

real estate *news*

A newsletter from the
Consumer Protection Division of the Department of Commerce

Name	Initials

High alert after more fraud attempts

The property industry in Western Australia has been warned to remain on high alert after recent attempts by overseas criminals to fraudulently sell two Perth homes.

In separate incidents, real estate agents were approached by fraudsters who successfully changed the contact details of the true owners of the tenanted properties. In both cases, the true owners were residing in South Africa. Copies of documents related to the management of the properties were sent to the fake owners by the agents in both cases. Requests to sell the two properties, valued at \$700,000 and \$800,000, soon followed.

In one case, the agent became suspicious after receiving a phone call from the scammer, who spoke with an accent, wanting an urgent sale for the property that had just sold two months earlier. The agent was familiar with the true owner and knew the accent was not consistent with earlier dealings.

In the second case, the agency received a request to sell the property supported by copies of fake passports, forged signatures and a letter of verification purportedly from the Australian High Commission in Pretoria, South Africa. The alarm was raised

when the agency's sales manager identified warning signs of property fraud he had learned about in presentations and educational material provided by Consumer Protection, WA Police and REIWA. In this case, scammers requested an urgent sale and promised the agency future sales – similar tactics used in previous scam attempts.

The WA Police Major Fraud Squad is investigating both recent incidents.

While the frauds were detected fairly quickly, Commissioner for Consumer Protection Anne Driscoll expressed concern these attempts were not detected much earlier by property management staff.

It is absolutely crucial that security questions are asked to confirm identity when dealing with property management clients and any requests to change contact details are confirmed via the existing contact addresses on file.

More information on the scams can be found in the Department's e-Bulletin at:
www.commerce.wa.gov.au/realestatebulletins

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Sales reps as independent contractors

The Department would like to remind industry members that sales representatives cannot be engaged as independent contractors; nor can they be engaged from another contractor who employs the sales representative (sometimes referred to as the 'ODCO' system). **Employment related payments to a sales representative must be made to a natural person, not an entity.**

Background

The introduction of the *Workplace Relations Amendment (Work Choices) Act 2005 (Cth)* on 27 March 2006 caused concern at the time in the real estate industry as it provides for a minimum wage for employees. Sales representatives were often paid on a commission only basis.

At the time, some contracting companies offering the services of sales representatives were advising industry members their contracting system was compatible with the requirements of the *Real Estate and Business Agents Act 1978* (the REBA Act). This is not the case.

A recent case has come to the Department's notice where payments were being made to an entity related to a sales representative, instead of directly to the person.

The Department considers that under the REBA Act, sales representatives **can only be engaged as employees** and not as independent contractors (the REBA Act governs the way sales representatives operate in the industry). This also has implications for the renewal of a

sales representative's certificate of registration as the Department may only renew the certificate if it is satisfied the sales representative will be directly employed by a licensee upon renewal. When an agent signs a statutory declaration on a sales representative's renewal form, they are declaring they are the employer of that sales representative.

Registered sales representatives must give the Commissioner for Consumer Protection written notice within 14 days of commencing or ceasing employment with a licensee or developer. If employment arrangements have changed, the Department must be notified. Licensees have an obligation under the Code of Conduct for Agents and Sales Representatives 2011 to take reasonable steps to ensure that sales representatives employed by the agency comply with the provisions of the REBA Act.

Agents should ensure they make the necessary arrangements for the employment of any sales representatives who are to act on their behalf.

Fine for real estate salesman using fake registration

A real estate salesman was recently fined \$1,000 and ordered to pay costs of \$748 by the Perth Magistrates Court for selling properties without a current certificate of registration.

David Paul Gammal sold or leased at least nine properties while working for a city real estate agency between March and November 2011. His certificate of registration had expired in February 2010, but he had altered the date on the certificate when he began working for the agency in March 2011.

Mr Gammal ceased working for the agency when the agency was informed by Consumer Protection that he was not the holder of a valid certificate of registration. Mr Gammal had been involved in the sale of properties in Landsdale, Morley, Wangara, Balcatta, Cockburn Central, Mirrabooka and Bayswater.

The Commissioner for Consumer Protection said the Court case highlights the need for all salespersons working in the real estate industry to be registered.

"The licensing and registration system is essential in protecting the interests of consumers involved in home and land sales in Western Australia," the Commissioner said.

"Particularly when salespeople are re-entering the industry after a period of absence, they need to ensure they have the proper certificates in place before they start selling property."

The Department will continue to focus on ensuring only licenced and registered people operate in the real estate industry to safeguard consumer interests.

