

Real estate agency fined for misleading buyer

A Wilson real estate agency, the agency licensee and a sales representative have been fined a total of \$11,500 for misleading a buyer during a property transaction.

Stoneform Enterprises Pty Ltd, trading as Minic Property Group, was fined \$5,000 by the State Administrative Tribunal (SAT) on 14 August 2013. Agency licensee Sabrina Lynn Minic was also fined \$5,000 and sales representative Michael Lee Minic was fined \$1,500. The agency was ordered to pay costs of \$2,000. The final orders by the SAT followed a negotiated settlement of the case.

The real estate agency, the agency licensee and sales representative were alleged by Consumer Protection

to have breached the Code of Conduct for Agents and Sales Representatives by making a false or misleading representation to the buyer in relation to a bore at a High Wycombe property in 2010. They also failed to familiarise themselves with the Seller's Disclosure Statement.

The sellers of the property had informed the agency that, while there was a bore shaft on the property, it was not working and there were no plans to fix it. Despite this, the buyer of the property was told that the bore would be in good working order in time for settlement.

Commissioner for Consumer Protection Anne Driscoll said real estate agents or sales representatives who engage in deceptive conduct will face disciplinary action.

"Buying a property is a major investment for most people so agents must provide accurate information in order for buyers to make an informed decision," Ms Driscoll said.

"Giving incorrect information or withholding important details on a property in order to expedite a sale is clearly in breach of the industry's code of conduct. Those who mislead buyers or sellers could face legal action and may jeopardise their licence to operate."

Anyone concerned about the conduct of a real estate agent or sales representative should contact Consumer Protection by email at consumer@commerce.wa.gov.au or by calling **1300 30 40 54**.

Misrepresentation of advertised properties

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An agent may also breach Article 8 of the *Code of Conduct for Agents and Sales Representatives 2011* (the Code). Article 8 provides that an agent and the person in bona fide control must take reasonable steps to ensure employees comply with the provisions of the REBA Act, the Code and any other statutes. An agent, sales representative or employee of an agency who fails to remove advertising of sold and settled properties in a timely manner may be in breach of the Code.

The Department has also received complaints about agencies distributing flyers via letter box drops, which state there has been 'good activity in the area in the past 12 months with a number of recent sales'. However, the properties listed had actually been sold more than 12 months earlier. For reasons similar to those outlined

above, agents who do this may breach the ACL, the REBA Act and the Code.

An agent claiming to have simply made a mistake or been tardy in withdrawing their inaccurate advertising may still be breaching Article 9 of the Code. Article 9 requires an agent to exercise due skill, care and diligence. In certain circumstances, an agent may not exercise the required 'care' and 'diligence' if they mistakenly fail to:

- remove an internet advertisement for an extended period of time after an offer and acceptance was signed; or
- confirm the accuracy of a letter being sent to the general public.



Property investment promoter agrees to cease seminars

A Sydney-based property investment promoter has voluntarily agreed to forego promoting his rent-to-buy scheme to WA consumers for two years, to clarify what Consumer Protection believes is misleading advertising and to clarify statements made on various websites.

Richard ‘Rick’ Keith Otton, together with his companies Rick Otton.com Pty Ltd and We Buy Houses Pty Ltd, entered into an enforceable undertaking with Consumer Protection in which he undertook to refrain from conducting his seminars in WA for two years. He also undertook to refrain from distributing promotional material and promoting his real estate business in WA for a two-year period as well as publish information on his websites about how the promoted arrangements operate.

By signing the enforceable undertaking, Mr Otton and his companies have not admitted any wrongdoing under the Australian Consumer Law.

The scheme that Mr Otton teaches, involves offering a property seller one dollar for an option to buy their property in the future at a fixed price while offering to pay rent in the meantime. While the seller remains the owner of the property, the person offering the option then seeks to on-sell it to a person who cannot access finance through normal means. The prospective buyer then purchases the option on the condition that they pay regular instalments greater than the rent in the expectation that they can secure finance to exercise the option and buy the property outright.

