to 'an electronic funds transfer issue'.

## Ground of complaint

The ground of complaint was that the Property Agent failed to exercise due care, skill or diligence by –

- Failing to ensure that the Bond was received, pursuant to the Agreement; and
- Incorrectly advising the Complainant that the Bond had been received.

## Discussion

The payment of bond clause in the Agreement read:

*"On signing, the Tenant must pay to the Property Owner the sum described in Item 13 of the Schedule to secure the performance of the Tenant's obligations under this lease."*

The Property Agent's advice to the Complainant that the Bond had been paid was based on a screenshot of the EFT payment from the tenant's mobile telephone and that formal transfer would occur 2 days later.

A message on the bottom of the screen shot read:

*"If funds aren't available on the due date we'll try again over a period of 4 days. If funds are still unavailable a dishonor fee will apply."*

The transfer of funds did not occur 2 days later (or at all) presumably because the tenant either cancelled the transaction after leaving the Real Estate Agency's office or because there were insufficient funds in the account to complete the transaction.

The Property Agent submitted to the Board that with the signing of the lease and commencing the EFT transfer process the tenant had for all intents and purposes met all of his obligations under that lease. He further stated that the wording of the lease did not definitively state there must be cleared funds or similar.

The Board fundamentally disagreed with these submissions of the Property Agent.

The Property Agent did not follow up to ensure that the funds were received into the Real Estate Agency's trust account on the date the transaction was scheduled to occur and it was not until seven months later when the Complainant requested the Bond in lieu of unpaid rent and damages that the Property Agent discovered the Bond had not been paid.

The Board considered that the Property Agent did not have any processes in place to check that the bond was paid into the Real Estate Agency's trust account at the time the lease was signed or at another time or alternatively any mechanism to alert the Property Agent that a lease condition, which was in the Property Agent's control to verify, had been met.

## Finding by the Board and actions taken

The Board determined that the complaint was substantiated as the Property Agent's conduct was not to a standard of competence and diligence that the public is entitled to expect from a reasonably competent property agent.

The Board reprimanded the Property Agent pursuant to section 101(6) of the *Property Agents and Land Transactions Act 2016*. The Board also required the Property Agent to provide evidence of his processes relating to bond payment and receipting.

# Case Study – Advertising – false and misleading

## Relevant Facts

The Complainant attended an open home at a property (the Property) which was part of a strata complex.

Prior to attending the open home, the Complainant checked the online listing which listed the number '2' next to the motor vehicle icon.

There was no mention of the car parking in the body of the listing, but the listing contained a standard disclaimer that information had been provided from a number of sources and that the Real Estate Agency had not verified the accuracy of the information and took no responsibility for its accuracy. It also stated that all interested parties should make and rely on their own enquiries to verify the accuracy of the information.

At the open home the Complainant alleged that the Property Agent confirmed that there were two allocated parking spaces included in the Property title as advertised in the marketing material. However, when the Complainant indicated that it appeared on the information that there was in fact only one park for the Property with the other as visitor parking, the Property Agent allegedly responded, *"Yes one of those is for this unit."*

The Complainant advised that when he further enquired whether his personal vehicle could be parked in the visitor park allocated to the Property, the Property Agent advised that a vehicle could not be parked in the visitor park allocated to the Property permanently, but there was ample on-street parking.

One hour later, when the Complainant returned home, he noted that the listing for the Property had been amended to contain the number '1' next to the motor vehicle icon in the heading to reflect one car park only.

## Ground of complaint

The ground of complaint was that the Property Agent engaged in false or misleading advertising regarding the number of carparking spaces available for the Property.

## Discussion

The Board considered that the information provided indicated that the Property title contained two car spaces, one for use by the occupier of the Property and one for use by visitors to the Property.

The Board accepted that the motor vehicle icon depicting the number of carparking spaces in online advertising material gives no description of the parking and that the person preparing the advertising material is unable to enter any information relating to the parking next to the icon other than a numeral. The Board also noted that as there are no legislative requirements or industry guidelines in respect to the type of parking recorded next to the motor vehicle icon inconsistencies in advertising occur within the industry. Although the Property's title appears to contain 2 car spaces, one is only for use by visitors to the Property. In those circumstances the Board did not consider it appropriate to indicate that there were 2 car spaces alongside the motor vehicle icon in the advertising material.

