

## THE ETHICAL CONSIDERATIONS FOR OCCUPATIONAL LICENSING IN PROPERTY – WHY IS WHITE COLLAR CRIME ON THE INCREASE?

HERA ANTONIADES<sup>1</sup>

University of Technology, Sydney  
Australia

### ABSTRACT

*There are various property agency laws and code of ethics which provide appropriate standards of behaviour for the property agent. The property agent is placed in a position of trust and there is a general expectancy from the consumer that the agent will act in a diligent and professional manner. However, there are many instances where consumers have lodged complaints against their dealings with real estate agents, and in recent times the consumer complaints have continued to increase. These complaints include non-disclosure of a vested interest, misrepresentation, unethical conduct and fraud. Therefore, the aim of this research is to analyse selected court cases in New South Wales, Australia, with regards to white collar crime. The purpose of the research is to obtain an understanding of the mechanisms involved in the increase for white collar crime and if any preventative measures can be implemented to lessen the impact for the consumer.*

**Keywords:** Ethics, Occupational Licensing, White Collar Crime,

### INTRODUCTION

Within Australia, many professions require a form of licensing recognition in order to practice and carry out their duties when dealing with the consumer. The Built Environment is no exception, with licenses required for property agency work, business agency, stock and station, valuation, building, construction, engineering and architecture. Therefore, this research paper will consider one specific profession for licensing, namely property agency practice which includes licensing for real estate agents, property managers, business agents, stock and station agents, and strata managing agents.

In New South Wales, occupational licensing for property agency and certificates of registration is mandatory under the Property Stock and Business Agents Act 2002 (Property Act), if working in the property industry. Furthermore, occupational licensing for this category is managed under the auspices of individual state and territory *Fair Trading* offices. Initially educational requirements were not mandated, however during the late 1960's compulsory formal education was introduced as a pre-requisite for licensing; with continuing professional development (CPD) mandated from September 2003 for all licensed and certificate holders under the Property Act. The aim for introducing mandated CPD was to provide agents and certificate holders with continuing education comprising of "significant intellectual or practical content, be relevant to property agency work and provide an educational outcome" (Office of Fair Trading 2007).

Additionally the purpose and objective of the compulsory CPD was geared towards the maximising of consumer protection and to maintain public confidence with the property professional. In 2007, the New South Wales minister for Fair Trading authorised an independent evaluation of the then, current system for CPD and invited submissions from training providers and industry associations to provide recommendations and improvement to the current program. The review resulted in an overhaul of the program and a broader range of topics approved as suitable for CPD for the property professional. At the top of the list subject areas such as trust accounting, ethics, and risk management were mandated.

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<sup>1</sup> [hera.antoniades@uts.edu.au](mailto:hera.antoniades@uts.edu.au)

Therefore, similar to the CPD requirements, occupational licensing has been identified as an important tool for protecting consumers (Office of Fair Trading, 2008c) and for the “benefit of citizens” (Parliament Legislative Council 2007). The licensing requirement is coupled with stringent rules associated with the record keeping of trust accounts. Thus, in NSW, every property agent is liable at common law, and at statute law to account to their principal, for any money held, collected or disbursed on their behalf. Under the Property Act, agents are required to open a Trust Account which is for the exclusive benefit of their client. For instance, the Trust Account would include transactions relating to collection and disbursement of money collected on behalf of vendors and landlords for sales transactions and rental collections. The Property Act also stipulates that all agency businesses should be “effectively controlled and supervised by a licensed agent”, (Fair Trading NSW 2014a) and in particular where there are large sums of money held by way of a trust account. Additionally, the Act has also clarified the responsibilities of licensees for their employees’ conduct.

The Property Services Compensation Fund in NSW was established to provide financial compensation to the consumer, whose money had been misappropriated by a licensed agent. Therefore, the compensation fund is considered an important consumer protection mechanism and is a key feature of the regulatory system. The majority of the funding for the compensation fund is through the licensing revenue received by Fair Trading NSW from the issuing of property agency certificates or registration and property license renewals. In the last 15 years, complaints from consumers include issues relating to fraud occurrences, duty of care, negligence, and mismanagement of their clients’ financial requirements.