Commissioner for Consumer Protection, Anne Driscoll believes WA consumers are being misled in the marketing of this scheme with

statements such as ‘buy a house for one dollar’ and ‘profit without initial investment’. In reality, the transaction cannot be completed with one dollar or without an investment, and the payment of additional rent will not necessarily satisfy a lender to advance the funds necessary to finance the purchase.

Under the agreement, Mr Otton, his companies and three websites have agreed to make it clear to prospective buyers in WA that:

- the purchase price for the property must ultimately be paid before they can own the property;
- the one dollar payment to buy the option is only the initial step towards owning the property;
- they may not necessarily satisfy a bank’s lending requirements to exercise the option to buy and payment of instalments over time may not be proof of creditworthiness; and
- legal advice should be obtained before being involved in a rent-to-buy property scheme.

The Commissioner raised concerns that the seminars operated by Mr Otton and his companies do not offer anything for free and instead promote training and mentoring courses for a fee.

“These types of seminars highlight to potential investors the benefits of securing their financial future by investing in property, while downgrading the risks. They also appear to exaggerate the

potential gains from property and other investments by following the promoter’s programs,” Ms Driscoll said.

“We advise those who attend these seminars to resist the pressure to sign any contracts or pay any fees without first getting proper independent advice from financial advisers and property investment professionals. Consumers should be wary about any ‘get rich quick’ claims being made.”

The additional information Mr Otton has agreed to provide overcomes concerns raised by the Commissioner.

Websites operated by Mr Otton include:

- www.howtobuyahouseforadollar.com
- www.rickotton.com
- www.massivepassivecash.com.au

The enforceable undertaking can be viewed on the Consumer Protection website: www.commerce.wa.gov.au/undertakings

Consumers with enquiries, concerns or complaints about property investment seminars can contact Consumer Protection by email: consumer@commerce.wa.gov.au or by calling 1300 30 40 54.

Recognition of prior learning

From time to time the Department receives enquiries from people seeking information about the process of obtaining recognition of prior learning (RPL).

Generally, these people already have a formal qualification which may be similar to one of the qualifications prescribed for licensing purposes.

Commonly, applicants submit a qualification that is more than 12 months old, which is beyond the acceptable validity period prescribed under the regulations.

The Department of Training and Workforce Development (DTWD) describes RPL as the acknowledgment of skills and knowledge obtained through: formal training or study including courses at school, college, adult education and training programs at work;

- work experience including paid and volunteer work; or
- life experience including skills attained through leisure pursuits such as musical, mechanical or linguistic abilities.

The Career Centre section of the DTWD can provide assistance with the RPL process and can make suggestions about the options available to you.

For further information visit the Career Centre's website at www.careercentre.dtwd.wa.gov.au or call 13 23 98.



Storm damage to rental properties

With extreme weather patterns becoming more common, it is timely to revisit how to deal with a tenancy when a rental property is wholly or partially destroyed and rendered uninhabitable.

Storms may result in broken windows, broken roof tiles, collapsed ceilings, serious roof leaks, electrical faults, flooding or other damage. As storm damage is caused by an event outside your tenant's control, it is the lessor's responsibility to arrange and pay for repairs.

Following a tenant's notification that there has been storm damage to a rental property, property managers should promptly organise an inspection and assess the extent of the damage.

Under the Residential Tenancies Act 1987 (RT Act), a lessor must take action to contact a suitable repairer and arrange for them to fix an urgent repair (or they may authorise their property manager to undertake these issues on their behalf). Urgent repairs are not general maintenance but more significant repairs to avoid the risk of injuries to people, damage to the property or hardship or undue inconvenience to the tenant. Urgent repairs also include "essential services," such as gas, electricity, a functioning refrigerator (if supplied with the premises), sewerage, septic, waste water treatment and water (including supply of hot water).

Property managers should:

- Provide the tenant with contact details in case of emergency;
- Promptly contact a suitable repairer (or the insurer) to make an appointment for urgent repairs;
- Keep the tenant informed about progress with the repairs; and
- Follow up to ensure the repair work is completed as soon as practicable.