The Board noted the inclusion of the disclaimer in the listing material however a disclaimer does not necessarily absolve a property agent of the responsibility to accurately describe the features and inclusions of the Property within the marketing material.

The Board considered that greater care could have been taken when preparing the online listing to clarify the parking arrangements, however immediate steps were undertaken by the Property Agent to rectify any confusion of the advertising of the Property as soon as it became apparent. This immediate action also suggested a lack of intention on the part of the person who prepared the listing; the Real Estate Agency and the Property Agent to mislead potential purchasers.

## Finding by the Board

The Board having considered the information provided to it determined to dismiss the complaint pursuant to Section 92 of the *Property Agents and Land Transactions Act 2016* as it was frivolous.

# Case Study - subject to sale contract and extension of contract

## Relevant Facts

The Complainants inspected a property which was part of a deceased estate and offers were by expression of interest (the Property).

The Complainants made a written offer to purchase the Property subject to the sale of their property (Complainant's Property). The final offer (the Contract) was signed by both parties and forwarded to the Complainant's solicitor on or about 14 November 2018.

Pursuant to the Contract, settlement of the Property was to occur contemporaneously with the settlement of the Complainant's Property and within 90 days of the date of the Contract.

The Complainants later became aware that the Contract was not conditional upon probate being issued, which meant that settlement may not have been able to occur contemporaneously with the settlement of the Complainant's Property.

The Complainants enquired with the Property Agent whether the Contract should be amended to accommodate probate, to which the Property Agent responded that probate questions were best to be dealt by the respective solicitors.

On 20 November 2018 the Complainants obtained a signed contract for sale for the Complainant's Property which was also subject to the sale of that purchaser's property on or before 18 February 2019.

Upon the expiry of the Contract on 8 February 2019 the Complainants requested and were granted an extension to 18 February 2019, which was the date that coincided with the expiry of the contract on their own property.

By 21 February 2019, the purchasers of the Complainant's Property had not met the contract conditions.

The Complainants requested another extension to the Contract however the vendor declined the request. On 22 February 2019 the Complainants were advised that the Contract was at an end and the Property was under contract to another purchaser.

Approximately two weeks later the Complainants noted that the Property was advertised as being sold on the internet and obtained a copy of the Property Sales Report.

This Report indicated that the sale price was substantially less than their offer had been. The Complainants also believed that one of the new owners was the sister in law of the Property Agent.

## Ground of complaint

The ground of complaint was that the Property Agent failed to act in a fair, honest and reasonable manner.

## Discussion

When the Complainant's request for the Contract to be extended a further time, the Property had been on the market for five months.

The Property Agent said that after testing the market it appeared that the Complainants' offer was at a level well above that at which other purchasers saw the Property.

The vendor subsequently accepted a lower offer that was subject to 21 days' finance. The purchaser was the Property Agent's sister-in-law and her partner. Pursuant to legislative requirements, the vendor was advised by the Property Agent prior to entering into negotiations that the purchaser and Property Agent were related.

There was no evidence provided to indicate that the manner in which the Property Agent negotiated the sale price between the Complainants and the vendor was inappropriate. Further, there was also no evidence provided to indicate that the Complainants had not been given ample opportunity to purchase the Property or that there was anything untoward regarding the negotiation of the sale between the vendor and the successful purchasers.

On that basis the Property Agent's conduct was considered by the Board to have been appropriate.

## Finding by the Board

The Board having considered the information provided to it determined to dismiss the complaint pursuant to Section 92 of the *Property Agents and Land Transactions Act 2016* as it was lacking in substance.

# Trust Account Names

A property agent who holds trust money must comply with the trust account requirements under the *Property Agents and Land Transactions Act 2016* (the Act) and the *Property Agents and Land Transactions Regulations 2017* (the Regulations). Please note these requirements are not applicable to a property agent's general working account.

## **Name**

A property agent's trust account and trust account records **must** be in the name of the licensed property agent or the business name under which the property agent carries on business. It is the name(s) displayed in the Board's Register for that property agent who is conducting business. *It is recommended that you confirm the licensed name before you open a trust account.*

## **ACN or ABN**

There is a requirement for the property agent's ACN or ABN to be attached to the trust account and identified on certain trust account records.

If the property agent licensed to conduct business is a company then the company's ACN must be attached to the Trust Account and trust account records.

If the licensed property agent is an individual, then the individual's ABN must be attached to the Trust Account and trust account records.

There should **not** be any additional ACN or ABN attached/linked/noted on a trust account or on trust account records (*see associated entities*).