The NSW Office of Fair Trading, in July 2008 released *The Report - Statutory review of the Property, Stock and Business Agents Act 2002*, (The Report 2008b), and identified in chapter 12 of this report, the following reasons as risks associated with trust accounting:

1. Lack of knowledge in trust accounting.
2. Failure to implement proper trust accounting systems.
3. Failure to monitor trust accounting systems.
4. Failure to review trust accounting systems.
5. Failure to monitor the actions of staff.
6. Failure to comply with audit requirements.
7. Fraudulent conduct.

This same report identified, that during the financial years ended 30<sup>th</sup> June 2003 to 30<sup>th</sup> June 2007, claims paid against the statutory compensation fund for failure to account accurately by property agencies, were between \$362,000 to \$1,024,000. This same report also estimated that approximately \$1,089 billion trust moneys were held by property agencies for the financial year ended 30<sup>th</sup> June 2007. Below in Table 1 is an overview summarising the claims from the statutory compensation fund during those relevant years.

**TABLE 1 -STATUTORY COMPENSATION FUND CLAIMS**

YEAR	TOTAL AMOUNT PAID	NUMBER OF CLAIMS
2003	\$ 362,400	35
2004	\$ 763,524	276
2005	\$ 751,196	146
2006	\$ 1,024,096	82
2007	\$ 918,906	264

Source: *The Report - Statutory review of the Property, Stock and Business Agents Act 2002*, Chapter 12.

Whilst currently Fair Trading NSW has not released information publicly relating to claims against the compensation fund, a study undertaken by the Antoniades (2013) identified ten randomly selected court cases from 2010 to 2013 which related to trust accounting fraud. From these ten court cases, five court cases

publicly disclosed the amounts misappropriated, which totaled \$2,107,261. Therefore, trust accounting fraud has continued to increase, despite the need for occupational licensing requirements. It is worthy to mention that since 2003 educational requirements and industry experience have undergone many changes with a view to improving consumer protection and streamlining the processes of accountability. However, as indicated above in Table 1, and the further study undertaken in 2013, increases in trust accounting fraud is continuing.

Questions arise over the content of educational requirements and if the fraud relates to lack of knowledge and inadequate monitoring and reviewing of trust account procedures, as mentioned in The Report 2008. However the 2013 study undertaken revealed that of the ten court cases randomly selected the majority of the offences were carried out by the owners, directors, licensees (or associates of these categories) within the real estate agencies. Therefore only a small number of offenders were identified as belonging to the individual category of an employee. There are also other considerations such as ethics and integrity and the consequential punishment for the offender, and whether or not these themes are addressed in the educational curriculum for real estate agents.

However, a detailed examination of the whereabouts for professional ethics located ethics and integrity embedded within the subject modules CPPDSM4007A *Identify legal and ethical requirements of property management to complete agency work*, CPPDSM4008A *Identify legal and ethical requirements of property sales to complete agency work* and CPPDSM4006A *Establish and manage agency trust accounts*, which are part of the Property Services CPP07 National Training Package (NTP) for property agents' educational requirements. It could also be argued that the resources and depth of information for professional ethics is not sufficiently highlighted in these modules, and the consequential treatment of the estate agent, if they do not adhere to the rules as laid down in the relevant legislation. The modules also include an awareness of the benefits associated with professional organisations for property agents in NSW, such as The Real Estate Institute of New South Wales (REINSW) and the Australian Property Institute (API). The institutes have adopted and implemented their Code of Practice/Rules of Conduct for their members, in addition to the legislative requirements.

Additionally, the values and behavioural expectations for property agents and employees are clearly listed in the Rules of Conduct under the Property Act. These rules provide the expected standard of behaviour, professionalism and ethics within the property industry. Therefore the fiduciary relationship between the principal and their agent is evident, with the understanding that the agent must always act in the best interest of their client. However, once again, because professional ethics is embedded within three modules from the NTP, it is not possible to monitor the extent of the knowledge and information imparted to the students. Consequently, a stand-alone subject covering all these aspects of ethics might be justifiable in view of the present circumstances, with consumer and trader complaints increasing during the last ten years.

