



Government of Western Australia
Department of Commerce
Consumer Protection

Real Estate Mandatory CPD 2015

Mandatory CPD for Real Estate and Business Agents

Case Studies and Compliance Exercises

- Off-the-plan sales
- Negotiating multiple offers
- Sale and/or transfer of property management “rent rolls”

MODULE TWO:

Participant Distance Learning Workbook

Welcome to Mandatory CPD for 2015

The purpose of the Compulsory Professional Development (CPD) program is to assist industry members in updating and developing their knowledge and skills in the areas of industry practice and legislative requirements.

The Commissioner for Consumer Protection (the Commissioner) has determined the topics for mandatory sessions in 2015.

This session topic is entitled *Case Studies and Compliance Exercises* and covers three subtopics.

- Off-the-plan sales
- Negotiating multiple offers
- Sale and/or transfer of property management “rent rolls”

Any questions arising out of this training may be addressed to the Consumer Protection Division of the Department of Commerce (the Department) by contacting the Consumer Protection Contact Centre on **1300 304 054** or by sending an email to consumer@commerce.wa.gov.au.

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Session Format

The design of this distance learning mandatory CPD training module for real estate and business agents is focused on the application of learning through review and discussion of real-life case studies and compliance activities that are both interactive and practical.

It is envisaged that this approach will allow you to consider current problems and trends facing the real estate industry and 'flesh out' a number of issues.

It should be noted that some of the case studies and compliance activities included in this training manual are based on actual investigations that have been conducted by Consumer Protection. To protect the anonymity of the licensees and registrants involved, the names of the parties and identifying facts have been changed.

Note: While you are strongly encouraged to attempt the activities and case studies in this workbook for your own learning, they DO NOT need to be submitted to REIWA Training for assessment.

Once you have read through this workbook and attempted the activities, please complete the enclosed evaluation quiz and submit it to REIWA Learning for marking.

PART ONE – Off-the-Plan Sales

Introduction

Buying “off-the-plan” generally involves signing a contract with a developer before the developer has obtained final approval to subdivide land that is being purchased or, in the case of a building, before building has commenced or been completed.

Off-the-plan sales may include the sale of vacant land, house and land packages and strata properties (such as units, townhouses or high rise apartments) that are yet to be built or are under construction. Completion of a development can take a long time. A one to two year timeframe would not be unusual for an off-the-plan development.

What is an off-the-plan contract?

Off-the-plan sales contracts are agreements where a developer promises to deliver a parcel of land, a house and land package or a strata property to a buyer at an agreed price at a future date, subject to the developer obtaining all necessary approvals in respect of the development from the relevant authorities and satisfying any conditions necessary to finalise the development.

Legislative responsibilities when selling off-the-plan

An agent selling off-the-plan on behalf of the developer, under section 4 of the *Code of Conduct for Agents and Sales Representatives 2011* (the Code), is required to act in the best interest of their principal (the developer) except where it would be unreasonable or improper to do so. However, agents must also make sure they comply with consumer protection legislation in their dealings with buyers of off-the-plan developments. In addition, agents are also responsible for the conduct of the sales representatives they employ in their dealings with buyers of these developments.

An off-the-plan contract is often a very lengthy, legally binding document that includes detailed specifications. It is often pre-prepared by the developer’s lawyers on their behalf to principally protect their interests. In some cases, the developer may choose to use the Joint Form of General Conditions for the Sale of Land which is part of the standard offer and acceptance contract produced jointly by the Real Estate Institute of Western Australia and the Law Society of Western Australia. However, the developer could also choose to have their own special terms and conditions written into the contract by their lawyer/s. Needless to say an off-the-plan contract is a difficult document for those in the industry to completely understand, never mind a potentially inexperienced buyer!

By taking appropriate steps to make sure that buyers and potential buyers understand what they are agreeing to when they sign an off-the-plan contract, agents reduce the risk of a buyer potentially challenging their conduct in the transaction, should the development not proceed or the eventual finished product not meet the buyer’s expectations.

Case Study #1 – “The sun sets on the sunset clause”

Jessica Briggs entered into a contract with the ABC Group Pty Ltd to purchase 75m² of retail space in a new multi-use development in North Fremantle called “Vista View”. Jessica intended on opening a fashion boutique in the space.

This was Jessica’s first business venture, having previously worked for a large fashion chain store. Jessica had no previous business experience however she was enthusiastic and her parents believed she had the creative ability to fulfil her dream in the fashion industry. As such her father became a silent business partner and provided the financial support to assist her with her new business.

As directors of Top End Fashion Pty Ltd, Jessica and her father signed the contract to purchase the retail space at Vista View on 2 February 2013 and paid a 10% deposit of \$39,500.

They had done some research of other retail premises in the area including reviewing previous sales in Fremantle and surrounding suburbs for retail premises of a similar size. They decided to purchase the space at Vista View because the development was in close proximity to several cafés and restaurants which they thought would bring foot traffic past Jessica’s proposed boutique and it was a stone’s throw from the river. The asking price was \$395,000 which was on par with several other mixed-use developments around Fremantle that didn’t have the great views Vista View offered. They thought they’d scored a bargain and couldn’t believe their luck!

Jessica and her father knew the development would not be an overnight process and were willing to wait the 6 months the real estate agent had told them it would take to finish the project. This would give Jessica time to finalise her business plan and get everything organised to launch her new fashion business.

As the project is nearing completion, Jessica receives a telephone call out of the blue from the real estate agent requesting an urgent meeting. Jessica and her father attend the agent’s office and to their absolute surprise were advised that the Vista View project could not be completed by the due date because the developer does not have the funds to finish the project. The agent also advised that they had not been able to obtain all the required approvals from the local council. The agent advises Jessica and her father that the developer is cancelling the whole project and their deposit will be returned. The real estate agent advises that he sign Jessica up for a contract for a similar development up the road for a further \$20,000 however it wouldn’t have the river views of the Vista View development. Jessica and her father are not willing to pay more for retail space that is not as good as that for which they were contracted. They are starting to feel as though they have been tricked!

Jessica’s father is well aware that the value of the retail space has increased in price since he and Jessica signed the contract with the agent in February 2013.

Jessica and her father can’t understand how the developer is able to get out the contract. “This contract is legally binding, how can this developer just shut up shop at this late stage without warning?” Jessica’s father exclaimed.

Jessica's father didn't want to admit he didn't have a lawyer review the documentation. He had intended to but they had already committed so much money to date without any guarantees that this business would make it past start-up. He decided to bluff his way through, after all, surely the agent would point out particular provisions he needed to know about?

Feeling as though they were out of options and money, Jessica and her father signed a rescission notice for the retail space they were contracted to purchase and their deposit was promptly returned. They said that they would get back to the agent about the more expensive retail space he had spoken of down the road, though it would really stretch their budget and they were feeling as though it was just all too hard!

About two weeks later, Jessica's father just about choked on his Weetbix whilst reading the morning paper. Low and behold the retail space they had just been told could not be finished was again for sale, two weeks off completion and at a price 25% more than what they had paid!

He was furious, how could this happen?

Questions:

Read the case study above and then attempt the questions below. Confirm your understanding by reviewing the suggested answers at the back of this workbook.

1. What is a sunset clause?

2. What do you think the agent and developer have tried to do here? What are their motives?

3. Has the real estate agent breached any legislation? If so, what provisions?

4. What advice would you give Jessica and her father in considering an off-the-plan sale in the future?

PART TWO: Negotiating Multiple Offers

As a licensee, whether you are working in the sale of residential or commercial property, you would have come across a situation where multiple offers are presented for one particular property you have listed.

Multiple offers occur generally in a **'sellers' market'** where competition for residential property is high and there are **more buyers than there are properties for sale**. However, it can occur in any market and especially for properties within the more affordable price range.

As a first step, consider the legislation you need to be mindful of when negotiating multiple offers.

Quick Knowledge Check #2

What provisions of the Code are relevant to negotiating multiple offers?

Compliance Exercise #1– Take on the role of a Compliance Officer

Let's assume you are a Compliance Officer in the Property Investigations Branch of the Consumer Protection Division of the Department. A new investigation file has landed on your desk to take carriage of from Mark Anderson, a departing Compliance Officer. In an attempt to get familiar with the investigation to date, you read the *Investigation Summary Report* Mark has prepared for you.

SUMMARY INVESTIGATION REPORT

File No: 28563

Complainant details: Casey and Max Milford
Respondent: Matt Dawson (RR 42174)

Key Issues:

Matt Dawson ("Respondent") listed 3 Moorland Terrace, Doubleview ("Property") for sale as instructed by Property Solutions.

Property Solutions was engaged by the ABC Bank to find a real estate agent to list the property as a mortgagee sale and liaise with the agent.

Sam Smith, who works for City Beach Realty, received an offer of \$550,000 from Casey and Max Milford (Complainants) and alleges she passed the offer on to the Respondent, Matt Dawson.