Agents can check the registration status of sales representatives on the Department's website.

The Code of Conduct: Article 18

What does Article 18 of the Code of Conduct for Agents and Sales Representatives 2011 (the Code) mean for your agency?

- Do you or your agency have association, affiliation (financial or non-financial) or a significant relationship with a supplier of goods or services (such as finance broker, pest control company, settlement agent, landlords' protection insurer etc.)?
- Do you or your agency act as the real estate agent and the settlement agent in the same transaction?

The Department's Proactive Compliance team has identified a number of cases of non-compliance with Article 18 of the Code. Article 18 requires real estate agents and sales representatives to provide adequate and full disclosure in order to obtain fully informed consent from client/s being referred to any provider of goods and/or services with which the agency is affiliated.

Article 18 of the Code states:

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.*

Where agents hold a real estate agent licence **and** settlement agent licence – and are appointed to act in both capacities on behalf of their client/s in the same transaction – a Disclosure of Interest Form must be provided. The form should disclose the conflict of interest and obtain informed consent from relevant parties.

It appears some agents believe the settlement agent's Disclosure of Interest Form (Form 2) is sufficient in such circumstances; however, this is not correct. Real estate agents and sales representatives must ensure compliance with Article 18 of the Code and properly disclose all conflicts of interest, irrespective of disclosures made to their clients by the providers of goods and services to which they have been referred.

A separate Disclosure of Interest Form should be completed and presented prior to the signing of the Offer and Acceptance contract in order to provide clients with sufficient time to assess the information.

You may wish to seek independent legal advice on the content and wording of Disclosure of Interest Forms.



Option fees

The *Residential Tenancy Amendment Act 2011 (Amendment Act)*, which takes effect 1 July 2013, provides that a person may not charge a prospective tenant more than the prescribed amount for an option fee. Subject to the Minister for Commerce's approval, the maximum amount of an option fee will be prescribed in the Residential Tenancies Regulations (The Regulations).

The Regulations (and the prescribed lease form) are available from the State Law Publisher website at www.slp.wa.gov.au/legislation/statutes.nsf/default.html. The lease form is also available from the Department's website at www.commerce.wa.gov.au/ConsumerProtection/PDF/Forms/Renting/1AAResidentialTenancyAgreement.pdf

The proposed maximum amount for an option fee will be:

Where the weekly rent under the residential tenancy agreement is \$500 or less.	\$50
Where the weekly rent under the residential tenancy agreement exceeds \$500.	\$100
Unless:	
Where the weekly rent under the residential tenancy agreement is \$1,200 or more AND the residential premises is south of the 26th parallel of south latitude.	\$1,200

An option fee is a sum of money paid by the applicant to show their rental application is genuine. However, option fees are not mandatory.

Section 27 of the Amendment Act places restrictions on the monies a lessor or property manager may require or receive from a prospective tenant in relation to entering into, renewing, extending or continuing a residential tenancy agreement. Subsection (2) provides that this restriction does not apply to the charging of an option fee.

The Amendment Act amends subsection (2) by prohibiting a lessor or property manager from charging an option fee that exceeds a prescribed amount.

It is important to note if an option fee is charged, the Act has also been amended to **require the option fee be returned to unsuccessful applicants within seven days of refusing their application.** The

fee must be returned by cash or electronic funds transfer.

The amendment in the law to cap option fees is to ensure any fee charged does not unreasonably exclude a person from making an application to enter into a tenancy agreement, while retaining the ability of lessors to require an option fee from a prospective tenant as a sign of the applicant's genuine interest in leasing the premises.

The Department recommends real estate agents who use their own application forms for tenancy agreements disclose information about option fees. For example, you should make it clear whether you intend to keep all or part of the option fee to cover any administration fees you incur if the applicant pulls out after you have told them their application was successful.

The Department's website will contain information about the

maximum option fees allowable once the Regulations have been finalised.

There is no change to the requirement of handling a successful applicant's option fee which may be refunded in cash or applied towards rent payable.



Property of a deceased estate

Under section 60 of the *Real Estate and Business Agents Act 1978*, an agent is not entitled to a commission unless licensed and validly appointed. Section 60(1)(b) requires that an appointment must be in writing, and signed by the person for whom the services are to be rendered, or some other person who is lawfully authorised to sign on behalf of the person for whom the services are to be rendered.

In situations involving a deceased estate, an agent should take the utmost care to ensure their instructions are from a person with proper authority. The Department is aware of cases where agents have

accepted appointments to act from people who claim to be administering a deceased estate without sighting any form of legal documentation supporting this representation.