Therefore this research paper examines the increase for white collar crime and if any preventative measures can be implemented to lessen the impact for the consumer. The first part of this paper discusses the literature for occupational licensing and the link between white collar crime and professional ethics. The paper continues with a discussion on the type of fraud committed and the various methods of application used to disguise the actions of dishonesty committed by the offender. In conclusion the implementation of suggested preventative measures is discussed.

## LITERATURE REVIEW

Agency theory relationship is based on trust, and involves the consumer engaging a person to act on their behalf. One party is designated as the agent, and acts for and on behalf, or is a representative for the other party, designated the principal (Ross 1973). For the property agency industry this is akin to the licensed real estate agent representing the role of the agent, with the vendor or landlord classified as the principal. The transactions usually also include various amounts of money held on behalf of the landlord and or vendor; this money is usually referred to as *trust money*. The regulatory impact for property agents is to ensure correct accountability in the handling of trust money – which has been identified as “one of the greatest areas of risk property owners face in transactions with real estate agents”. (Fair Trading 2008 (a), pp56).

Initially white collar crime and blue collar crime were identified as two fields of study (Sutherland 1939), who attempted to prove a correlation between money and social status i.e. high society. This was based on the premise that the majority of offenders sent to jail were in fact blue-collar crime offenders. However, researchers argued that a contributing factor to this outcome related to the Great Depression, where people had lost their wealth and were working long hours to regain their financial independence. This provided the worker with the opportunity to take advantage of their position of authority and commit fraud. So, is there a difference between the white collar crime and the blue collar crime? Does fraud include white collar crime and blue collar crime? To some extent the answer would be affirmative. Taft (1951) identified blue-collar crimes as the crimes of the under-privileged, whilst white collar crimes brought “material rewards with little or no loss of status”, although both types of crime are usually a criminal prosecution by the courts. Therefore, the notion of ethics and integrity is interwoven within both white collar crime and blue collar crime.

Sutherland (1939) classified blue-collar street crimes as arson, burglary, theft, assault, rape, and vandalism, whereas white collar criminals were considered to be “opportunists” who took advantage of their circumstances; and were usually educated, intelligent and affluent and held in high esteem and were placed in a position of trust which provided the opportunity to commit the crime. However, society over the years has changed and with the increase of white collar crime, consumer confidence has eroded. In particular property agencies who hold a large amount of money in their trust account, are required to provide full accountability of their records; hence the purpose of occupational licensing used as a mechanism to provide a form of consumer protection.

During the last few decades, white collar crime has included corporate crime and computer crime. This is a similar theme as noted by Sutherland (1939) who identified white collar crime as “those illegal activities that occur in connection with a person’s job or work” and further concluded, “a crime committed by person of respectability and high social status in the course of his occupation”. Therefore, white collar crime is a broad inclusion of fraud such as false or misleading advertising, evading corporate taxes, computer crime, and misappropriation of money held in a property agents trust account.

Subsequently to Sutherland, there have been a number of definitions relating to white collar crime, such as Clinard (1952) who defined white-collar crime as "a violation of the law committed primarily by groups such as businessmen, professional men, and politicians in connection with their occupations". This definition deviated slightly with Hartung (1950) who proposed white collar crime as “a violation of law regarding business which is committed for a firm by a firm or its agents in the conduct of its business”. Therefore, is the misappropriation of trust money considered white collar crime? The answer is yes, according to these various definitions, because trust money evolves from the furtherance of running a property agency business; the agent is required by law to be the holder of an occupational license, and the fraud is the stealing of the trust funds. Therefore, to further define the “white-collar crime” concept it is important to recognise that the crime which has been committed is “job-specific”.

Continuing from this theme of white-collar crime, the term fraud has also been used to identify misappropriation of trust funds in a real estate agency. Therefore if we were to expand with the definitions from Clinard (1952) the action of fraud can also be considered a violation of the law. During the last decade, Gu, Liang and Wang (2005) developed a theoretical framework for detecting accounting fraud. Their model, “the three elements theory concept”, identified interest, environment and implementation as the three necessary elements contributing towards fraud occurring. This theoretical concept involved the use of interest as the motivational power of fraud, secondly, environment such as the lack of environmental control providing the opportunity for fraud, and thirdly various kinds of illegal implementation methods which could trigger accounting fraud. These three elements are similar conclusions arrived at by Sutherland (1939), Clinard (1952), and Hartung (1950). Therefore, as a point of observation, literature from 1939 to the present date has attempted to define white-collar crime and blue-collar crime. However, even with the changing attitudes of society over the decades, the core themes relating to fraud and dishonesty have remained very similar.