An offer of \$540,000 was accepted by ABC Bank.

Property Solutions has advised it never received an offer from the Respondent for \$550,000.

Background:

1. On 10 June 2013, Property Solutions, on behalf of ABC Bank, appointed First Choice Investments Pty Ltd trading as A-plus Real Estate Scarborough ("Agency") as the listing agent for the Property to be sold as a mortgagee sale. Tom Clifford is the person in bona fide control of the Agency, appointed the listing to the Respondent, a registered sales representative employed by the Agency.
2. The Respondent received instructions from Property Solutions to present all offers on separate "Offer forms" rather than completing an Offer and Acceptance. No specific instructions were given as to what offer to accept or reject.
3. Two offers were placed at some stage. One was for \$480,000 and subject to finance. The other was for \$540,000 and subject to finance and a termite inspection.
4. On 12 August 2013, another offer of \$550,000 was placed, this time by Casey and Max Milford ("Complainant"), through Sam Smith, as the conjunctional agent, which was also subject to finance.
5. That same day, the Respondent emailed copies of the \$480,000 and \$540,000 offers to Property Solutions.
6. On 18 August 2013, the Respondent emailed a Property Update Report to Property Solutions which stated that only two offers had been received.
7. The offer of \$540,000 was accepted and an Offer and Acceptance was drawn up on 14 August 2013 which was accepted by ABC Bank on 23 August 2013.
8. Property Solutions never saw or heard of the \$550,000 offer.
9. Sam Smith, claims she received a phone call from the Respondent a couple of days after the Offer Form was submitted to advise her that his clients' offer had been rejected by the vendor in favour of a full-price cash offer.

Recommendation:

Prepare a brief of evidence for legal review.

Mark Anderson, Compliance Officer

10 June 2014

Questions:

Read the summary investigation report above and then attempt the questions below. Confirm your understanding by reviewing the suggested answers at the back of this workbook.

- 1. You will notice the alleged misconduct has not been included in the Investigation Summary Report. What do you think is the alleged misconduct in this matter?**

(Hint: You may like to refer to the excerpts of the legislation at the back of your workbook)

- 2. What do you think are your obligations and responsibilities when representing the seller in a multiple offer scenario?**

3. What do you think are your obligations and responsibilities when representing the buyer in a multiple offer scenario?

4. What are some 'best practice' steps or principles that you could suggest to your staff to prepare them for dealing with a multiple offer scenario?

PART THREE – Sale and transfer of property management rent rolls

What is a 'rent roll'?

The collection of rental properties managed by a real estate agency is often referred to as a 'rent roll'. Rent rolls are occasionally offered for sale, whether through specialist rent roll brokers, agency networks or word of mouth. They may be offered for sale when an agency decides not to engage in property management any more, when an agency is being sold or if an agency is in financial difficulties.

Purchasing a rent roll can be seen as an attractive way to manage a steady flow of income, rather than being reliant on the more irregular commission derived from the sale of properties. However, if the diligence process prior to the purchase of the rent roll is inadequate, or there are insufficient resources in place to manage a large rent roll, the ability to comply with legislative requirements or maintain the relationship between the owner/tenant may be compromised.

Issue to consider when purchasing and transferring a rent roll

Agencies should consider the following issues when deciding whether to purchase a property management rent roll.

- the management fees charged at the selling agency compared to their own agency, and the potential to increase fees if they are below current levels;
- whether any properties are in arrears, currently involved in court action or for sale;
- whether and how much rent has been paid in advance, as the selling agency may have the right to charge management fees upon these early payments, while the purchasing agent may not;
- the number of private lessors and how many properties they each hold (if a majority-holding landlord leaves this may have a serious effect on the return and value of the newly purchased rent roll);
- the quality of the records and files; and
- where the rental properties are located. The most efficient purchase is where the majority of the rent roll is located in the agency's primary trading area (though this may be less of a factor if agencies outsource inspections, home opens etc.).

The Department has taken complaints from both tenants and owners, who have been affected financially because agents selling or purchasing a rent roll have not conducted due diligence or ensured all records were accurate and complete. This has led to claims against the Fidelity Guarantee Accounts, Magistrates Court Orders and compliance action against agents, as well as agents having to devote considerable resources in order to attempt to resolve these matters.

Relevant legislation

On purchasing a rent roll from another agency, some real estate agents proceed to manage properties under the same terms and conditions as the existing agreement until a new Management Authority (MA) in favour of the agent buying the rent roll is obtained. This is a breach of s.60 of the REBA Act. Additionally, if they are receiving payment for any services rendered while the appropriate authority is not in place, any such fee incurred may be recoverable by an owner as a civil debt under s.60 (4) of the REBA Act.

A new MA may not be required where there is scope to reassign the authority in the original MA. However, a Deed of Assignment should be used with caution. The Department is of the view that for a Deed of Assignment to be valid, and for the agent to be able to receive commission, reward or consideration, the assignment must comply with all the requirements of the REBA Act and Regulations for an appointment to act and in addition, the principal must also consent to the assignment occurring.

In addition to s. 60 of the REBA Act, agents acquiring a rent roll should also be mindful of ss 6, 9, 15, 16 and 17 of the Code.

Key issues identified by the Department

Some of the key issues that the Department has identified surrounding past purchases of rent rolls by real estate agencies arise where the new agent that buys a rent roll fails to exercise due skill, care and diligence in breach of s. 9 of the Code. For example, the agent may have failed to:

- arrange for a valid management authority to be in place;
- verify that bonds have been received and changed over;
- ensure electronic or physical files contain all the necessary notes, paperwork and original documentation; and
- verify that rent is paid and up to date.

Many of these issues are identified in the initial months following the transfer or sale of a rent roll, when it becomes clear that MAs are not in place, copies of keys are not available, bond location paperwork is missing etc. However, in a number of complaints to the Department, the problem is unknown until years later, when the tenant has difficulty with the bond disposal at the end of the tenancy. Issues may also be identified through a proactive compliance visit.

Scenario activities

Consider the scenarios and then attempt the questions that follow. Confirm your understanding by reviewing the suggested answers at the back of this workbook.

Scenario #1

For the purpose of this scenario, Tom Smith, licensee of ABC Realty is selling his rent roll; and Jane Kirkham, licensee of Kirkham Real Estate is buying the rent roll. The owner of the subject rental property is Mr Thompson.

On 6 May 2014, Tom Smith notifies the owner of a rental property for which he manages, of the sale of his rent roll to Jane Kirkham. He advises Mr Thompson that the sale is going to take effect on the 20 May 2014. In doing so it may be considered that Tom Smith has given notice to terminate the Management Authority he has with Mr Thompson.

Jane Kirkham then purchases the rent roll from Tom Smith on the 20 May 2014. Jane manages Mr Thompson's rental property, and others on the rent roll under the same terms and conditions as Tom Smith.

On 22 May 2014, rent for Mr Thompson's property was due to be paid by the tenant so Tom Smith collected it and transferred it to Jane Kirkham without deduction. Upon receipt, Jane Kirkham transferred the rent to Mr Thompson, deducting fees at the same rate as originally agreed with Tom Smith.

On 8 June 2014, once Ms Kirkham has got herself organised she completes a new appointment to act with Mr Thompson for the rental property she is managing on his behalf.

- 1. What are the breaches of the REBA Act, and the Code that may have occurred?**

- 2. From a best practice point of view, what are some of the steps and actions that the agent should have taken to ensure they were complying with the legislation?**

Scenario #2

For the purposes of this scenario, Sue Cotton is a licensed agent who has purchased a rent role from Steve Roxon, also a licensed agent. The tenants are the Jones family. The owner of the rental property is Kimberley Grant.

Kimberley Grant made a complaint to Consumer Protection regarding the conduct of Steve Roxon and Sue Cotton following the sale of Steve's rent roll to Sue.

Kimberley was happy for Sue Cotton to take over the management of her rental property and so she signed a new management authority with Sue. About six months later, the tenants in Kimberley's property vacated and left behind a lot of damage to the property. In addition, the rent was two months in arrears. Kimberley found she was unable to make an insurance claim for the damage because Steve Roxon had failed to take out full insurance. Sue Cotton was taken by surprise, she didn't realise that there wasn't full insurance coverage in place.

- 1. What are the breaches of the REBA Act, and the Code that may have occurred?**

- 2. From a best practice point of view, what are some of the steps and actions that the agent could have taken to ensure they were complying with the legislation?**

SUGGESTED ANSWERS

PART ONE: Off-the-plan sales

Quick Knowledge Check #1

Issues to consider when selling off-the-plan

1) Review the appointment to act and make sure that it contains all the required elements.

Section 8(2) of the Code requires that the person in bona-fide control of the agency business properly supervise the business of the agency and ensures the agency is complying with the provisions of the REBA Act, Regulations and the Code.

The person in bona-fide control of the agency should make sure that the authority to act on behalf of a developer contains all the necessary elements of a valid appointment to act in accordance with section 60 of the REBA Act and regulation 6BA of the Regulations. The specific elements of a valid appointment are at **Appendix D**.

