



ManagementONE

The quarterly newsletter from The Management Rights Lawyers

Is your head in the cloud? by Will Kenny

Managers will be aware of the increase in use of cloud based rent payment as an alternative to the use of traditional trust accounts. We are aware of managers now using at least one platform to collect rental payments from tenants and using the platform to distribute payments to themselves and owners.

The platform, which involves the use of an app, avoids the need for managers to receipt and hold trust money on behalf of owners. The rationale is that the account is not recognised as a “trust account” and managers do not have to comply with the rigorous legislative obligations, in particular for receipting, transferring and auditing purposes. But is the use of such platform compliant with Queensland legislation?

The *Agents Financial Administration Act 2014 (Qld)* (Act) regulates the use of trust accounts and handling trust money. In very simple terms, the Act defines a “trust account” as an account kept under the Act. These accounts must be held by a licensed real estate agent or letting agent with an approved financial institution within Queensland.

“Trust money” is defined to include an amount that was, or ought, under the Act, to have been deposited in a trust account by an agent. The Act provides that if an amount is received by an agent for a transaction (such as rent under a tenancy agreement), it must be paid to the agent’s trust account.

In practical terms, if an agent receives a rental payment into their trust account, it is “trust money” and is held on trust for the owner. A portion of that amount is later disbursed to the agent in payment of their commission and other fees and

charges under the appointment. The remainder of the payment is paid to the owner.

These new platforms use a “wallet”, set up by the tenant, into which rental payments are made and the agent and owner decide upon and direct how the funds are to be disbursed from the wallet. Our initial concern was that this practice might be purporting to delegate the responsibility for an agent to collect for landlords payments made by a tenant such that the platform was receiving the rent on behalf of the agent. It seems though that as the tenant pays the rent to the tenant’s “wallet” then it is not received by the agent or by anyone on the agent’s behalf. It would therefore not be trust money.

When an agent receives such “trust money” there are certain obligations under the Act in respect of receipting and transferring such money. Managers who are using the platform appear not to be receiving or transferring money. The record of payments which are made and subsequently disbursed from the wallet are kept on the platform itself.

Auditing is an important part of an agent’s responsibility to properly deal with trust money. It ensures that monies have been properly receipted and transferred and that there is no money which has been withheld or incorrectly paid. The “wallet” used by these platforms would not be caught by these auditing requirements. Without regular auditing, it is up to the agent and owner to ensure that payments have been properly dealt with and any irregularities will not be reportable to the OFT. This raises the question of whether an agent is liable for any incorrect payments if they have failed

to ensure that payments are properly disbursed via the platform.

These issues are only some that we have identified. The platforms also present a range of other non-procedural issues which need to be considered. For example, what obligations are owed by the service provider of the platform to the owner? What if money paid into the wallet goes missing – could the agent be held liable to the owner in those circumstances? Will owners be content to see an agent charging 6% or more for rent collection when the app is doing that, not the agent?

Whilst cloud based rent payment offers real benefits to agents and owners by streamlining the process of when payments can be distributed and overcomes the onerous administration involved with a traditional trust account, the lawfulness of using these platforms is uncertain and there are definitely risks involved.

Apart from the question of strict compliance with the Act, the platforms seemingly achieve the object of the Act which is to protect consumers from financial loss in dealing with agents by minimising the misappropriation of funds paid by the tenant.

At the time of this article, the OFT has not prohibited the use of these cloud based platforms. We are aware that the OFT has concerns about them but is yet to arrive at and publish any clear position about them. It is possible that there will be legislative reform to address the OFT’s concerns. Whilst that is unlikely to occur for some time (if at all), we would not be surprised if the OFT publishes guidelines about the use of the platforms in the near future.

Updated Property Occupations Form 6 - Appointments by Brenden Eames

Following the introduction of the new Property Occupations Form 6 from 1 May 2024, now is an opportune time to check all of your letting appointments and correct any issues.

Regular reviews of your business paperwork, including Form 6's, will ensure any issues are dealt with before they can impact on the value of your management rights business (i.e. when it comes time to sell) or before coming to the attention of the OFT.

Furthermore, it is important to remember that without a proper appointment there is no entitlement to a commission or to your fees and charges for any services you may provide.

What to look for

Letting agents should ensure that they are using the current Form, which is "Form 6 – V1-May 2024" from 1 May 2024 for any new letting appointments.

Common issues to look for include:

- not having signatures or dates in Part 9 of the Form;

- the correct name of the letting agent/ licensee;
- the correct licence number;
- listing commission 'exclusive of GST' in Part 7;
- not attaching a schedule of fees and charges;
- not including all fees and charges actually being charged;
- not including the ability to increase any fees;
- ensuring the appointment is continuing;
- having an appointment which was for a fixed term that has expired.

Importantly, the Form 6 is not sufficient on its own. It needs to have terms and conditions and a schedule of fees and charges.

The various industry forms have different special conditions or addendums and special care should be taken when completing these. Our preference is to use the ARAMA Addendum as it is relatively simple to understand and to complete. Importantly it also has some very

carefully worded conditions dealing with the letting agent's entitlement to make a profit from providing certain services to an owner or guests.

If you offer holiday lettings or short term lettings you may need to include what are commonly referred to as the "forced sale provisions" in accordance with the managed investment provisions of the Corporations Act. If at all unsure, check with your lawyer to see if they are required, as it is critical that they be included if they apply to your complex.

What to do now

One day you will want to sell and any well advised buyer's accountant will be looking closely at your appointments. Of course you might also face a visit from the OFT doing a random check on your appointments. Be prepared and get it right the first time.

Mahoneys regularly assist letting agents to rectify and update their letting appointments.

Feel free to contact us if you require our assistance to help review your appointments.



Brisbane office

L 18, 167 Eagle Street
Brisbane Qld 4000
p 07 3007 3777

Gold Coast office

L 2, 235 Varsity Parade
Varsity Lakes Qld 4227
p 07 5562 2959

For latest CPI figures go to

[Click here for Brisbane All Groups CPI figures](#)

You will need to click on "All groups CPI, index numbers(a)" to see the detail. For example, if your remuneration started at \$100,000 on 1 September 2016, the correct calculation for the 1 September 2023 increase based on Brisbane All Groups CPI would be $\$100,000 \times 136$ (i.e. the last index figure before the review date – the June 2023 quarter) / 109 (i.e. the last index figure before the commencement date – the June 2016 quarter) = \$124,770.64. Mahoneys has assisted many managers in having their remuneration increased to market level.



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