As a means to implement these three identified elements and align to trust account agency fraud, the three elements could be applied in this way. Firstly an agent could be identified as committing the fraud due to their business not being successful and requiring funds urgently to keep their business afloat; the second element which related to regulatory control is very prevalent in New South Wales, where research and continuous discussions and amendments to the legislation have ensured that this is kept at optimum consumer requirements; and thirdly the illegal implementation methods which could trigger accounting fraud tends to be that the owner of the property agency has met the first element and therefore does not keep correct accounting records because of the missing funds; or if a staff member has committed the fraud, then there is usually an accounting cover up from the staff member.

Therefore, if we were to examine the need for regulation and mandatory occupational licensing, the answer would lead back to consumer protection, namely the misappropriation of trust money as a priority area. So with regards to real estate licensing regulation, the property owners, tenants, and purchasers would represent the stakeholders. The governments' solution with regulation requirement is to address the stakeholders' individual interest such as the safekeeping of the trust funds. Then the question of ethics and integrity arises. Is there an inherent assumption that when people are placed in a position of trust they will know the difference between right and wrong? And is it possible to prevent white collar crime in property agencies? Thus is it feasible for a property agent to acquire an understanding of how their actions impact adversely and positively from the consumers' perspective and also the regulator.

Within these thought parameters, Brinkmann (2009) researched the ethics of Norwegian real estate agents and suggested action research as a method to add professional ethics to the agents' agenda. For instance a recommendation was to provide an environment for the agent to critically self evaluate their involvement within a variety of business transactions. This trigger mechanism on self reflection would focus on the sensitive issues which contained moral conflicts relating to the discharge of their daily duties. In parallel, this self reflective process could be adopted for CPD.

Research undertaken by Schlaefli et.al. (1985) sought to assess the impact of moral education as a stimulant to assist the students in the development of their moral judgement. Findings suggested that all groups of students benefited from the program, and better results were obtained from programs where the adults were twenty four years and older and the duration of the program was between three to twelve weeks. Therefore, there is some indication of the benefits of introducing ethics into the course curriculum. In conclusion, literature readily acknowledges the importance of professional ethics and indeed this topic is taught as a separate subject in many real estate curriculums. However, questions are raised if there is a more effective method of teaching ethics and embedding the values within the course curriculum. For instance, is ethics a topic where the knowledge is *acquired* or *developed*?

Generally ethics is considered to be developed, based on scenarios and decisions learnt from a very young age, and would form part of a person's education within their social skills learnt at home. For instance, Yiu (2008) argued that ethics education should not be taught through the traditional lecture and exam based style of learning. The author argued that students needed to develop their moral and ethical processes, through a series of role plays, workshops and involvement with practitioners. This indeed could be argued that in Australia, competency based assessments are a model approach to assess professional ethics, rather than the traditional exam style assessment.

There is also evidence to suggest that agents have a conflict of interest with their property agency transactions. For instance, Young (2011) identified the fact that agents were acting on behalf of a vendor wishing to sell their property, whilst simultaneously advising potential homebuyers for the same property. Issues such as sales commission and loan fee kickbacks to the agent were cited as conflicts of interest. However in contrast, Australia has very strict laws within the Property Act identifying the agents' duty to disclose conflicts of interest. The Property Act highlights that the agent is acting on behalf of their client only and cannot include the purchaser as their client if they are acting on behalf of the vendor. Furthermore, legislation in Australia prohibits an agent from giving financial advice.

In conclusion, literature supports the inclusion of professional ethics within the course curriculum. Various research has also highlighted the importance of course content to include additional topics such as communication, advertising, guidance, representation, results, and governance as essential skills and fields of knowledge. The next section of the paper outlines the research method adopted for this paper.