2) Review the off-the-plan contract in detail and ensure you understand all the terms and conditions

a. The agency may consider seeking independent legal advice.

It is good practice for agencies to seek independent legal advice on the particular terms, conditions and specifications of a contract before deciding to act for a developer in an off-the-plan project.

The Department has investigated complaints in relation to off-the-plan developments where licensees, registrants and agencies have been left exposed to potential legal action because they have become involved in speculative off-the-plan developments without conducting adequate due diligence on the contract, the developer, the location or the state of the market.

If a development does not proceed, agents may run the risk of not getting paid their commission, despite having earned it. Conducting appropriate due diligence including obtaining legal and/or financial advice as well as conducting a risk assessment of the project, will help reduce the risk of the agent or agency being left without financial reward if the development does not proceed as planned.

b. Consider security of deposit monies.

Deposit money can be tied up for a long time without any guarantee of a development being finalised. If the developer becomes insolvent, the buyer's deposit money may be at risk as will the agent's commission.

Agents should know how a developer is financing an off-the-plan development before choosing to get involved. From the point of view of an agent, one of the biggest risks associated with selling off-the-plan is that the developer is unable to secure sufficient investment funding to finance the project and then elects to cancel the contracts.

c. Consider unfair contract terms.

A contract to purchase a property off-the-plan may be subject to the unfair contract term provisions of the ACL if it is a 'standard form consumer contract.'

A standard form consumer contract with respect to an off-the-plan purchase is one for personal use and the contract is usually prepared by one party (the developer) and is not subject to negotiation. The unfair contract term provisions of the ACL do not apply if the off-the-plan purchase contract is made for business or investment purposes.

Agents should be mindful of terms in an off-the-plan contract that could be considered unfair. A contract term can be considered unfair if it:

- would cause an imbalance in the rights and obligations of the parties arising under the contract;
- is not reasonably necessary to protect the legitimate interest of the party who would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were relied upon.

d. Consider special laws for strata developments.

With respect to strata properties, deposits and any other money payable by a buyer prior to registration of the strata or survey-plan must be held in the trust account of the solicitor, real estate agent or settlement agent until the strata or survey –strata plan is registered with Landgate. It is a breach of the *Strata Titles Act 1985 (WA)* to release money before registration of the strata or survey-strata plan. If money is released before registration, then the buyer may at any time avoid the sale before the strata or survey-strata plan is registered.

However, after registration of a plan, there is no requirement for money to remain in a trust account. As such, a developer can then access deposit money unless there is a term in the contract to the contrary. Agents should be wary of contracts that enable a buyer's deposit to be accessible to the developer prior to settlement. Agents should also be wary of speculative developments where a developer seeks to use deposit moneys to fund the development itself. In these cases the required deposit could be much higher than normal and could be lost altogether if the buyer signs away their legal rights to it because they have been lured by a purchase price that is under current market value.

Buyers may wish to include an additional clause, specifying that the deposit and any other moneys held must remain with the deposit holder until settlement. If selling strata titled properties, agents need to ensure that all disclosure material (Form 28, 29 and attachments) has been provided to buyers before they sign the contract of sale.

3) Review the past history of the developer:

Prior to getting involved with a developer, an agent may want to consider conducting their own research on the developer to make sure it is reputable, is complying with the relevant legislation and perhaps, most importantly, has been involved with successful developments in the past.

Agents may give particular consideration to the following:

➤ **Is the developer complying with Consumer Protection legislation?**

For example, is the developer complying with advertising requirements (section 62 of the REBA Act);

Has the developer registered its principal place of business – section 57 of the REBA Act)?

- **Has the developer been before the State Administrative Tribunal or any other Court in relation to their conduct as a developer?**

- **How many developments has it been involved with and has it been successful?**

- **Does the developer have the necessary approvals for the subject development?**

Most developers will not sell land off-the-plan before they have received Western Australian Planning Commission (WAPC) “conditional approval” of the subdivision.

Buying land off-the-plan that does not have conditional approval can expose the buyer to significant risk that the development will not proceed or will not proceed as initially proposed.

Final settlement of an off the plan sale can only occur after a Certificate of Title for a property has been issued by Landgate.

- **Does the developer own the land or the strata lots?**

A recent decision of the WA Court of Appeal has made it clear that *the Sale of Land Act 1970* (WA) (Sale of Land Act) prevents a developer from individually selling five or more lots in a subdivision, or two or more strata lots in a strata development, unless they are the registered owner of the land or strata lots.

If the developer were to sell lots of land or strata lots contrary to the requirements of the Sale of Land Act, then the sale is unenforceable by the seller and the buyer cannot be required to continue with the purchase. The buyer can however, require the sale to proceed.

Agents and buyers can check who the registered owner of land or strata lots is by doing a title search at Landgate.

4) Conduct relevant market research:

- **Consider the potential for the market to depreciate**

In an off-the-plan sale, there is always a risk that the market value of the property will be less, possibly substantially less, at the time of settlement than it was when the contract was signed. Agents need to be mindful of the information that they provide to potential buyers about potential market value at the time of settlement.

- **Research the demand and supply of the market and owner-occupier ratio of the development**

- **Rental guarantees**

Some off-the-plan contracts are aimed at investors and feature a ‘rental guarantee clause that guarantees the property, when finished, will be tenanted for a set period of time, with rent set at a particular level. Agents need to be mindful of the advice they give potential buyers with respect to rental guarantees. Buyers need to be aware that the rental return they are receiving under the guarantee may not commensurate with what they are able to get when the guarantee expires.

- **Location of nearby developments**

How many other developments are close by? The more developments that are available the less likely prices will increase substantially during development and construction.

Case Study #1 – “The sun sets on the sunset clause”

Questions:

1. What is a sunset clause?

Should a project go well over schedule, off-the-plan contracts have ‘sunset clauses’ allowing the buyer and developer to walk away from the original agreement at no cost, with the buyer getting his or her deposit back and the developer being able to put the property back on the market. This date is usually set a year or so from the expected completion date. While this provides some protection for both parties, there have been cases where developers have deliberately gone over sunset clauses in order to be able to put the apartments back on the market at a higher price.

The Department recommends these three considerations to determine whether a sunset clause's length is appropriate:

- (a) Whether the developer has obtained all the necessary approvals to commence and, if not, what still needs to be approved.
- (b) Whether the developer is required to secure a minimum number or proportion of unconditional contracts before they can obtain funding to allow the project to proceed and, if so, how many contracts have already been secured.
- (c) The extent of progress of the development made to date (to check on progress, a proposed buyer could ask their solicitor, the developer or the developer's representative whether the milestones are being met within the necessary time frames under the contract). *(Source: Department of Commerce publication “Buying Off-the-Plan”)*

2. What do you think the agent and developer have tried to do here? What are their motives?

In this case study the developer and the agent have potentially misled Jessica and her father and used the sunset clause as a means of rescinding the contract so that they can sell the development at a higher price thereby making a greater profit.

The sunset clause has seen some developers run over the time limit, refund the deposit, and then look to sell the blocks on at a higher price. This is especially the case when the market is strong. In this situation, the buyer can miss out on capital growth during this time as well as lose out on other opportunities while their deposit is tied up in the development.

3. Has the real estate agent breached any legislation? If so, what provisions?

The real estate agent may have breached section 30(1)(f) of the ACL by allegedly making false and misleading representations to Jessica and her father in connection with the promotion of the land and the use to which the land was capable of being put.

Jessica and her father were led to believe by the agent that the development would not be proceeding and it was on this basis that they agreed to sign a rescission notice. Jessica and her father were advised that the development could not proceed because the relevant approvals from the Council could not be obtained and there was insufficient funding to complete the project.

It would appear that these verbal representations were false and were made to Jessica and her father as a means of coercing them into signing a rescission notice so that the retail space could be re-sold at a higher price.

4. What advice would you give Jessica and her father in considering an off-the plan sale in the future?

It is important that buyers of off-the-plan developments understand the terms of the contracts they are signing. Ultimately as would be the case with any significant purchase, the buyer needs to take responsibility for conducting their own due diligence and seeking their own independent legal and financial advice.

However, from a best practice point of view and to give you piece of mind as the selling agent of an off-the plan development, it would be advisable that you suggest they seek advice and conduct their own due diligence enquiries before signing an off-the-plan contract. This is particularly advisable where a sunset clause is applicable that can be invoked by either party part way through the contract.

It might be useful to suggest to buyers the types of due diligence enquiries and considerations they should make prior to signing a contract for an off-the-plan development.

Some of the enquiries and considerations you can suggest buyers make may include, but are not limited to:

- seeking expert financial advice to ensure that they have the borrowing capacity before putting down a deposit;
- researching the location;
- conduct their own enquiries to make sure the developer is reputable;
- researching the demand and supply in the market and the owner-occupier ratio of the development;
- researching the rental guarantee (if applicable) and being realistic about it; and
- have a lawyer review the contract.