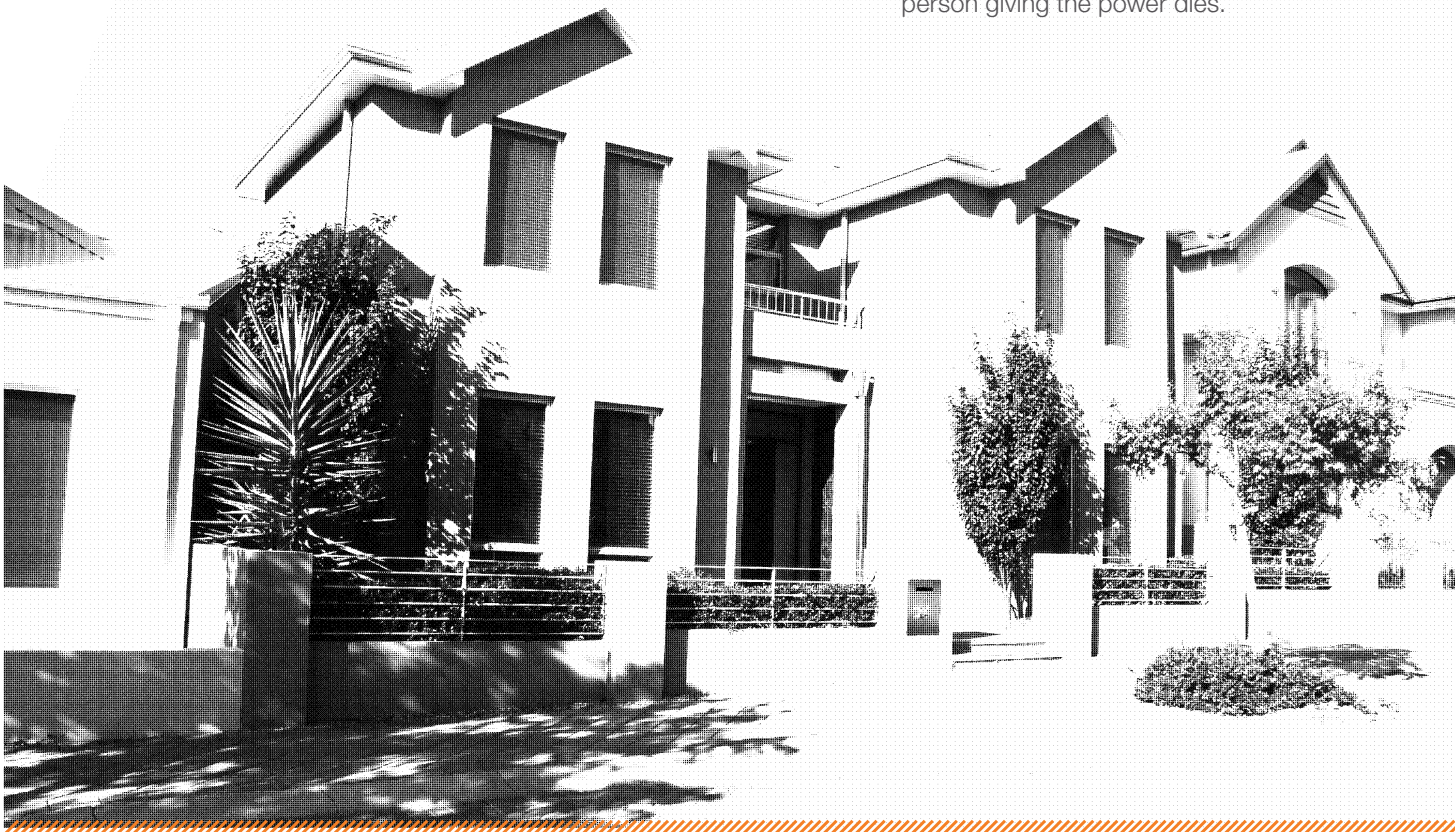
If the deceased owned real estate at the date of death as a joint tenant with another person such as a spouse or partner, the title can be transferred to the surviving party without a grant of Probate being required.

However, in order to dispose of Western Australian property held by the deceased in their own name or as tenants in common with another party, the executor must apply for a grant of Probate to the Supreme Court. If there is no executor and/or no will, a family member who is entitled to receive a benefit from the deceased's estate will need to apply for a grant of Letters of Administration in order to be authorised to dispose of the property.