## **RESEARCH OBJECTIVE, METHODOLOGY and LIMITATIONS**

With the documented increases in trust accounting fraud and the subsequent criminal convictions of property agents, it is questioned if the Property Act is relevant in today's changing society. Occupational licensing requirements are mandated throughout the world for many professions, and in particular the property sector, in NSW, has been regulated for over 100 years. The mishandling of trust money is a criminal offence and this is usually accompanied by a jail sentence. However, Fair Trading NSW, which administers the Property Act, also has a range of administrative, civil and criminal enforcement remedies available. Therefore, to provide a balanced enforcement strategy and to promote compliance and socially acceptable behavioural standards, Fair Trading will use a variety of enforcement options, depending on the breaches identified.

Consequently, the aim of this research is to analyse a mixture of recorded breaches which relate to trust accounting irregularities. In general, Fair Trading will issue public warnings and undertake prosecutions for the more serious breaches; and undertake disciplinary determinations for the less serious breaches which include but are not limited to a written warning, penalty infringement notice, cancellation of licence and enforceable undertakings. In conclusion, the purpose of the research is to obtain an understanding of the mechanisms involved in the increase for white collar crime and if any preventative measures can be implemented to lessen the impact for the consumer.

Therefore, it is beyond the scope of this research to include other areas of fraud such as misrepresentation of material information, non-disclosure of a vested interest and other similar matters which are related to unethical conduct.

The research was approached in two stages. The first stage involved an analysis of all court cases during the financial year ended 30<sup>th</sup> June 2014, with the following criteria:

1. Prosecution to have occurred through the Australian Court System rather than a Tribunal System.
2. The breaches were to relate to the misappropriation of trust funds.
3. The defendants analysed were not to include entities such as a company, i.e. the entity is identifiable as a human being.

The reason for the above criteria stems back to the discussion in the earlier part of this paper. It is acknowledged that trust accounting fraud has increased during the last ten years and therefore the most recent court cases are considered justifiable. Secondly, Fair Trading prosecutes through the court system trust accounting irregularities of a significant amount (although the exact amount has not been quantified). As mentioned previously other mechanism such as disciplinary processes are also available and therefore the research in the first stage, is concerned primarily with the large amounts of money missing. Thirdly, the majority of real estate agencies are set up through a company structure, where a corporation real estate licence is issued through Fair Trading. However an individual person who is employed by the corporation is nominated as the licensee in charge of the corporation. Whilst Fair Trading does prosecute the company entity and issues penalties and licence disqualifications, it is the actual licensee, or director or offender who will receive the criminal record and imprisonment sentence.

The second stage of the research involved an analysis of the trust accounting irregularities which were dealt through the disciplinary process other than the court system, during the financial year 30<sup>th</sup> June 2014. For instance the issuing of warning letters and penalty infringement notices. Again, only cases which involved trust accounting irregularities were considered.

Lastly, the data analysis from the first and second stage of the research are summarised in a table format and discussed further in the following section.

## DISCUSSION AND ANALYSIS

There are various mechanisms used to disguise misappropriation of trust funds. This can include, but are not limited to, actions such as late or short banking of trust moneys and falsifying entries in the financial records of the trust accounts. There is also the issue of incorrect premature trust fund withdrawals for sales deposits and rentals collected. In some instances investigations reveal evidence of non lodgement of funds collected for sales deposits, which should in fact have been retained in the sales trust account pending settlement and any required appropriate authorisation for the disbursement of funds. Another issue of contention is the advance payment of commission from sales deposits prior to settlement, and also advance commission for property management prior to accounting to the landlords.

Therefore, the discussion in this paper considers the five court cases which occurred during the financial year ending 30<sup>th</sup> June 2014. The misappropriation of trust funds ranged from \$813,936.00 to \$1,434,111.43 with jail sentences extending from a bond for good behaviour to 18 months' imprisonment, and disqualification from holding a licence or certificate and working in the property industry. The relevant data for each of these court cases is listed below in Table 2.