PART TWO: Negotiating Multiple Offers

Quick Knowledge Check #2

What provisions of the Code are relevant to negotiating multiple offers?

Section 4: General duty to principal

An agent must act in the best interests of his or her principal except where it would be unreasonable or improper to do so.

Section 6(2): Acting within authority and instructions

An agent must in accordance with the instructions of a principal, except where it would be unreasonable or improper to do so.

Section 7: Duty to behave fairly

(1) *An agent must act fairly and honestly.*

(2) *An agent must not knowingly mislead or deceive any parties in negotiations or a transaction.*

(3) *An agent must not engage in harsh or unconscionable conduct.*

Section 13: Confidentiality

An agent must not at any time use or disclose any confidential information obtained while acting on behalf of his or her principal, except for information that an agent is required by law to disclose.

Section 14: Communicating offers to principal

An agent must communicate all written offers to his or her principal as soon as practicable

Compliance Exercise #1 – Take on the role of Compliance Officer

Questions:

1. **You will notice the alleged misconduct has not been included in the Investigation Summary Report. What do you think is the alleged misconduct in this matter?**

This matter is based on a real investigation conducted by the Consumer Protection Division of the Department.

The investigation considered whether sections 7(2) and 14 of the Code had been breached by the Respondent and what action, if any, may be taken against him.

It appears that the Respondent failed to communicate the offer of Casey and Max Milford to his Principal, the ABC Bank. This constitutes a breach of section 14 of the Code which states: *“An agent must communicate all written offers to his or her principal as soon as practicable.”*

It also appears that the Respondent contravened section 7(2) of the Code in several ways. Section 7(2) of the Code states: *“An agent must not knowingly mislead or deceive any parties in negotiations or a transaction.”*

Firstly, the Respondent advised the offeror's sales representative that he would communicate the offer to the CBA and then did not do so. By virtue of the offeror's sales representative providing the offerors with assistance to buy the Property, the offeror's sales representative would have been entitled to receive a share of the Respondent's sales commission, as a 'conjunctive agent', had the offer been presented to the ABC Bank by the Respondent.

Secondly, the Respondent told the offeror's sales representative during a telephone conversation that the offer had been rejected in favour of a full price cash offer when in fact it had never been presented in the first place.

2. What do you think are your obligations and responsibilities when representing the seller in a multiple offer scenario?

Many real estate agents will no doubt have represented a seller and been in the envious position of having multiple offers on their property to consider. In this situation it is up to the seller how they wish to proceed and as the listing agent, you have a legal and fiduciary responsibility to act in their best interests (section 4 of the Code). In being given the authority to sell a property, the agent is required to sell the property in accordance with the instructions of the seller.

Under section 14 of the Code, agents have an obligation to submit all written offers to the seller. The agent should advise their principal that they can only negotiate on one offer at a time. Once negotiations with the first offer have been exhausted and the offer then discounted, the seller can move on to negotiate with another offeror.

Section 9 of the Code requires that an agent exercises due skill, care and diligence in their dealings with their principal (seller). In addition, section 7 of the Code requires that agents act fairly and honestly, do not mislead or deceive and do not engage in unconscionable conduct in negotiations.

Under section 13 of the Code, an agent must not disclose any confidential information that they are provided with while acting on behalf of their principal (the seller), except information that by law they are required to disclose (that is, a material fact that should be disclosed to the buyer).

3. What do you think are your obligations and responsibilities when representing the buyer in a multiple offer scenario?

Agents have an obligation to let a buyer know if their offer is part of a multiple offer situation and to encourage a buyer to put their best offer forward (taking into consideration that the offered purchase price is only one of the terms of the offer).

One approach may be to inform prospective buyers in writing and obtain a written acknowledgement. This gives potential buyers an opportunity to submit an offer if they have not already done so, or revise their existing offer if it has not yet been accepted by the seller.

Under section 14, a buyer who writes a written offer on a property has the right to expect that the offer will be presented to the agent's principal (the seller) as soon as practicable.

The agent should also advise buyers that the seller of the property will likely examine all the terms and conditions of each offer before deciding to accept or reject any offer. Price is of course not the only factor to be considered and some conditions can make certain offers more attractive than others. For example, some sellers may be prepared to accept

a lower price if an offer is unconditional rather than take the risk that a higher offer may not proceed to settlement, because of the special conditions required by the buyer.

Section 9 of the Code requires that an agent exercises due skill, care and diligence in their dealings with potential buyers. In addition, section 7 of the Code requires that agents act fairly and honestly, do not mislead or deceive and do not engage in unconscionable conduct in negotiations with buyers.

An agent is required to disclose all material facts with respect to a real estate transaction to a potential buyer.

4. What are some 'best practice' steps or principles that you could suggest to your staff to prepare them for dealing with a multiple offer scenario?

Some best practice principles agents and business brokers may want to consider when negotiating a multiple offer scenario include, but are not limited to:

- Maintain confidentiality of your principal – (section 13 of the Code).
- Don't mislead buyers and be honest about the interest level in the property – (s. 7 of the Code)
- Don't play one buyer against another – (ss 7 and 9 of the Code).
- Don't disclose the value and/or conditions of an offer to another purchaser.
- If a buyer makes a written offer on a property, as the agent you must present the offer to the seller – (s. 14 of the Code).
- Don't give advice to potential buyers or to your principal that you are not qualified to give. (that is, financial and/or legal advice). Instead, recommend that the buyer or seller seek expert advice from someone qualified in the relevant area.

ADDITIONAL INFORMATION:

This compliance exercise is based on a matter that the Department took before the State Administrative Tribunal (SAT) in 2014.

In this matter, the SAT made the following orders.

- The Respondent had contravened s. 14 of the Code by receiving a written offer for \$550,000 and failing to communicate the offer to his Principal, the ABC Bank. For this contravention, the Respondent was fined \$1,500.
- The Respondent had contravened s. 7(2) of the Code by advising the offeror's sales representative that the offer would be presented to this Principal and then failing to do so. In addition, the Respondent lied to the offeror's sales representative by advising them that the offer had been rejected when it had not been presented in the first place. For this contravention, the Respondent was fined \$2,000.
- The Respondent was also required to pay the applicant's costs of \$1,000.

PART THREE – Sale and transfer of property management rent rolls

Scenario activities

1. For each of the scenarios below, what are the breaches of the REBA Act, and the Code that may have occurred?
2. From a best practice point of view, discuss the steps and actions that the agent should have taken to ensure they were complying with the legislation.

Scenario #1

Question One:

In this scenario, both Tom Smith and Jane Kirkham have potentially breached ss 60 and 68 of the REBA Act.

From 20 May 2015 to 8 June 2015, Jane Kirkham did not have authority to manage the rental property of Mr Thompson. Until she obtained a valid appointment to act from Mr Thompson, she did not have the authority to manage the property on his behalf, collect or disburse monies received in relation to the property or charge a fee for her management services.

Jane Kirkham could have used a deed of assignment in this scenario. However, the Department advises that caution should be exercised. Agents need to be aware that they should not rely solely on this clause. For a Deed of Assignment to be valid and for the agent to be able to receive commission, reward or consideration, the assignment must comply with the requirements of s. 60 of the REBA Act, regulation 6BA of the Regulations and ss 14, 15, 16 and 17 of the Code and the principal must also consent to the assignment occurring.

After 20 May 2015, Tom Smith did not have the authority to exercise the rights and obligations of Mr Thompson including collecting or disbursing monies he received in relation to Mr Thompson's property. In addition, he was not entitled to charge a fee for his management service.

While Jane may have wanted to keep the management terms and conditions with respect to Mr Thompson's property the same as originally agreed with Tom Smith, she needed to have an appointment to act or deed of assignment with Mr Thompson before rendering any services in relation to his property.

Question Two:

From a **best** practice point of view, Tom Smith should have:

- advised Mr Thompson of his options with respect to management of his property once the rent roll was sold. Tom Smith should have advised Mr Thompson that he had the option of negotiating afresh with Jane Kirkham by signing a new management authority (unless there was a valid and compliant deed of assignment in place), managing the property himself, or selecting a different agency to manage the property;
- made sure he kept all records transferred to Jane Kirkham. If Mr Thompson had agreed to transfer the management authority to Jane Kirkham, Jane should have obtained originals of all documents wherever possible (e.g. original lease and property condition report); and

- written to the tenants of all the affected properties to advise them that Jane Kirkham was taking over management of the rent roll, including the effective date and contact details for Jane Kirkham. This letter should also include advice of the tenant's 'paid to date'.