## **Trust account records**

Regulation 5 identifies *trust account records* as:

- Trust account receipt
- Trust account deposit record
- Trust account payments – trust account cheques or EFT payments
- Trust account cash book
- Trust account ledger
- Trust account general journal
- Statement by approved institution (bank statement)
- Reconciliation records
- Schedule of invested trust money (if trust money has been invested)

## **Location of trust account records**

The trust account records for the property agent's business must be kept at the authorised place of business of the property agent conducting business.

The authorised place of business is the address entered in the Board's Register.

The Board may approve trust account records to be kept at a place other than the authorised place of business but approval for this must be received in writing from the Board before the records are relocated.

## **What is the relevant legislation?**

**Section 3 Interpretation** of the Act contains some definitions that are referred to here -

- *Authorised place of business*
- *Name*
- *Register*
- *Trust account*
- *Trust money*

Part 9 of the Act discusses trust money, trust accounts and records and includes the following relevant sections -

- *Section 133 Trust money*
- *Section 134 Trust account*
- *Section 135 Trust money to be paid into trust account*

The *Property Agents and Land Transactions Regulations 2017* provides the requirements for maintaining a trust account and trust account records. Regulation 4 through to Regulation 40 relate to trust accounts and trust account records.

## **Associated Entities – family or unit trusts**

Sometimes businesses are created with a structure using family trusts or unit trusts. Under the Act, companies (body corporate wherever incorporated) and individuals can be licensed however there is no ability to license trusts under the Act.

It is important to remember that these associated entities must not be linked to the trust account. The legislation is very specific that the trust account must be in the licensed name.

This information is available to download from the Board's website – Publication – Advice Note – Trust Account Names.

# Auctions

In Tasmania, the function of selling property owned by other people via auction is regulated. The term “property” includes both real and personal property.

Only general auctioneers and real estate agents who are licensed by the Property Agents Board (the Board) under the *Property Agents and Land Transactions Act 2016* (the Act) are authorised to undertake general auctions in Tasmania

The relevant section of the Act relating to conduct of auctions is Section 59 of the Act.

In essence a person must not carry on all or any part of general auctioneering business or hold himself or herself out as prepared to do so unless the person is a general auctioneer named in Part 3(1) of the Register or a real estate agent named in Part 1(1) of the Register.

**general auctioneering business** means business as an auctioneer where the property auctioned does not include land.

The only exception to this is if the gross proceeds are to be used for a charitable purpose, then the auction may be conducted by a person who is not a general auctioneer or real estate agent

If a regulated auction is conducted there are other provisions of the Act and the *Property Agents and Land Transactions Regulations 2017* (the Regulations) which need to be complied with.

It is not sufficient for a general auctioneer or real estate agent to just conduct the auction, the auction must be conducted as part of the general auctioneer or real estate agent’s business (advertising, trust accounting etc).

Other legislative provisions include, but are not limited to:

Section 62 of the Act provides that a general auctioneer must not carry on general auctioneering business otherwise than under the name of the auctioneer.

Sections 75 of the Act through to Section 79 provides for how public and private auctions must be conducted.

Section 80 of the Act provides for an appointment of a general auctioneer.

Section 133 to 135 of the Act identifies and provides for dealing with trust money.

The *Property Agents and Land Transactions Regulations 2017* (the Regulations) then provides for the way trust money must be handled and ultimately released.

The Board has received enquiries about virtual/online auctions. The following is an example of the considerations used:

Has the auction been advertised?

Is the auction conducted in rooms and/or via a digital platform, website, email, telephone, absentee or other online bid?

The auction can be conducted without the public present, as under the Act **public auction** means an auction that has been publicly advertised.

Note - during COVID-19 distancing restrictions online platforms were the only way that auctions in Tasmania were conducted.

The legislation does not speak to where the item(s) to be auctioned must be located - again in many cases items auctioned are not at the same location as the auctioneer or where the auction is being conducted.

Therefore, if an auction has been advertised, the items that are to be auctioned are owned by persons (vendors) other than the auctioneer and the sale proceeds are returned to the vendor of the goods, or that not all gross proceeds are to be used for a charitable purpose. Then it is considered that the auction is covered by the *Property Agents and Land Transactions Act 2016* and it should be conducted in such a manner as to comply with the relevant auctioning provisions.