**TABLE: 2**

### Summary of First Stage Research – Court cases for trust accounting misappropriation

NAME	TRADING NAME	AFFILIATION	PROSECUTION YEAR	OFFICE LOCATION	DATE OFFENCES OCCURRED	TRUST AMOUNT MISAPPROPRIATED	REASON	OUTCOME
Roger Ocvirk and Gordana Ocvirk	Bayelm Pty Ltd trading as Dougmal Harcourts Warilla Sales and Strata Decisions	Director Secretary	2013/2014	Wollongong	2012 and prior	\$1,235,402.67 \$198,708.76	Business was running at a significant loss	18 months prison (12 months non parole). Appealed against sentence.
Patrick Scott	CBD Commercial Pty Ltd trading as L J Hooker Surry Hills	Director	2013/2014	Surry Hills	2011 and prior	\$813,936	Gambling addiction	16 months prison (12 months non parole)
David Michael Johnson	Johnson Prestige Realty Pty Ltd trading as L J Hooker Pymble	Director	2013/2014	Pymble	2011 and prior	\$980,000	Funds used to pay for illegal drugs for spouse to alleviate her pain from failed surgery.	12 months imprisonment. Suspended on entering a bond for good behaviour
Glenn Raymond Boatswain	GLMP Pty Ltd trading as Boatswain Commercial and Industrial Real Estate	Director	2013/2014	Bathurst	2012 and prior	\$225,323.16	Funds used for personal use.	12 months prison to be served as home detention

**Source: Collated and analysed from the NSW Fair Trading Annual Report 2013-2014 (d) and Enforcement Schedules 2013-2014 (b).**

This section of the discussion and analysis considers data from Table 2. Whilst each of these five court cases has identified the amount of money misappropriated, there are instances where the final amount of money missing cannot yet be determined. This is due to the fact that the consumer has up to two years from when they become aware of the fraudulent act, to lodge a claim against the Property Services Compensation Fund. Additionally, in many instances, the offender has not repaid the misappropriated funds and this is noted on the public register with Fair Trading.

### Roger Ocvirk and Gordana Ocvirk

These defendants were prosecuted for missing trust funds totaling \$1,434,111.43. It was revealed that their business dealings were running at a significant loss and so the trust funds were used for the purpose of sustaining the operation of their business. Their property agency business was through a company set up with Roger as the director and Gordana as the secretary. Therefore, in this instance the theft did not occur through other staff members, rather the owners of the business were held responsible. Whilst their original

sentencing did occur in May 2013 both parties appealed against the severity of their 18 month prison sentence. However, the couple eventually withdrew their appeal a few months later. This was due to the fact that the presiding judge on the appeal was contemplating increasing their sentence. Since the matter of their sentence was finalised in a different financial year, for the purpose of the research this court case was included for the financial year ended 30<sup>th</sup> June 2014.

### **Patrick Scott**

The defendant in this case was the sole director of a company structure, and during 2010 to 2011 used the trust funds to feed his gambling habit. His inability to control his gambling resulted in \$813,936 of trust funds used, with instances such as \$77,000 gambled in one bet. Again in this instance, the owner of the business was responsible for the missing money.

### **David Michael Johnson**

Similar to the previous instance, this defendant was also the sole director of a company structure. He accessed trust funds of \$980,000 to purchase illegal drugs for his wife. His wife had undergone an unsuccessful surgery which resulted in her being in constant pain, and the drugs were her source of relief. In this court case the sentence for prison was suspended with a good behaviour bond in place. The events leading up to the missing money are also different from the first two cases, where the defendants in those two cases used the funds for self-gain, although ethically the actions by David M Johnson are still unethical and a breach of the Property Act.

### **Glenn Raymond Boatswain**

Again, this defendant was the sole director of a company structure. The trust funds were used for personal purposes and occurred over a number of years. The prison sentence was by way of home detention for 12 months. As the amount missing was only \$225,323.16 – a small amount in comparison to the other cases it would appear that the convictions and prison sentences take this amount of money into consideration.

Therefore, in all five instances the defendants were the owners of the business and able to readily access the trust funds. There was another court case during the early part of 2014, however, as the matter was set for appeal at the time of preparing this research paper, documentation and information on the outcome was not yet decided. In conclusion these five court cases have highlighted the unethical behaviour of the owners of the real estate agencies. It is difficult to question if the Property Act is doing its job. After all, is it the responsibility of the government to instill ethics and moral standards? Or is this consideration for ethics an aspect that should be part of a person’s life from when they are born, and continuously instilled throughout their life? Therefore, should there be an expectation that individuals understand the meaning of socially acceptable behavior with regards to ethics and moral standards?