Jane Kirkham should have:

- confirmed with Mr Thompson that he wanted to transfer his management authority to her and as such sign up a new management authority in this regard;
- confirmed with Tom Smith that Mr Thompson's file contains all the relevant records;
- made sure she completed a Bond Variation Form (with both her and Tom Smith's signatures) to notify the Bond Administrator of the change in management and signatures so that the bond in relation to Mr Thompson's property could be released in the future; and
- contacted the relevant tenants, after obtaining a new signed management authority, to confirm the last rent paid to Tom Smith and organise how rent was to be paid in the future. The letter to the tenant should also confirm how much bond is being held on the tenant's behalf, the date the rent is being paid up to, if there are any outstanding invoices and the date of the last inspection.

Scenario #2

Question One:

In this scenario, Sue Cotton has potentially breached s. 9 of the Code by failing to exercise due skill, care and diligence in checking that full insurance had been taken out on the property. Sue should have checked and confirmed that Steve Roxon had taken out insurance and that the last premium due had been paid. Likewise, Steve Roxon potentially breached s. 9 of the Code by failing to take the insurance out in the first place.

Question Two:

From a best practice point of view, Steve Roxon should have made sure he kept all records and then transferred them to Sue Cotton. Sue Cotton should have performed a due diligence check prior to the sale of the rent roll occurring, to ensure that all necessary and pertinent information was attached to the file relating to Kimberley Grant's property. Sue should have obtained originals of all documents wherever possible (e.g. original lease, property condition report and insurance policy).

The Department has developed a "Transfer of Management Checklist" that details the types of records that an agent should obtain on each property acquired when a rent roll is purchased. A copy of this publication is at the back of your workbook. Alternatively it can found on the Department's website via the following link:

<http://www.commerce.wa.gov.au/sites/default/files/atoms/files/transferofmanagementchecklist.pdf>

Legislative requirements for licensees to consider in selling off-the-plan

The table below details some of the key legislative provisions licensees should be aware of dealing with off-the-plan contracts. Please note, depending on the circumstances of a transaction, there may be provisions that are not listed below. This table is to serve as a guide only.

Legislation/Act	Relevant provisions	Legislative requirement and/or information to impart to the buyer
REBA Act	Section 62 - Advertising by agents and developers Section 57 and 58 – Registration of principal place of business by a developer.	Agents should be mindful that any developer they are planning to sign an appointment with is abiding by the relevant provisions of the REBA Act.
Code of Conduct	Section 4 – General duty to principal	Agents must act in the best interests of their principal. With respect to off-the-plan developments, sales representatives should refer to their principal for direction.
	Section 7 – Duty to behave fairly	Agents must act fairly and honestly in their dealings with buyers. This includes not misleading or deceiving parties in negotiations or transactions and not engaging in harsh or unconscionable conduct.
	Section 9 – Standard of Service	Agents must exercise due skill, care and diligence in their dealings with buyers, potential buyers and their principals.
	Section 10(2) – Duties as to details of the transaction	Agents are required to disclose or material facts ascertained in relation to an off-the-sale contract to the buyer.
Australian Consumer Law	Section 4 – Misleading representations about future matters	If an agent makes a representation concerning an off-the-plan development to a buyer they need to have reasonable grounds for doing so. For example, they should be able to link the representation back to information that is contained in the contract.

Best practice approach for negotiating multiple offers

Below are a number of considerations with respect to writing, presenting and negotiating multiple offers.

Writing multiple offers

1) Make an appointment with the interested parties

Firstly an appointment should be made with each of the interested parties, advising each that multiple offers will be written and presented to the seller.

2) Encourage each party to put their best offer forward

When writing the offers, each party should be advised to put forward their best offer, as they may not get a second chance. It should be explained that the seller can only counter-offer on one offer at a time and will therefore be obliged to *choose* the offer they wish to deal with. If their offer is not the seller's first choice to deal on, then it may come to an end without opportunity for counter offer.

3) Have the offerors sign an acknowledgement form

It has become common practice in some offices to have buyers sign a simple form to acknowledge that they have been advised that theirs is one of multiple offers to be presented. While not a legal requirement, such a form could be described as best practice for a number of reasons.

- Having a buyer sign an acknowledgement of multiple offers ensures they take the matter seriously and ask questions if they don't understand. It is not uncommon for a buyer to not believe the representative when told there are multiple offers. Signing a document to acknowledge this information can add credibility to the information.
- The buyer's acknowledgement of the existence of multiple offers, protects the agency from any accusation that the situation was not explained to them or that the representative has misled them by failing to disclose information.

Presenting multiple offers to the seller

1) Present all the offers to the seller on the one occasion

There are several different ways a seller may choose to respond when faced with multiple offers. The agent may notify the seller that there are multiple offers and set up a time so that all the offers can be presented together.

Prior to this, the agent may contact the potential buyers who have submitted an offer to advise that there are multiple offers and give them the opportunity to put their best price forward with as few conditions as possible.

2) Explain each offer and its particular circumstances in detail to the seller

The agent should be able to explain the implications of each offer to the principal. For example, cash versus finance, long settlement versus short, difficult or special conditions versus simple and higher prices versus lower.

The principal may have a special set of circumstances that make a slightly lower price more appealing because of the simplicity of the conditions or the time frame of the settlement. The agent must never make assumptions about what is best for the seller, but should discuss all aspects of all of the offers to assist the seller in making their decision.

Negotiating multiple offers with the seller

The seller has the following options once the buyers' best offers have been presented:

- Accept any one offer.
- Negotiate with any one offer – counter offer until negotiations are exhausted.
- Reject all offers.

In terms of which option they may choose to take, consideration needs to be given to the following:

1) The seller can only deal with one offer at a time

It must be explained to the seller that he/she can only *deal* on one offer at a time. If the seller was to counter on more than one offer at the same time, the possibility exists that more than one buyer could accept the counter offer which would effectively result in the subject property being sold twice! This situation is clearly not possible as a property can only be sold to one buyer.

2) Buyers can choose to withdraw an offer at any time

It must also be explained to the seller, that at any time up until acceptance, any or all of the buyers can withdraw their offer. It is not uncommon to go from a situation of multiple offers to a situation of no offers because of a failure to respond and communicate by either the seller or the agent.

3) Acceptance of an offer

It may be that the seller is willing to accept one of the offers without a counter offer. In this case, the seller would simply sign their acceptance of the offer and the agent would communicate the acceptance to the buyer in the normal way. Once the acceptance has been communicated to the successful buyer, the agent would advise the other offering parties that their offers have been unsuccessful.

4) The seller may counter offer

Where the seller chooses to counter offer, the agent would have the seller sign the counter offer. The counter offer would then be presented to the appropriate buyer for a decision.

5) Reject all offers

In some circumstances, a seller may choose to reject all offers if they do not consider there is an opportunity for negotiation with the offerors.

Advice and liaison with the offerors

1) Advise parties of the existence of other offers.

In a multiple offer scenario, the seller may take their time to consider a number of written offers. In this case, it would be a sound practice for the agent to advise the offerors that the seller is considering more than one offer. The agent should advise these other offerors that whilst they have the right to withdraw their offer at any time, they may also leave their offer 'on the table'. If the negotiation on the 'preferred' offer is unsuccessful, the seller may then choose to negotiate on the next best offer. If a buyer has chosen to withdraw their offer, then they will not get an opportunity at this point.

2) Details of offers should not be disclosed to other parties

In accordance with s. 13 of the Code, agents should not disclose details of offers to other offerors, including price, finance particulars, dates or special conditions. These details are private and confidential for the individual offering parties. It may be tempting to disclose such details as motivation for buyers to increase their offer, however it not ethical or in the best interest of the principal. A buyer may have offered a low price with the intention of offering a higher price in due course, however if they become aware that the seller is considering much lower offers, they would not be inclined to put a higher offer forward.

5) Keep the offerors informed of progress

From a customer service point of view, agents should keep buyers informed of the progress of their offer. Treating buyers with respect, communicating in an open and transparent way, and working in the best interest of the principal (seller) are all essential elements of negotiating multiple offers.

The agent should also be mindful that some buyers will be inexperienced in a multiple offer scenario and may not understand the process. In these circumstances, if buyers lose interest and decide to purchase elsewhere, they should be advised to let their agent know so that they can withdraw their offer. This will protect the buyer from purchasing two properties if the first seller suddenly decides to accept their offer.

Other issues to consider with negotiating multiple offers

Are all offers equal?

It is important to remember that not all offers are equal and what is important to one seller may not be important to another!

A seller might choose to negotiate an offer that is not the highest but is more favourable to the seller for other reasons. For example, a seller may need to sell quickly and would therefore prefer to negotiate with a straightforward offer for a

lesser amount as opposed to a higher offer that is conditional to the sale of another property.

Licensees can offer suggestions and guidance to a seller based on their industry experience and expertise; however the decision of how to proceed when faced with multiple offers lies with the seller.

What is the subject to sale clause?

The 'subject to sale clause,' also known as the 'two business day condition' is a clause that inserted into the Offer and Acceptance when a buyer wants to make an offer that is conditional upon the sale of their existing property. In this circumstance, the seller may want to continue marketing their property in the hope of receiving an unconditional offer on better terms.