# False, Misleading, Deceptive Statements, Conduct, Material Facts and Stigmatised Property

**Please note** the following information is intended only to provide a summary and general overview on matters relating to false, misleading and deceptive statements, material facts and stigmatised property. It is not intended to be all-inclusive nor does it constitute legal advice.

## False and Misleading

Section 56 of the *Property Agents and Land Transactions Act 2016* makes it an offence for property agents to represent in any way to someone else anything that the agent knows is false or misleading in relation to the letting or sale of property.

An essential element of the offence is that the property agent knew when the relevant information was published that the relevant statement or representation was false or misleading.

Section 56 does not in itself create any obligation to make enquiries or to independently verify information that is given to the property agent (eg by the client).

A property agent however has a professional responsibility to ensure so far as is reasonably practicable that information that is published in connection with the sale or lease of property or business is not false or misleading.

The obligation also extends beyond general publication to all forms of communication including direct communication to a person with whom the property agent has dealings, such as potential purchasers and tenants.

The extent to which a property agent may be obliged to make enquiries to obtain information about relevant matters, or take steps to independently verify information given to the agent by a client or obtained from any other source will depend on a variety of considerations which might include, for example:

- the identity of the client
- the apparent reliability of information supplied by the client or the reliability of any other source
- the nature of the transaction
- the nature of the property
- the importance of the information in the context of the transaction.

Where there is evidence to suggest that a property agent could have discovered that information was false or misleading upon proper enquiry before making the statement or representation, but in fact made no such enquiry, the property agent is likely to be guilty of professional misconduct or unsatisfactory professional conduct in the event the statement or representation turns out to be false or misleading.

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## Stigmatised property

The term stigmatised property is used to refer to property which has a stigma attached to it due to something that has happened at the property or near the property. This stigma may affect the property price and the decision of purchasers as to whether they will purchase the property or a whether a tenant wants to rent a property.

The reasons for the stigma of a property will vary, but might generally include:

- The history of the property—such as murders, suicides, sexual assaults or major crimes taking place at the property;
- Any health or safety issues—such as the proximity of the property to toxic waste, chemical residue or other matter which might affect the health of the property.
- Proximity issues—such as the proximity of the property to properties with a history or those that have been the subject of an event involving significant public comment.
- Other matters—which would clearly be relevant to purchasers or tenants.

With this in mind the Code of Conduct requires that a property agent:

- must at all times accept that his or her first responsibility is to serve the interests of the client and while serving the interest of the client, to act fairly, honestly and in a reasonable manner toward all other customers.
- does everything that can be reasonably expected to obtain the best price and conditions for the sale or lease of a client's property or business.
- must ascertain all pertinent facts in relation to a transaction undertaken for a client so as to avoid error, exaggeration or misrepresentation.

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### Misleading or Deceptive Conduct

There are also offences in the Australian Consumer Law (ACL) regarding misleading and deceptive conduct.

Misleading or deceptive conduct in trade and commerce has been prohibited under Australian Law since 1974. This provision is contained in Section 18 of the ACL. Section 18 also makes it clear that as well as businesses needing to comply, employees can now be the primary defendant in legal proceedings under ACL.

The ACL prohibits businesses and their staff from engaging in behaviour which:

- actually misleads or deceives; or
- is likely to mislead or deceive.

All kinds of conduct and communication are covered, including personal discussions, emails, SMS, letters, advertising, negotiations and others.

Misleading or deceptive conduct may include:

- lying or intentionally misleading the client or customer;
- encouraging a wrong conclusion;
- factually correct information that gives a false impression;
- not correcting a misunderstanding;

- not updating information that has changed;
- leaving out or concealing important information;
- making false, exaggerated or inaccurate claims; and
- staying silent about material facts (non-disclosure).

Conduct that **actually misleads** others is generally considered relatively easy to identify. For example, a brochure that wrongly states the size of a block of land is misleading.

Conduct **likely to mislead** is also prohibited but may be harder to identify, without the trigger of a complaint from someone claiming to have been misled.

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### Material Facts

Material facts include any fact that could influence a consumer's decision about whether to buy or lease a property, and/or how much to pay.

Property Agents should disclose all facts that a reasonable person would expect to be told. This may include facts that will not impact every purchaser or tenant but could stigmatise a property for some.

It is difficult to define just what constitutes a material fact because what is an important consideration for one person may be completely irrelevant to someone else.

For example in the NSW case of *Hinton & Others v Commissioner for Fair Trading*.