If the tenant is unable to establish contact with the lessor/property manager about the urgent repairs within 24 hours (for essential repairs) or 48 hours (for other urgent repairs), or the lessor/property manager fails to ensure the repairs are carried out as soon as practicable, the tenant may arrange for the repairs to be carried out by a suitable repairer to the minimum extent necessary. The tenant must be reimbursed for reasonable expenses.

In relation to general responsibilities for cleanliness and repairs, under the RT Act the tenant is required to notify the lessor as soon as practicable after any damage to the premises. The lessor also has an obligation to maintain the premises in a reasonable state of repair and conduct repairs within a reasonable period after the need for repair and comply with building, health and safety laws.

If a property is uninhabitable, the tenant or the lessor can decide whether it is appropriate to end the tenancy under section 69 of the RT Act. If a tenant decides to end the agreement, they are only required to

give two full days' notice in writing.

If the lessor decides to terminate the agreement, the lessor must give the tenant at least seven days' notice in writing on a Form 1C Notice of Termination before the termination day.

With respect to storm damage, it is not always appropriate or fair for a tenancy to be terminated. If either party believes it is inappropriate for the tenancy to end, they can have the matter determined in the Magistrates Court. Property managers should make themselves aware of the relevant provisions of the RT Act, namely, section 69 and section 71.

If the agreement is mutually terminated, then both parties go their separate ways without further costs. Any rent paid in advance by the tenant must be fully refunded. If there is unpaid rent or bills these are dealt with in the normal manner of ending a tenancy.

If only part of the premises has been destroyed or rendered uninhabitable, and there is no safety risk, the lessor could consider reducing the rent until repairs have been carried out and the property is fully habitable. As a reference point, property managers should understand the provisions of section 32 of the RT Act. Depending on the extent of the damage, your tenant may agree to move out temporarily and then return once repairs have been carried out.

For further information, or to discuss a particular situation, contact Consumer Protection on 1300 30 40 54.



Court rejects Westpoint Director's second appeal

The Court of Appeal has dismissed a second appeal by the Director of Westpoint Realty Pty Ltd (in liquidation), Mr Norman Phillip Carey, against five convictions for making false or misleading representations.

Mr Carey was convicted in his personal capacity because he was a Director of Westpoint Corporation, and failed to persuade the Magistrate that he could have prevented the offences by reasonable diligence.

Mr Carey was found guilty by the Perth Magistrates Court on 11 February 2011 of five charges of breaching the Fair Trading Act in relation to the sale of a residential property development in Rivervale in 2005. The Supreme Court dismissed Mr Carey's first appeal on 10 January 2012, and the Court of Appeal has now dismissed a further appeal of the earlier Supreme Court decision.

The original trial found that the company, via its agents, misled purchasers of units in the Regent Apartments development by falsely informing them that there had been indefinite delays to the project due to planning approvals. The agents caused purchasers to terminate their contracts of sale, then each of the units were re-sold at a higher price within a short period of time.

The Court of Appeal ruled the Magistrate was correct in his decision and upheld the conviction. The judgement concluded that Mr Carey was responsible because he was the architect of a scheme in which investors in an 'off the plan' development by the Westpoint Group were 'duped' into terminating their contracts for units at below market value so those rights could be sold by the Westpoint Group at a higher price. The purchasers were misled into believing that the development would not proceed, but that was not the case.

The Court stated that Mr Carey had every capacity to prevent the agents from making false representations in the exercise of reasonable diligence, but failed to do so. The situation was further exacerbated, the Court said, by Mr Carey's provision of false and misleading information to the agents concerned.

The Court pointed out that Mr Carey's reliance upon the general training manuals and experience of the agents as the basis for his defence was misplaced, and that a memo written by Mr Carey to the agents to the effect that the Westpoint Group did not want to terminate the purchases was 'hollow' because Mr Carey had given oral instructions to terminate the contracts.

Westpoint Realty Pty Ltd was also convicted, but did not appeal. The case will return to the Magistrates Court for sentencing submissions.