If the seller receives an alternative offer to the first that they would like to accept, then they must serve a notice upon the first buyer. From receipt of that notice, the initial buyer then has two business days to secure an alternative source of finance or obtain a contract for the sale of their existing property. If at the end of the two business days, the first buyer does not waive the condition of selling their property, then the contract comes to an end and the deposit they paid must be returned. The seller is then free to enter into a contract with the alternative buyer.

The REIWA Offer and Acceptance document provides for special conditions to be inserted including a 'two business day' Annexure for its members use. However, if you are not using this contract, you may choose to write a clause to this effect in another the offer and acceptance with a buyer.

It is important that agents ensure that buyers and sellers understand the 'subject to sale' clause before signing a contract as there can be variation in the wording depending on the contract. If they are unclear or have any concerns, agents should recommend they seek appropriate legal advice. Similarly, agents should seek expert legal advice if they require assistance in writing a standard subject to sale clause.

Conjunctional Offers

This refers to a situation where one real estate agency might have a sole agency agreement on a property and a competing real estate agent finds a willing buyer for the property and by mutual agreement, the two agents may share the commission payable on the property (i.e. no additional cost to the seller).

A competing real estate agent must not encourage a seller to terminate an existing contract with a competitor and must not sign the seller up to another agreement without advising that the seller could now be up for two commissions as there may now be two legally binding contracts in operation at the same time.

Best practice approach to the sale and transfer of a property management rent roll

Licensed agents should adhere to the requirements set out below when considering the sale or purchase of a rent roll. Consider the best practice principles below in the context of the scenario outlined below.

Sally is selling up!

Sally Rodgers of ABC Property Professionals has a rent roll of 250 owners and she is selling her rent roll to Bill Maxwell of XYZ Realty. Sally provides her owners with a date at which the sale is to take effect, that is, the day Sally and her team at ABC Property Professionals Pty Ltd will cease providing property management services.

In doing so, Sally has effectively given notice to terminate the management authority she has with the owners.

1) Seek Legal Advice

Both Sally and Bill should obtain legal, financial and other advice where appropriate. Amongst other things, Bill should consider the management fees Sally was charging in comparison to his own fees, the number of owners and properties and the location of the rental properties.

2) Advise your owners of their options

Sally, as the seller of the rent roll, should notify her owners that they can:

- accept Bill Maxwell and his team at XYZ Realty taking over management and sign a new management authority with him;
- manage the property themselves; or
- select a different agent to manage the property.

3) Consider privacy legislation when providing client information

Sally should be mindful of the *Privacy Act 1988* (Cth) regarding information she provides to Bill Maxwell and XYZ Realty. Sally should obtain the owner's consent to provide the information to the new managing agent, or the property owner could be asked to contact the former managing agent requesting that it be provided to the new managing agent.

4) Ensure a new authority to act is in place

Bill Maxwell, as the purchaser of the rent roll should negotiate afresh with each new client. If a client chooses to accept Bill Maxwell and his team taking over management of their property, Bill needs to ensure that he has the proper authority to manage their property. A new management authority should be signed for each new client.

Remember....

Before Bill Maxwell is entitled to receive management fees from a client, a valid appointment to act must be obtained.

Any "Deed of Assignment" should stand on its own as a valid appointment that complies with the relevant provisions of the REBA Act and the Code.

A note about the "Deed of Assignment"....

It is acknowledged that some licensed agents use a deed of assignment, however you should be cautious about relying on this. **Although the standard REIWA management authority contains a clause allowing for assignment, agents should be aware that they should not rely on this clause.** The clause may potentially breach the rights of the owner/lessor to choose whom they appoint to manage their property.

For residential property management, the appointment form commonly used by industry is REIWA's "*Exclusive Management Authority for Residential Premises.*" Clause 4.6.1 of the commonly used form states: "*The Agent may transfer, sell or assign the Agent's rights under this agreement to a third party without the prior consent of the Owner (if allowed by law) and upon such transfer the Owner and the third party will be bound by the terms and conditions of this Agreement.*"

Any such *Deed of Assignment* should stand on its own as a valid appointment including the detail prescribed by s. 60 of the Act, the regulation 6BA and ss 15, 16 and 17 of the Code. This could be done by incorporating the original document as an attachment to the *Deed of Assignment*.

5) Retain and maintain secure records

Sally should retain copies of all records transferred to Bill Maxwell and XYZ Realty. Where the principal has agreed to transfer the management authority to Bill Maxwell, Bill should obtain the originals of all documents wherever possible e.g. the original lease and other related documentation such as the property condition report.

Bill should confirm with Sally that each property file contains all the pertinent documentation such as a copy of the lease, the original management authority, the Property Condition Report, maintenance records, breach notices etc. and items such as spare keys are noted and/or included.

2) Ensure bonds have been transferred to the Bond Administrator

All bonds held in financial institutions should have been transferred to the Bond Administrator by 31 December 2014. Sally will need to ensure that this has occurred. Where bonds are held with the Bond Administrator, a Bond Variation Form with respect to each bond held will need to be completed and signed by both Sally and Bill to notify the Bond Administrator of the change in management and signatures so that the bond can be correctly released in future.

Bill Maxwell must accurately verify and reconcile all bonds transferred from Sally Rodgers.

3) Keep the tenant informed

Sally Rodgers should notify the tenants of all affected properties on her rent roll in writing that Bill Maxwell will be taking over the management, the effective date and contact details for Bill Maxwell. It should also include advice of the tenant's "paid to date" and confirming details of any bond held.

Bill Maxwell, once he has obtained a signed Deed of Assignment of a new Management Authority, should contact the relevant tenants to confirm the last rent paid to Sally Rodgers and organise how the rent is to be paid in future. The letter to the tenant should include confirmation of how much bond is being held on the tenant's behalf, the date the rent is paid up to, if there are any outstanding invoices and the date of the last inspection.

4) Notify the relevant parties

Bill Maxwell should notify the Water Corporation, local council and any other relevant parties that he is now responsible for managing the property.



ELEMENTS OF A VALID APPOINTMENT TO ACT

The following is a summary of the requirements under the *Real Estate and Business Agents Act 1978* (the Act), Real Estate and Business Agents (General) Regulations 1979 and Code of Conduct for Agents and Sales Representatives 2011, which an agent must comply with in order to have a valid appointment to act. A valid appointment to act enables the agent to receive remuneration and or recover expenses as agreed with the principal for the services provided.

Section 60(1)(a)

An agent must be licensed and the holder of a current triennial certificate.

Section 60(1)(b)

An agent must have a valid appointment to act in writing signed by the person for whom the services are being provided or his lawfully authorised agent.

Section 60(2)(a)

The appointment must be contained in a document.

Section 60(2)(a)(i)

The appointment must clearly set out the services to be rendered, e.g. Appointment to Sell, Auction, etc.

Section 60(2)(a)(ii)

Where specific property is to be the subject of those services the appointment must clearly identify the property; e.g. address of property, title details; business etc.

Section 60(2)(a)(iia)

Clearly set out a method by which the amount of remuneration is calculated.

Section 60(2)(c)

The person obtaining the signature of the principal(s) on the appointment must give a true copy of the appointment to the signatories immediately after the appointment is signed.

PENALTY \$5,000

Applies to a person who demands or receives any commission, reward or other valuable consideration in contravention of the applicable legislation (s. 60(3) of the Act).

Additionally, the State Administrative Tribunal can order repayment of commission, reward or other valuable consideration held in contravention of the Act or Regulations (s. 103(1)(d)).

The material provided by the Department of Commerce is provided voluntarily as a public service. The information and advice provided is made available in good faith and is derived from sources believed to be reliable and accurate at the time of publication. However the information is provided solely on the basis that readers will be responsible for making their own assessment of the matters discussed herein and are advised to verify all relevant representations, statements and information.

Changes in circumstances after a document has been published may impact on the accuracy of the information. No assurance is given as to the accuracy of any information or advice contained after publication.

Resources

Buying off the plan:

The Department has recently published a brochure entitled “*Buying land or property off-the-plan*” which may be of assistance in the development of training material on this subtopic. The brochure can be downloaded from the Department’s website.