A triple murder at the property was not disclosed to potential purchasers. The stigma for the buyers was largely because of their personal religious beliefs. The court said they and all other prospective purchasers were entitled to disclosure of such a significant matter.

The same principles would apply if the property was for lease. Although tenancy laws may not spell out the need for disclosure in all areas, many different types of facts can be considered 'material facts' under consumer law.

# Material Facts and Disclosure other States and Territories

## Other Australian States and Territories - disclosure requirements

Some other Australian States and Territories are legislating what is material and disclosure requirements. When dealing with clients or customers from other States and Territories they may have different expectations regarding disclosure requirements.

### NSW

On 23 March 2020 NSW introduced legislative amendments that provided as following -

It is an offence for an agent to induce a person to enter into a contract or arrangement by concealing a material fact.

The new regulations specify the kinds of facts that an agent knows or should reasonably know and must disclose to a prospective purchaser. These include that the property:

- flooded from a natural weather event or was affected by bush fire in the last 5 years;
- has significant health or safety risks;
- is listed on the [loose-fill asbestos insulation register](#);
- has been the scene of a crime of murder or manslaughter in the last 5 years;
- has been used for the production or supply of a prohibited drug or plant in the last 2 years;
- is, or is a part of, a building that contains external combustible cladding to which:
  - a fire safety order, or a notice of intention to issue a fire safety order, has been issued requiring the building to be rectified regarding the cladding
  - a building product rectification order, or a notice of intention to issue a building product rectification order, has been issued requiring the building to be rectified regarding the cladding;
  - a development application or complying development certificate application has been lodged for rectification regarding the cladding.

The agent will be liable if they fail to disclose these facts, whether or not they intended to conceal them from the prospective purchaser, if they knew of the fact, or should have reasonably known about the fact.

<https://www.fairtrading.nsw.gov.au/housing-and-property/property-professionals/recent-law-reforms>

### Victoria

The *Sale of Land Amendment Act 2019* (the Act) came into effect from 1 March 2020.

Vendors and agents cannot knowingly conceal from a prospective buyer any material facts about a property when selling land.

Material facts include whether a murder had occurred on the property, if the property had been used as a meth lab, or the existence of flammable cladding or asbestos.

The [Material Fact Guidelines](#) state that a vendor or their agent must disclose all known material facts, as soon as a prospective buyer indicates they are considering buying the property.

The vendor or agent must also answer all questions from prospective buyers about material facts as fully and frankly as possible.

<https://www.consumer.vic.gov.au/latest-news/sale-of-land-changes-in-effect-legislation-update>

# Application for Licence - Insolvency Checks

In order for the Board to be satisfied that a natural person is a fit and proper person in accordance with section 18(5) of the Act, the applicant is required to disclose if they are an undischarged bankrupt or if they have made a composition or arrangement with creditors that is still in force.

The Board will require from 1 July 2020 any natural person who is making a licence application to provide evidence to support the disclosure.

## Authority to seek evidence under the Act

The Act clearly considers that the solvency of an applicant is a criterion to indicate whether a person is fit and proper to hold a licence. The ability for the Board to seek additional documentation and information is prescribed under section 16(2)(e) of the Act.

## Extract or a result report from the National Personal Insolvency Index (NPII)

Such evidence is available by providing an extract or a result report from the National Personal Insolvency Index (NPII) maintained by the Australian Government's Australian Financial Security Authority.

## Results extract with record

If the applicant has a record on the NPII, a results report will be produced.

**Administration Details**

Type	BANKRUPTCY - Debtors Petition
AFSA Reference	SA 12345/6
Date of Bankruptcy	10-Jun-2005

**Debtor's Details**

Name	CITIZEN, Jane Mary
Date of Birth	30-Mar-1956
Also Known as	BLOGGS, Janice Mary
Address	345 ABC Street STREETHOLME SA 9999
Occupation	PENSIONER - DISABILITY
Statement of Affairs filed	10-Jun-2005
Date Entered on NPII	10-Jun-2005

**Discharge Details**

Discharge Reason	Discharge by Law
Discharge Date	13-Jun-2008

**Trustee Details**

Trustee	OFFICIAL TRUSTEE IN BANKRUPTCY
Business Name	AFSA
Business Address	GPO BOX 2904 ADELAIDE SA 5000
Phone	1300 364 785

**Summary Details**

Summary	This individual is no longer bankrupt under this administration.
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## Result extract - no record