Two former Westpoint Realty Pty Ltd sales representatives pleaded guilty to related charges in September 2010, were fined \$2,000 and \$750 respectively and granted spent convictions. A third sales representative, Mr Thomas Haynes, pleaded guilty in December 2010, was fined \$1,000 and ordered to pay Court costs of \$1,180.

Commissioner for Consumer Protection Anne Driscoll said, while real estate agents may argue in their defence that they did not personally mislead clients, they are still ultimately responsible for the conduct of their staff, especially if sales representatives are acting according to their instructions.

"If instructions from the licence holder are based on false information and result in clients being misled, this is a serious breach of both general consumer protection laws and the industry Code of Conduct. Those involved in the deception face substantial consequences," Ms Driscoll said.

"Real estate licence holders need to exercise due diligence and fulfil their obligations to properly supervise staff to ensure they are not misleading the public, are providing accurate information and demonstrating absolute honesty in their dealings with clients.

"Sales representatives also have a clear obligation to comply with the Code of Conduct at all times to ensure their own personal dealings with clients are truthful and honest. They should question instructions from the licence holder if they believe it will lead to unlawful conduct.



Changes to real estate licensing forms

A number of changes are being made to the application forms for real estate and business agent licenses as a result of an interim review to bring the forms in line with current policies under the *Real Estate and Business Agents Act 1978* (REBA Act). These changes seek to reduce red tape for business and streamline the application process.

The proposed changes include:

- Pro forma references;
 - Directors/partners who hold a current agents licence will no longer be required to provide new references with partnership/body corporation applications.
 - Where references are required these will be facilitated by use of a pro forma to ensure necessary information is obtained and to allow the Commissioner to accurately determine a person's eligibility.
- There will no longer be a requirement to provide company registration documents – the Department will obtain these on the applicant's behalf at no cost to them.
- A confidential statement of assets and liabilities will be limited to the applicant company and not for each individual director covered by the pro forma (body corporate). This will ensure consistency across all licensed industry applications that have similar financial assessing requirements.
- Providing a recommended day to publish required notices – research undertaken by the Department indicates the least expensive day to run a public notice is Tuesday and incorporating this information into the pro forma will allow applicants to comply at a lower cost (legislation to do away with this requirement is before Parliament but the requirement will continue until it is passed.)
- Increasing the validity period of national police clearances (NPCs) for licence applicants to three months rather than one month. This will bring NPCs validity periods in line with other licensed occupations.

ASIC's small business booklet

The Australian Securities and Investments Commission (ASIC), has released a booklet to help small businesses understand their compliance obligations.

The booklet, *Your obligations as a business owner* provides small business operators with the following information:

- ASIC's regulatory role and functions;
- the types of business structures regulated by ASIC; and
- the responsibilities for managing businesses under company and business name structures.

ASIC's booklet also explains the key legal obligations of small businesses who are operating under a company structure and the consequences of failing to comply.

To view the booklet, visit the Australian Securities & Investment Commission website at www.asic.gov.au

For information on registering your business or company, deciding on a business structure and registering for taxation visit: www.business.gov.au/Registrationandlicences

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 enquiry efficiently, please note the following:



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

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

If your enquiry relates to a proactive visit or a general enquiry about complying with legislation, please contact Proactive Compliance on (08) 92820874.

If you have a trust account or auditing enquiry, please call (08) 92820926 or email audits@commerce.wa.gov.au

If your enquiry relates to CPD (contact trainers directly for bookings) please 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 general contacts should be used for all other enquiries. Please 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 Landgate's property interest reports and fake testimonials. An e-Bulletin archive can be found on the Department's **website**.

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

Website

The Department's website is an integral tool in providing education and advisory services to industry participants and the public.

The website has a dedicated section for real estate agents and sales representatives, which covers a range of subjects including Compulsory Professional Development and licensing information. It also contains a wide range of application forms.

Comments and feedback on the website can be sent to pinews@commerce.wa.gov.au



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

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