A person should be able to produce the grant of Probate or the Letters of Administration as evidence that they are a properly authorised person. Agents should also verify the identity of the person presenting the documents, as required by the Code of Conduct for Agents and Sales Representatives 2011.

When an agent has sighted these documents and verified the person's identity, they can be satisfied they are acting under the instructions of the authorised legal representative of the deceased person. If uncertain, seek legal advice.

In one case, an agent mistakenly took instructions from a person to sell a deceased estate when that person had no authority. The person had been given power of attorney during the lifetime of the deceased person. The agent was unaware that a power of attorney, whether general or enduring, becomes void when the person giving the power dies.



Compliance issues regarding advertising

Advertising (in relation to the sale of residential properties) is a major area of investigation by the Department. Agents need to be aware of the requirements for accuracy in specifying the details of properties, and the risk of breaching both the Australian Consumer Law (WA) (the ACL) and the Code of Conduct for Agents and Sales Representatives 2011 (the Code of Conduct).

The advertising issues below have been highlighted as some of the main areas where agents are unsure on compliance.

Title searches

Title searches cannot be included in the advertising costs agreed upon in the written authority; however, they must be carried out. Article 10(3) of the Code of Conduct is clear in this respect; 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.

This will not only help the agent identify the party who has the authority to act in regards to the land, but also provide details as to whether the land has easements, memorials etc.

Paying for advertising

This should be agreed upon prior to any advertising occurring and noted in the authority to act. Article 16 of the Code of Conduct states that an agent must not demand money from the seller that is greater than that agreed to in writing, or initialled on the agreement by the seller. It has been brought to the Department's attention that some agents list the maximum costs to be paid by the seller as 100 per cent. The

Department considers the maximum advertising costs to which the seller agrees to in the appointment to act cannot be listed as a percentage; it must always be listed as a dollar amount, as otherwise the principal has not agreed to an amount. Furthermore, the agent must supply all relevant information that may reasonably be required to satisfy the principal that these costs were properly incurred.

In-house advertising costs

The seller shall only pay for in-house advertising costs if this has been specifically agreed upon in the selling authority. This agreement should be specific: for example 100 flyers @ 20cents each = \$20, design and placement of internet advertising \$100 etc.

Price guides

In 2004, the ACCC successfully prosecuted a real estate agency it alleged had engaged in misleading and deceptive conduct when advertising the expected selling price of a property ([2005] FCA 404). Real estate agents should be aware that they could be breaking the law by advertising at a lower price if the vendor has no intention of selling at the lower price. Price guides designed to lure potential purchasers which are without foundation may be found misleading and in breach of the ACL.

Listing suburbs

Incorrectly advertising the location of a property may be in breach of articles 7(1) and 7(2) of the Code and s152 of the ACL. Article 10(3) of the Code requires agents to promptly obtain a copy of a property's certificate of title after they receive instructions to sell the property. Agents should check and use the location listed on the

property's certificate of title in their advertising. Agents should never rely on the description provided by the seller. This means if a property is located in a particular suburb, it should be advertised as such and not in a more prestigious suburb.

Agents may advertise a property to buyers looking in other suburbs but they must be clear regarding its correct location (as listed on the title).

Unlisted properties

Agents cannot advertise properties unless they hold a valid appointment from the owner of the property. If a listing agent authorises another agent to advertise a property the 'other' agent is to identify the listing agent in the advertisement. The listing agent must obtain the seller's consent before advertising through another agency. When an unauthorised agent advertises a property under their company logo, trading banner or business letterhead, there is the risk that consumers may incorrectly believe that the agent has the listing for the property.

Identifying the agent

Under section 62 of the *Real Estate and Business Agents Act 1978*, any advertisement relating to the business of an agent shall contain such details as are sufficient to identify the agent. The Department's view is that the trading name and agency office telephone number are a minimum requirement. The mobile number or home number of an agent or sales representative alone would not be sufficient, neither would an email or website address. However, these could be placed in an advertisement along with the minimum requirements mentioned.

Rent-to-buy

While the following article is primarily aimed at consumers, agents who conduct or assist rent-to-buy schemes may potentially breach sections 60(3), 61(4) and 68(4) of the *Real Estate and Business Agents Act 1978* and the *Code of Conduct for Agents and Sales Representatives 2011*.

Consumer Protection has recently lodged a Supreme Court Writ against the promoter of a rent-to-buy property scheme, alleging the company and its Director misled consumers.

The Commissioner for Consumer Protection is seeking injunctions against Presto Property Solutions Pty Ltd and Director Ms Rowan Amanda Lines restraining them from making false representations to both buyers and sellers involved in their scheme, in breach of the Australian Consumer Law (WA).