If the applicant does not have a record on the NPII, an extract of the NPII will be produced with a nil result extract. A sample of what this extract will look like:

**Search Criteria**

Family Name	CITIZEN (Exact)
Given Name	Mitch (Starts With)
Middle Name	<blank> (Any Middle Name) (includes records with no middle name)
Date of Birth	<blank> (Any Date of Birth) (includes records with no date of birth)
Insolvency records searched	Last 10 years only

**Search Result Summary**

Family Name	Given Names	Alias	Occupation	Date of Birth	Suburb at Start Date	Start Date
CITIZEN	Mitch		SALES MANAGER	26-Dec-1975	BELMORE NSW	04-Sep-2006
CITIZEN	Mitch Glenn		UNKNOWN		BUDERIM QLD	17-Apr-2009
CITIZEN	Mitchell B		NURSE	30-Nov-1968	INGLE FARM SA	26-Jun-2009

The information contained in this extract comes from the National Personal Insolvency Index at the time and date of the extract. If you consider the information contains errors, please contact the Australian Financial Security Authority on 1300 364 785 or visit the website www.afsa.gov.au for more information.

END REPORT

## Default search is 10 years

All names searched on the Bankruptcy Register default to records started in the last ten years which is sufficient for the Board's purposes.

## Process to obtain an extract or a result report from the NPII

A request for an extract or a result report from the NPII is done online for a small fee that can be paid by credit card.

The process for a request and receipt of the extract or result report from NPII takes less than 5 minutes.

The mandatory criteria is a family name and a given name. Further information from search tips can be found on the agfs.gov.au website.

## Date of the extract or a result report from the NPII

Upon lodging an application for licence with the Board, the applicant must also include either an extract or a result report from the NPII that has been issued not more than seven (7) days before the date of lodging the application for licence.

This information is available to download from the Board's website – Publication – Policy Insolvency Checks for granting of licences.

# So you know

## Appeals of a Board Decision

The right to appeal against a decision of the Property Agents Board (the Board) is conferred by Section 116 of the *Property Agents and Land Transactions Act 2016*.

In the Appeal the Tribunal must consider whether the decision of the Board was correct, having regard only to the evidence before the Board when it made the decision appealed from.

It is not a rehearing, and the Tribunal will not normally receive evidence which was not before the Board.

The Tribunal, after it receives a notice of appeal, holds a directions hearing. The purpose of the directions hearing is to ensure that the parties to the appeal know what is required for the conduct of the appeal.

Directions will usually include:

- that the Board within 14 days provide a list and copies of all the documentary evidence before it, and the recordings of evidence before it, to the Tribunal and to the appellant;
- that the appellant within 14 days provide the Tribunal and to the Board a written statement of the grounds of the appeal, setting out each aspect of the Board's decision said to be wrong, and the reasons why the decision on that aspect was wrong;
- setting a time and place for the hearing;
- any other direction required by the circumstances of the appeal.

The hearing takes place at the appointed time, and the Tribunal normally reserves its decision, which is published in writing with reasons.

A person, including the Board, may apply for a review of a decision of the Tribunal, pursuant to s.117 of the above Act.

## Selling a Cemetery

Under the *Burial and Cremation Act 2019* (the Act), a person or organisation wishing to sell a cemetery (including a closed cemetery) must apply to the Regulator for a certificate. For more information click [here](#)

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## Examinations

The Property Agents Board conducts examinations for the qualification of property representative and general auctioneers.

### Virtual Examination

Due to COVID-19 and social distancing requirements examinations are being conducted via video conferencing.

Examination candidates must register their interest using the electronic form available on the Board's website <http://www.propertyagentsboard.com.au/exams2.html>.

An examination time will be allocated and instructions regarding the process will be forwarded.

Candidates should allow up to 3.5 hours to complete the examination.

### Equipment

You will need to have access to a device (computer/mobile/tablet) with a camera and microphone and an area that would be private and quiet during the examination.

### Expectations

The Board expects that exam candidates will comply with examination conditions and instructions.

### Results

Candidates will be notified of exam results by email – you should allow at least 5 working days from the day the examination is posted back to the Board.

# Licensing

## Person's Name

The Board has determined the Register will contain the Full Legal Name, that is first name, (any) middle name(s) and surname.

The Board has also determined that a preferred name or nickname for marketing/advertising can be added to the Register.