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/buyinglandorpropertyofftheplan.pdf>

Consumer Advice for Buying Off-the-Plan – e-bulletin, issue 60, 9 May 2014

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/issue60consumeradviceforbuyingpropertyofftheplan.pdf>

Property management rent rolls:

Potential rent roll fraud – e-bulletin, issue 35, 26 March 2013

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/reissue35rentrollmar13.pdf>

Transfer of Property Management Checklist:

<https://www.commerce.wa.gov.au/sites/default/files/atoms/files/transferofmanagementchecklist.pdf>

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Potential rent roll fraud – E-bulletin, issue 35, 26 March 2013. [ONLINE] Available at: <https://www.commerce.wa.gov.au/sites/default/files/atoms/files/reissue35rentrollmar13.pdf> [Accessed 6 November 2014]

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Relevant Legislation

Real Estate and Business Agents Act 1978

57. Developers, principal place of business to be registered and service on
- (1) A developer shall, on and after the day on which he commences to carry on business as a developer, and for so long as he carries on that business, have his principal place of business in the State registered with the Commissioner by giving written notice of the situation of that place to the Commissioner.
- Penalty: \$1 000.
60. Agent not entitled to commission etc. unless licensed and validly appointed
- (1) An agent is not entitled to receive any commission, reward, or other valuable consideration in respect of his services in that capacity unless —
- (a) he is licensed in that capacity and he holds a current triennial certificate in respect of his licence when he renders the services; and
- (b) he has a valid appointment to act in that capacity which is in writing signed by the person for whom the services are or are to be rendered or by some other person lawfully authorised to sign on behalf of the person for whom the services are or are to be rendered.
- (2) An appointment to act as an agent is not valid unless —
- (a) it is contained in a document which —
- (i) clearly sets out the services that are or are to be rendered; and
- (ii) where specific property is to be the subject of those services, clearly identifies the property; and
- (iia) clearly sets out the method by which the amount of any commission, reward or other valuable consideration to be received for those services is to be calculated; and
- (iii) contains such other information, if any, as is prescribed;
- 61A. Agents not to demand etc. money etc. for letting etc. from tenants
- (1) An agent shall not demand or receive from a tenant a commission, reward or other valuable consideration for a service rendered by the agent in connection with —
- (a) the letting or management of residential premises; or
- (b) the renewal, extension or continuation of a tenancy where, upon the expiry of the term of the tenancy, a further right of occupancy of the same premises is granted to the same tenant.
- Penalty: \$5 000.

- (2) A commission, reward or other valuable consideration received in contravention of subsection (1) is recoverable by the tenant as a debt due in a court of competent jurisdiction.

62. Advertising by agents and developers

- (1) Any advertisement in respect of the business of an agent or a developer shall not be published without his authority.
- (2) A duly authorised advertisement in respect of the business of an agent or developer shall contain such details as are sufficient to identify the agent or developer, as the case may be.
- (3) A person who enters into a contract as a consequence of an advertisement which contravened subsection (2) is not thereby entitled to avoid the contract.
- (4) In a proceeding for a contravention of subsection (1) or (2) it is a defence if the accused establishes that he is a person whose business is to publish or arrange for the publication of advertisements and that he received the advertisement in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to such a contravention.

[Section 62 amended by No. 84 of 2004 s. 82; No. 58 of 2010 s. 98.]

68. Trust accounts, use of etc.

- (1) Every agent who holds a current triennial certificate shall maintain one or more trust accounts, designated or evidenced as such, in the prescribed manner, with an authorised financial institution and shall, as soon as practicable, pay to the credit of that account or those accounts all moneys received by him for or on behalf of any other person in respect of transactions.
- (2) Moneys so paid into any such trust account shall not be available for the payment of the debt of any other creditor of the agent, or be liable to be attached or taken in execution under the order or process of any court at the instance of any such creditors.
- (3) An agent may pay out of a trust account such of the proper charges relating to transactions as are payable by the persons on whose behalf the moneys are received but may do so only when those charges lawfully fall due.
- (4) Moneys received by an agent for or on behalf of another person in respect of a transaction shall not be withdrawn from a trust account except for the purposes of the transaction, or as otherwise authorised by this Act, or as otherwise authorised by the person or persons lawfully entitled to the moneys.
- (5) An agent shall pay moneys withdrawn from a trust account to the person or persons lawfully entitled or authorised to receive them.
- (6) An agent shall —
 - (a) keep full and accurate accounts of all money received or held by him on account of any other person and of all payments made by him of that money; and

- (b) before the end of the next business day after the day on which the money is received or paid, enter in the accounts particulars of the amount so received or paid and the person from whom it was so received or to whom it was so paid; and
- (c) keep the accounts in such manner that they can be conveniently and properly audited; and
- (d) correctly balance the accounts at the end of each month.

[Section 68 amended by No. 59 of 1995 s. 13.]

63. Agents etc. to supply signatories of documents with copies

Where a person signs any offer, acceptance, or contract, or any document purporting to be an offer, acceptance, or contract relating to any transaction that has been negotiated, or that is the subject of negotiation, wholly or in part by an agent, a developer, or a sales representative, in the course of his business or employment as such, the agent, developer, or sales representative, as the case may be, shall forthwith supply the person who has signed the offer, acceptance, contract, or document, with a true copy thereof (the onus of proof of which is upon the person obtaining the signature).

68. Trust accounts, use of etc.

- (1) Every agent who holds a current triennial certificate shall maintain one or more trust accounts, designated or evidenced as such, in the prescribed manner, with an authorised financial institution and shall, as soon as practicable, pay to the credit of that account or those accounts all moneys received by him for or on behalf of any other person in respect of transactions.
- (2) Moneys so paid into any such trust account shall not be available for the payment of the debt of any other creditor of the agent, or be liable to be attached or taken in execution under the order or process of any court at the instance of any such creditors.
- (3) An agent may pay out of a trust account such of the proper charges relating to transactions as are payable by the persons on whose behalf the moneys are received but may do so only when those charges lawfully fall due.
- (4) Moneys received by an agent for or on behalf of another person in respect of a transaction shall not be withdrawn from a trust account except for the purposes of the transaction, or as otherwise authorised by this Act, or as otherwise authorised by the person or persons lawfully entitled to the moneys.
- (5) An agent shall pay moneys withdrawn from a trust account to the person or persons lawfully entitled or authorised to receive them.
- (6) An agent shall —
 - (a) keep full and accurate accounts of all money received or held by him on account of any other person and of all payments made by him of that money; and
 - (b) before the end of the next business day after the day on which the money is received or paid, enter in the accounts particulars of the amount so received or

paid and the person from whom it was so received or to whom it was so paid;
and

- (c) keep the accounts in such manner that they can be conveniently and properly audited; and
- (d) correctly balance the accounts at the end of each month.

[Section 68 amended by No. 59 of 1995 s. 13.]

68A. Client may ask agent for separate trust account

- (1) A person may request that moneys paid by that person to an agent in respect of a transaction be deposited to the credit of a separate interest bearing trust account maintained in accordance with section 68.
- (2) A request shall be in writing.
- (3) An agent shall, subject to subsection (4), comply with a request.
- (4) Where requirements are prescribed under subsection (6), an agent shall only comply with a request if satisfied that those requirements have been met.
- (5) An agent shall ensure that all interest credited to a separate account is paid to the person who requested the deposit of moneys in that account.
- (6) Regulations made under section 145 may prescribe requirements to be met before a request can be complied with and, without limiting this subsection, those requirements may relate to —
 - (a) the amount of moneys paid to the agent; or
 - (b) the type of transaction in respect of which the moneys are paid; or
 - (c) the length of time for which the moneys are to be deposited.
- (7) In this section —

request means a request under subsection (1).

[Section 68A inserted by No. 59 of 1995 s. 14.]

68B. Interest on trust accounts to be paid by financial institutions

- (1) Every authorised financial institution with which a trust account is maintained shall pay to the credit of the Interest Account interest on the balance of the trust account at the prescribed rate at such times as are prescribed.
- (2) Subsection (1) does not apply to a separate account.
- (3) Where a court convicts an authorised financial institution of an offence under subsection (1) and interest required to be paid under that subsection remains outstanding, the court may, in addition to imposing a penalty, order the institution to pay to the credit of the Interest Account an amount equal to the amount of that interest, and any such order may be enforced as if it were a judgment of the court.

- (4) In regulations made under section 145 the prescribed rate referred to in subsection (1) may be prescribed by reference to a market rate indicator specified in the regulations.

[Section 68B inserted by No. 59 of 1995 s. 14; amended by No. 47 of 2011 s. 25(4).]

68C. Agents to give Commissioner information about trust accounts

- (1) When an agent opens or closes a trust account, the agent shall, as soon as is practicable, inform the Commissioner in writing of the opening or closure of the trust account and, in doing so, shall specify —
 - (a) the name and number of the trust account; and
 - (b) the name and address of the authorised financial institution with which the trust account is or was maintained.
- (2) Subsection (1) does not apply to a separate account.
- (3) If an agent's trust account is overdrawn, both the agent and the authorised financial institution with which the trust account is maintained shall, as soon as is practicable, inform the Commissioner in writing of —
 - (a) the name and number of the trust account; and
 - (b) the amount by which the trust account is overdrawn.

[Section 68C inserted by No. 59 of 1995 s. 14; amended by No. 58 of 2010 s. 134.]

Code of Conduct for Agents and Sales Representatives 2011

4. General duty to principal

An agent must act in the best interests of his or her principal except where it would be unreasonable or improper to do so.

5. Certain inducements prohibited

- (1) An agent must not knowingly induce or attempt to induce a person to breach a contract of sale, letting or agency.
- (2) An agent must not knowingly induce or attempt to induce a person to enter into an agency contract which would make that person liable to pay commission to more than one agent in relation to a sale or a lease of any real estate or business.