In conclusion, these results above do indicate a greedy approach to the use of other people’s money, and a lack of ethics and consideration for the trust relationship that accompanies the correct accountability of trust funds. So whilst these cases of fraud involved court proceedings, there are also disciplinary processes other than the court system. For instance, this can be in the form of issuing warning letters and/or penalties. Therefore, the second stage of the research summarises the cases which involved a disciplinary process other than the court system, during the financial year 30<sup>th</sup> June 2014. Below in Table 3, is a summary of the findings.

**TABLE: 3 Summary of Second Stage Research – Disciplinary process (other than court proceedings) for trust accounting misappropriation**

<b>Quarter Ending</b>	<b>30<sup>th</sup> September 2013</b>	<b>31<sup>st</sup> December 2013</b>	<b>31<sup>st</sup> March 2014</b>	<b>30<sup>th</sup> June 2014</b>	<b>TOTAL</b>
<b>TOTAL ENFORCEMENTS</b>	6	2	3	1	12

Source: Collated and analysed from the NSW Fair Trading Annual Report 2013-2014(d) and Enforcement Schedules 2013-2014(c)

As indicated above in Table 3 there was a total of twelve individuals who received disciplinary enforcement action due to an irregularity within their trust funds. Additionally, in all instances the offenders were the owners of the business. This is a similar outcome to the analysis of the court cases which proceeded to a criminal conviction – as detailed in Table 2.

The twelve enforcements from Table 3 included disqualification of the individual’s licence either for a set number of years or permanently; reprimand and warning letters issued; monetary penalties; conditions imposed on the future use of trust accounts; and recommendations to introduce established trust accounting practices. These outcomes are aimed to facilitate better business practice for the management of the trust account and to comply with the relevant legislation. Indeed these enforcements are different from the previous table which were aimed at prison terms as part of the sentence. However, there seems to be an approach that, depending on the severity of the situation and the amount of money missing, will determine the course of action undertaken by Fair Trading NSW.

Earlier in this paper, the literature review identified white collar crime as “opportunists” who took advantage of their circumstances; this does appear to be correct with the analysis from the data in Table 2. In all instances the offenders were in a position of trust and had access to the trust funds. Additionally, the literature identified white collar crime as a descriptor for individuals who were educated, intelligent and affluent and had committed a crime against society. At this stage of the analysis, one can only question if the term “white collar crime” camouflages the true extent of the crime and the impact on society, and if the title “white collar crime” truly is the appropriate title for this type of crime.

For instance a person who murders, also commits a crime, but is labelled a “murderer”; a person who robs a bank commits a crime, but is labelled a “bank robber”. Therefore, it is worth considering a more specific label to the general term of white collar crime. Is the offender an “embezzler”; or maybe a “thief” or “fraudster” ? Perhaps due to the changing nature and attitudes of society, the term “white collar crime” and the definitions and characteristic relationships of the offenders, which emerged from the 20<sup>th</sup> Century, require revisiting during the 21<sup>st</sup> Century.

A further analysis was undertaken of the total consumer and trader complaints in the market place with regards to real estate transactions. Whilst the information from Table 4 below, does not identify the type of complaint, it is obvious that the complaint numbers have risen during the last ten years. These complaints include all types of property transactions, for example issues relating to ethical conduct, false and misleading advertising, non-disclosure of material information, and the inability to account for trust funds collected.

**TABLE: 4 New South Wales - Consumer and trader complaints about market place transactions**

	<b>Number of complaints</b>	<b>% Increase since 2005</b>
1 <sup>st</sup> July 2004 to 30 <sup>th</sup> June 2005	1,756	Base year
1 <sup>st</sup> July 2005 to 30 <sup>th</sup> June 2006	2,181	24.20%
1 <sup>st</sup> July 2006 to 30 <sup>th</sup> June 2007	2,650	50.91%
1 <sup>st</sup> July 2007 to 30 <sup>th</sup> June 2008	2,612	48.75%
1 <sup>st</sup> July 2008 to 30 <sup>th</sup> June 2009	2,440	38.95%
1 <sup>st</sup> July 2009 to 30 <sup>th</sup> June 2010	2,564	46.01%
1 <sup>st</sup> July 2010 to 30 <sup>th</sup> June 2011	2,358	34.28%
1 <sup>st</sup> July 2011 to 30 <sup>th</sup> June 2012	2,341	33.31%
1 <sup>st</sup> July 2012 to 30 <sup>th</sup> June 2013	1,444	17.77% decreased
1 <sup>st</sup> July 2013 to 30 <sup>th</sup> June 2014	3,754	113.78%

Source: Annual Reports Fair Trading NSW (d) 2008 to 2014 inclusive

Note: The 2011 report from Fair Trading initially showed 3,094 complaints which were later revised in subsequent publications. This table is a reflection of those revised figures.