Some property agents are using a different name to that recorded in the Board's Registers. This could be due to change in marital circumstances (reverting back to a maiden name or taking on a partner's surname) or shortening a first name or surname, using a nickname or another preferred name in their marketing/advertising.

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## Details up to date?

There is no cost associated with making a change to the Register.

A property agent is required to keep his or her details up to date and therefore must advise the Board of a 'change of details' so the Register can be amended. Such changes may include:

- Employer change
- Change of name
- Change of residential address
- Contact details

If a change of name is due to change in marital circumstances attach evidence of the name change such as a copy of a valid passport or current driver's licence that reflects his or her new legal name.

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## Carrying on Business?

The use of social media is a great medium to get a message out there and market yourself and your business. But a word of caution: property representatives must not call themselves a "real estate agent" or "property manager".

These are prescribed terms and to say or imply that you hold that licence when you do not is misleading and deceptive, and you may be in breach of the Act for holding yourself out to be able to carry out work that you are not licensed to do so.

The term PROPERTY AGENT may be used as this term includes a real estate agent, property manager, general auctioneer and property representative.

Further, unless a person is named in the Board's registers as being able to conduct business, he or she must not state or imply that they have their own agency business eg "John Smith Property" or "John Smith Real Estate". This includes terminology used on Facebook pages. The Board has published Social Media Guidelines to assist the industry. These guidelines together with other useful information is available on the Board's website [here](#)

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## Licence conditions - Check them out

Take some time out now to ensure that you have complied with or are on track to comply with any condition that has been placed on your licence. All conditions are printed on your licence.

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## Mutual Recognition

In Australia, each state and territory administer its own occupational licences for property agents. The basic principles under the *Mutual Recognition Act 1992* is that a person holding a licence in one jurisdiction is entitled to apply for a licence in another jurisdiction without the need to undergo further testing or examination.

It should be noted that obtaining a licence under mutual recognition is not an automatic process. Individuals must apply for recognition of their existing licence/s by lodging a mutual recognition application which can be found on the Board's website and pay the applicable fees and provide other supporting documentation.

# Advertising/Marketing

## Advertising - the business name and address

When a property agent publishes an advertisement in connection with the business, the advertisement must contain both name and the address of the authorised place of business.

Further the Code of Conduct at clause 11 (2) provides a property agent must ensure that, as far as reasonably practicable, any advertising or promotional material (including any material in any social media post or advertisement) and any other sign, notice or advertisement includes a clearly legible statement of the name and address of the property agent's business in respect of which the property agent is licensed.

This provision applies to all advertisements regardless of the medium used to advertise. There are a number of property agents that are advertising without this information.

**name** in respect of a property agent conducting business, means the name shown in the Register - being the business name.

**authorised place of business**, means the address in the Register where the property agent may carry on business.

As an example, if the Board was a licensed real estate agency business. Any publication would have included the words:

Property Agents Board (as the name)  
Level 1, 15 Victoria Street, Hobart (as the authorised place of business).

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## Whose listing is it?

An agreement to sell or manage property is between the agency business and the client.

If a property agent leaves an employer the agency agreement and client stays with the employer.

## Approaching a person already under agency

The Australian Competition and Consumer Commission (the ACCC) made rulings with regards to an agency being able to contact a person who is a client of another agency.

In 1998, the ACCC took action against the Western Australian Real Estate Institute that restricted its members from approaching a vendor already under agency: -

“As a result of the ACCC action, the particular anti-competitive Rules and Rules of Practice have been removed to ensure that the Real Estate Institute of Western Australia's (the REIWA) professional standards no longer breach the Act. The changes mean that member agents can compete more actively by, for example, allowing REIWA real estate agents to provide information about their services to home-owners even if the sellers have already signed up with another agent. This will allow home-owners to be better informed about their options. Agents may also offer consumers incentives such as prizes and reward points that were previously not allowed.”

The Property Agents Board does not consider a property agent providing promotional material to a vendor as being misconduct. However, it is important to ensure that material provided does not contain advertising or information that is false or misleading or that a client of another agency is encouraged to cancel a valid contract outside the provision of the original agreement.

Further, it is important to note the provisions in the Code of Conduct relating to conflicts of interest, rights and responsibilities and second commissions.

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## Extending a sales authority - 120 days

The maximum period of a sales authority is 120 days. The Act specifies that an agreement expires after 120 days.

This means that an agency agreement cannot be extended (even by mutual agreement between the parties) past 120 days.