The Commissioner alleges that Ms Lines dealt with a Quinns Rock couple who had signed up to her scheme in July 2010 after responding to a sign 'we sell houses fast' that was posted on a light pole in a street near their home. Ms Lines had later purported to be the owner of the home when dealing with the tenant/prospective buyer. At no stage did Ms Lines own the property, she had only signed an option to purchase it.

The Commissioner further alleges that Ms Lines and her company made similar false statements such as 'no banks, rent and own'

and 'I buy houses fast' in a series of advertisements in the Quokka newspaper and Gumtree website.

The Commissioner has urged consumers considering a rent-to-buy scheme to be extremely cautious.

"In this case, the Quinns Rock couple returned from overseas almost a year later to discover the tenant/prospective buyer had sold their above-ground swimming pool which had a replacement value of more than \$16,000," the Commissioner said.

"This highlights the confusing nature of these agreements where the line between tenant and owner is blurred and the legal rights of all parties are unclear. There are many other risks that we are also concerned about.

"Under these schemes, buyers who default on their tenancy agreement or can't get finance to buy the property at the end of the option period are at risk of losing the money that was intended to go towards the purchase.

"We are also concerned that money paid by the buyer does not appear to go into a trust account and there is very little accountability of where the funds go or any system in place to keep track of the ongoing option payments."

This is the third rent-to-buy scheme which has been the subject of recent legal action by Consumer Protection.

In October 2012, the Commissioner lodged a Supreme Court Writ seeking an injunction against another rent to buy property scheme. It was alleged that

promoters Patricia Mirawati Susilo and Bryan Artawijaya Susilo, of Applecross, engaged in misleading and deceptive conduct in breach of the Australian Consumer Law (WA).

In August 2011, the Commissioner warned consumers about rent to buy property promoters No Loan Home Pty Ltd (trading as Perth's Easyhomes WA), its sole Director Filip (Fil) Butkovic and employee Nikola (Nik) Butkovic. In May 2012, the Supreme Court ruled the scheme was illegal because the promoters were not licensed real estate agents. The Court also ruled that the promoters had misled clients regarding the future value of the property, the potential equity over a four to five year period and their ability to obtain finance at the end of this period.

Consumers or agents who have concerns about a rent-to-buy property scheme should contact Consumer Protection on 1300 30 40 54 or at consumer@commerce.wa.gov.au for further information and advice.



Contact Details

Since the restructure on 1 July 2011, various functions previously performed by Board staff have been split to different Directorates of Consumer Protection. In order to handle your query efficiently, please note the following:



If your query relates to your licence or registration, license or registration application or the structure of your business, you should contact Licensing on 1300 30 40 64, option 2.

If you need to inform the Commissioner of a change to your details, you can email licensingenquiries@commerce.wa.gov.au. Include your license/registration number.

If your query relates to a proactive visit or a general enquiry about complying with legislation, you should contact Proactive Compliance on (08) 9282-0874.

If you have a trust account or auditing query, you should call (08) 9282-0926 or email audits@commerce.wa.gov.au

If your query relates to CPD (contact trainers directly for bookings) you should call (08) 6364 3120 or email cpd@commerce.wa.gov.au

For newsletter or e-Bulletin subscription enquiries, email pinews@commerce.wa.gov.au

Consumer Protection's generic contacts should be used for any other issue. You can telephone 1300 30 40 54 or email consumer@commerce.wa.gov.au

e-Bulletins

The Department regularly publishes Real Estate e-Bulletins which provide agents, sales representatives and other interested parties with industry-related news and up-to-date information on the Department's policy developments.

Recent e-Bulletins have included articles relating to a real estate fraud attempt, CPD and break lease situations.

Our e-Bulletin archive can be found under *News, Publications and Forms* on the Department's website at www.commerce.wa.gov.au/CP/RealEstate

If you would like to subscribe to our e-Bulletins or update your email address, or if you have any queries, please email pinews@commerce.wa.gov.au



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THIS PUBLICATION WAS ISSUED BY THE CONSUMER PROTECTION DIVISION OF THE DEPARTMENT OF COMMERCE.

Consumer Protection Division, Department of Commerce

The Forrest Centre, Level 6, 219 St Georges Terrace, Perth, Western Australia 6000

Locked Bag 14, Cloisters Square 6850 | Admin: (08) 9282 0843

Real Estate and Settlement Advice Line: 1300 30 40 54

consumer@commerce.wa.gov.au

www.commerce.wa.gov.au/cp/realestate