The analysis in the above table using 2005 as the base year indicates complaint numbers of 1,756 increased to 3,754 a decade later. Interestingly, in 2012/2013 Fair Trading reported only 1,444 complaints, which represented a decrease of 17.77%. However, there does appear to be an anomaly with the following year, which has reported an increase of 113.78%. Therefore, there is the possibility that the complaints for the financial year ending 2013 could have been partly accounted in the tally, during the following financial year; hence the disparity with the calculations. If this indeed is the situation, then an average calculation would indicate that the financial years 2013 and 2014 were in fact an increase of an average of 48% for each year which appears more in line with increases indicated during the earlier years. An error did occur in 2011 when Fair Trading later revised their initial complaint figure of 3,094 to 2,358. Enquiries at Fair Trading in the past have indicated that adjustments are sometimes carried out depending on the method used to collect the data. Therefore, according to the figures in Table 4 the average increase from the base year is currently at 41.38%.

As mentioned from the outset, the research paper aimed at investigating if preventative measures could be implemented to lessen the impact for the consumer, against fraudulent activities undertaken by the agent. Primarily the research focus in this paper has concentrated with matters relating to trust accounting irregularities. An interesting outcome now points to the fact that the majority of offences were carried out by the owners of the business. Therefore, the issues relating to the mechanisms involved in the increase for white collar crime are starting to emerge. In the next section the conclusion and recommendations are discussed.

## **CONCLUSION**

Consumer complaints have continued to increase during the last decade. Similarly, with the larger amounts of money misappropriated in recent years, the research paper selected the financial year ended 30<sup>th</sup> June 2014 as the starting point to investigate the increase in white collar crime. The conclusions from the analysis are identified below:

1. In relation to the court cases leading to a criminal conviction, the analysis clearly indicated a deliberate misuse of the trust funds.
2. The analysis for the enforcement actions however, indicated some instances where the trust account irregularities related to human error and mismanagement of adequate office procedures.
3. Trust funds were readily accessible to the owners of the business and there is an apparent lack of regard for the ethical considerations of accountability to the rightful owners of these funds. These offenders are in a position of trust and use their position to manipulate the books and accounting records.
4. It appears that the ready availability of trust funds is a temptation for these offenders, who have little regard for the laws.
5. Consumers continue to use the Property Services Compensation Fund as a remedy for reimbursement of missing trust fund money.

However, whilst consumer protection is available through the compensation fund there is also the consideration of the effective cost in providing the means for these pooled funds to become available. Therefore, are there any preventative measures which can be implemented to address these problems of trust fund misappropriation? Is it the ethical considerations which are lacking in a person's make-up or is there a lack of understanding of the relevant concepts associated with the accounting process? In regard to ethics and accounting, the following recommendations are suggested:

1. A major overview of the educational course curriculum for real estate agency licensing. The consideration of ethics and misconduct should be highlighted.

2. The implementation of good accounting practices and the correct procedures for trust money and recording information accurately. This can also be linked very closely to enhancing the course curriculum for trust accounting.
3. Develop a system where agents must submit their business and personal financial details to Fair Trading in order to obtain or renew their property licence. This will in effect identify the agents whose businesses are not trading profitably and who might be considered a high risk person with regards to trust accounting ethics.
4. Implement an interview system where agents applying for their licence are required to undertake a *viva voce*. The process could be administered through professional associations with a minor fee paid to the associations to cover their cost. In Australia, professional associations for the valuation profession have successfully used this method of assessment for decades.

In conclusion whilst it is expected that ethics and integrity form part of a person's up-bringing, the reinforcement of these principles through education is highly recommended, coupled with a solid understanding of the accounting framework for trust accounts.

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