6. Acting within authority and instructions

- (1) An agent must not act as agent or represent himself or herself as acting as agent on behalf of a person without written authority.
- (2) An agent must act in accordance with the instructions of a principal, except where it would be unreasonable or improper to do so.
- (3) An agent must not advertise that any real estate or business is for sale or lease or erect or display a notice of sale or leasing without written authority.
- (4) An agent must not —

- (a) advertise or offer for sale or lease any real estate or business at a price or on terms different from that, authorised by the principal; or
 - (b) advertise or offer to purchase or lease any real estate or business at a price or on terms different from that authorised by the principal.
7. Duty to behave fairly
- (1) An agent must act fairly and honestly.
 - (2) An agent must not knowingly mislead or deceive any parties in negotiations or a transaction.
 - (3) An agent must not engage in harsh or unconscionable conduct.
8. Duties to manage, to supervise, to attend at place of business
- (1) An agent must properly supervise the agency business carried on by the agent and take reasonable steps to ensure that sales representatives and other employees of the agency business comply with the provisions of the Act, this Code and other relevant statutes, rules and regulations where applicable to them.
 - (2) The person in bona fide control of the agency business carried on by a corporation must properly supervise the agency business carried on by the corporation and take reasonable steps to ensure that sales representatives and other employees of the agency business comply with the provisions of the Act, this Code and other relevant statutes, rules and regulations where applicable to them.
 - (3) The person in bona fide control of the agency business carried on by a firm must properly supervise the agency business carried on by the firm and take reasonable steps to ensure that sales representatives and other employees of the agency business comply with the provisions of the Act, this Code and other relevant statutes, rules and regulations where applicable to them.
 - (4) An agent who personally carries on an agency business, the person in bona fide control of the agency business carried on by a corporation and the person in bona fide control of the agency business carried on by a firm must —
 - (a) personally manage the agency business full-time; and
 - (b) carry out the principal managerial duties of the agency business; and
 - (c) frequently attend at the offices at which the agency business is conducted.
9. Standard of service
- An agent must exercise due skill, care and diligence.
10. Duties as to details of the transaction
- (1) Prior to the execution by the agent's principal of any contract relating to the sale or lease of any real estate or business the agent must make all reasonable efforts to ascertain or verify the facts which are material to that transaction which a prudent agent would have ascertained.

- (2) If an agent ascertains a fact which is material to a transaction in which the agent's principal is involved the agent must promptly communicate that fact to any person who may be affected by it unless it is clear that person was already aware of that fact.
- (3) When an agent receives instructions to offer real estate for sale he or she shall promptly obtain a copy of the certificate of title for the real estate and, after obtaining it, refer to that copy for the names of the registered proprietor.
- (4) Without limiting the generality of subsection (1), an agent must, as soon as practicable after receiving instructions to act for a person in arranging a disposal, by way of sale, exchange or otherwise, of real estate and before a contract for that disposal is executed, make all reasonable efforts to verify —
 - (a) the identity of each person who claims to be, or to act for, a person who is to dispose of all or any of the real estate; and
 - (b) each person's authority to dispose of the real estate, or to act for the person disposing of it, as the case requires.

11. Duty to advise of market price

An agent engaged to sell or purchase any real estate or business must advise his or her principal as to what the agent considers to be the current market price of that real estate or business and, if requested, give reasons for that opinion.

12. Conflict of interest

- (1) An agent must not accept an engagement to act, or continue to act, where to do so would place his or her interest in conflict with that of the principal.
- (2) An agent shall not without the prior written consent of the principal, directly or indirectly, purchase or take on lease or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease.
- (3) An agent who directly or indirectly purchases or takes on lease or is in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any real estate or business which the agent is engaged to sell or lease shall not demand, retain or receive a commission unless the principal has agreed in writing to pay the commission at the same time as or following the signing of the consent referred to in section 10(2).

13. Confidentiality

An agent must not at any time use or disclose any confidential information obtained while acting on behalf of his or her principal, except for information that an agent is required by law to disclose.

14. Communicating offers to principal

An agent must communicate all written offers to his or her principal as soon as practicable.

15. Restrictions on commission and other benefits

- (1) An agent must not accept or demand any commission from any person other than his or her principal in respect of any service performed or to be performed by the agent, being a service in respect of which the agent received commission or is entitled to receive commission from his or her principal.
 - (2) An agent must not demand, retain or receive a discount or rebate which relates to a service by a stocktaker or tradesperson, or to advertising, in connection with a transaction or a service provided by the agent unless the agent has —
 - (a) disclosed to his or her principal the full nature, extent and amount of the discount or rebate sought or to be retained; and
 - (b) obtained the written consent of the principal to the seeking or retaining of the discount or rebate by the agent.
16. Further restriction on reward for service

An agent must not demand, retain or receive a commission, reward or other valuable consideration for a service which is —

 - (a) greater than the amount agreed in writing with the principal; or
 - (b) unjust in the circumstances; or
 - (c) not initialled on the agreement by the principal.
17. Claiming expenses from principal
 - (1) If an agent is entitled to seek reimbursement from his or her principal of any expense which the agent has incurred the agent shall promptly supply to the principal all relevant information and material which the principal may reasonably require in order to be satisfied as to the amount of the expense and that the expense was properly incurred by the agent.
 - (2) An agent shall not seek or retain reimbursement of an expense which the agent has incurred in respect of advertising, sign boards, printed material and promotions unless —
 - (a) the principal has agreed in writing to pay the expense; and
 - (b) the agreement specifies a maximum amount which the agent may seek or retain by way of reimbursement; and
 - (c) the maximum amount is stated on the agreement and has been initialled by the principal.
18. Disclosure required when recommending
 - (1) An agent who recommends to a party to a transaction, a settlement agent, finance broker or any other supplier of goods or services, must make a written disclosure to the party of any significant relationship, connection or affinity between the agent and the supplier.
 - (2) Where the relationship, connection or affinity between the agent and the supplier is capable of producing a conflict between the interests of the party to

the transaction and the agent, the agent shall include in such written disclosure an explanation of the nature of the potential conflict.

Australian Consumer Law

Chapter 2 — General protections

Part 2-1 — Misleading or deceptive conduct

18. Misleading or deceptive conduct

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2) Nothing in Part 3-1 (which is about unfair practices) limits by implication subsection (1).

Note: For rules relating to representations as to the country of origin of goods, see Part 5-3.

Chapter 3 — Specific protections

Part 3-1 — Unfair practices

Division 1 — False or misleading representations etc.

29. False or misleading representations about goods or services

- (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:
 - (a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or
 - (b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or
 - (c) make a false or misleading representation that goods are new; or
 - (d) make a false or misleading representation that a particular person has agreed to acquire goods or services; or
 - (e) make a false or misleading representation that purports to be a testimonial by any person relating to goods or services; or
 - (f) make a false or misleading representation concerning:
 - (i) a testimonial by any person; or
 - (ii) a representation that purports to be such a testimonial; relating to goods or services; or

- (g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or
- (h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or
- (i) make a false or misleading representation with respect to the price of goods or services; or
- (j) make a false or misleading representation concerning the availability of facilities for the repair of goods or of spare parts for goods; or
- (k) make a false or misleading representation concerning the place of origin of goods; or
- (l) make a false or misleading representation concerning the need for any goods or services; or
- (m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or
- (n) make a false or misleading representation concerning a requirement to pay for a contractual right that:
 - (i) is wholly or partly equivalent to any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); and
 - (ii) a person has under a law of the Commonwealth, a State or a Territory (other than an unwritten law).

Note 1: A pecuniary penalty may be imposed for a contravention of this subsection.

Note 2: For rules relating to representations as to the country of origin of goods, see Part 5-3.

- (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation of a kind referred to in subsection (1)(e) or (f), the representation is taken to be misleading unless evidence is adduced to the contrary.
- (3) To avoid doubt, subsection (2) does not:
 - (a) have the effect that, merely because such evidence to the contrary is adduced, the representation is not misleading; or
 - (b) have the effect of placing on any person an onus of proving that the representation is not misleading.

30. False or misleading representations about sale etc. of land

- (1) A person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:

- (a) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or
- (b) make a false or misleading representation concerning the nature of the interest in the land; or
- (c) make a false or misleading representation concerning the price payable for the land; or
- (d) make a false or misleading representation concerning the location of the land; or
- (e) make a false or misleading representation concerning the characteristics of the land; or
- (f) make a false or misleading representation concerning the use to which the land is capable of being put or may lawfully be put; or
- (g) make a false or misleading representation concerning the existence or availability of facilities associated with the land.

Note: A pecuniary penalty may be imposed for a contravention of this subsection.

- (2) This section does not affect the application of any other provision of Part 2-1 or this Part in relation to the supply or acquisition, or the possible supply or acquisition, of interests in land.