



settlement *news*

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

Are you on track for your CPD?

CPD activities for 2012

The core training topics for 2012 are:

- Risk Management.
- Ethics; disclosure and conflict of interests; agent/principal relationship; valid appointment to act.

The elective training topics for 2012 are:

- Trust account reconciliation (required by all new settlement agent licensees within the first six months of operation).
- Understanding self-managed superannuation funds for real estate purchases.
- Dealing with disposition statements.
- Interpreting contracts.

Registration forms and timetables can be downloaded from the AIC (WA division) website www.aicwa.squarespace.com
For enquiries email admin@aicwa.com.au

Important Update From the Office of State Revenue

The Office of State Revenue (OSR) recently released the Commissioner's Practice TAA 8.7: Valuation of Land For Duties and Stamp Duty Purposes.

This Commissioner's Practice outlines the circumstances in which the Commissioner will obtain a valuation of land for duties and stamp duty assessment. For example, when a dutiable transaction is between related parties, the dutiable property must be independently valued before an assessment is issued.

One of the most important amendments to TAA 8.7 is an increase in the value cap from \$400,000 to \$2 million for valuations that may be relied on in the assessment of a transaction between related parties without referral to the Valuer General.

Further information on the Commissioner's Practice can be found on the OSR website at <http://www.finance.wa.gov.au/cms/section.aspx?id=209>

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New policy to counter title fraud

A new policy aimed at reducing the incidence of land title fraud and other improper dealings in Western Australia is currently being drafted by Landgate following industry submissions.

The Western Australian Registrar of Titles and Commissioner of Titles are drafting the policy 'Joint Practice: Verification of Identity' (the Practice) in response to two alleged Western Australian land title frauds in 2010 and 2011. It is expected to be released soon.

Consultation on the Practice closed on 27 April 2012. Stakeholder submissions indicate there is general support for the need to introduce verification of identity with respect to land transactions. However, in response to certain stakeholder concerns, Landgate is conducting further reviews and revising the policy.

The Practice will be amended to provide for a transitional implementation period. It is proposed to establish a window between 1 July 2012 and 2 January 2013 during which businesses will be able to comply

with the Practice as and when they have established the means to meet the requirements.

The expectation is that all documents lodged on or after 2 January 2013 will comply with the Practice.

Background

In both of the alleged title frauds, it appears that fraudsters assumed the registered owners' identities and forged signatures on documents that were lodged with Landgate. These alleged frauds occurred whilst the registered owners were overseas.

Verification of identity is a critical step in reducing the opportunity for land title fraud and other improper dealings. While it is impossible to completely prevent fraud, the best opportunity to do so is before financial settlement.

Consumer Protection and the Australian Institute of Conveyancers (WA Division) have submitted feedback to Landgate on the draft Practice. At this stage, settlement agents should still identify their clients as soon as practicable after receiving instructions to act using the 100-point identity check, outlined in the **Guidance notes** issued in November 2011.

Further information can be found on Landgate's website: <http://www.landgate.wa.gov.au>



Caveat (Improper Dealings)

Landgate recently introduced a new form of caveat in order to minimise the risk of land title fraud. The purpose of the Caveat (Improper Dealings) is to stop the registration of any instruments or documents that would ordinarily need to be signed by the owner, such as, an instrument to transfer the title of a property.

In order to remove the Caveat, all the owners must present themselves in person at the same time at Landgate's Midland office and satisfy, as a minimum, the requirements of a 100-point identity check using original documents, not copies.

Consumer Protection has recently considered whether settlement agents can prepare and lodge the Caveat (Improper Dealings) on behalf of their client(s). On consideration, settlement agents should not undertake this work.

The limitations on an agent's function as specified in Section 46 of the *Settlement Agents Act 1981* suggest that it is not possible as preparing and lodging the caveat

would not be in order to "arrange or effect settlement". Although a settlement agent may undertake business outside their role as a settlement agent, it is likely that preparing and lodging a caveat, if not undertaken in order to arrange or effect settlement, could be considered as engaging in legal work, which is prohibited by the *Legal Profession Act 2008*.

Settlement agents may still wish to inform their clients of the existence of Landgate's caveat service. However, agents should be careful not to provide advice on whether to utilise the service or on the correct method of filling out the caveat forms.

Additionally, while settlement agents could consider lodging a caveat form completed by their client, they should consider the risk involved in doing so. It may be inferred by a client that the settlement agent has assessed and/or considered the content of the form as correct. Furthermore, as the action of lodging the caveat is not part of an agent's function as a settlement agent, should an issue arise involving the lodged caveat there may be implications for claims against the professional indemnity insurance.

More information can be found on the Landgate website at <http://www.landgate.wa.gov.au/> and searching for "Caveat (Improper Dealings)".

Person in *bona fide* control taking leave

Consumer Protection reminds agents in *bona fide* control of a settlement agency that they must obtain written approval from the Commissioner before being absent from the business for more than four continuous weeks in a calendar year.

This is required under regulation 14 of the Settlement Agents Regulations 1982 (the Regulations).

When an agent in *bona fide* control wants to take leave for more than four continuous weeks, the Regulations provide two alternatives. The agent can either close the business for the time they are away or they can find an appropriate person to conduct the business in their absence.

Where the business is to be conducted by another person, the Commissioner needs to be satisfied they are suitable to do so.

To be approved by the Commissioner, the replacement should:

- hold a settlement agent's licence and not be in *bona fide* control of another settlement agency; or
- be a certified legal practitioner of not less than four years experience; or
- have at least four years experience in effecting settlements and made substantial progress in completing the prescribed course of study required for a settlement agents licence.

If the above conditions are not met, the Commissioner may refuse to grant approval for the person in *bona fide* control to be absent from the agency.

Where the business is to be closed, the Commissioner needs to be satisfied the agent has carried out all their obligations under the *Settlement Agents Act 1981* and the Settlement Agents' Code of Conduct 1982 before closing the business and going on leave.

Termination audits

Section 51 of the *Settlement Agents Act 1981* (“the Act”) provides that every agent must have a termination audit of their trust accounts arranged and conducted within three months of a triennial certificate ceasing to have effect.

The purpose of the termination audit is to serve as a final check on a trust account and to ensure all transactions carried out from the beginning of the audit period until the time of the account closure, are true and correct and conducted in accordance with the Act.

Termination audits should be conducted regardless of whether the account has been closed (ie zero balance) or not. It is the agent’s responsibility to direct the auditor to conduct the audit within three months of the triennial certificate ceasing to have effect. The auditor must deliver the report to Consumer Protection within two months after the end of that three month period.

If the account is not closed within three months of an agent ceasing to hold a triennial certificate, the auditor assumes responsibility for notifying Consumer Protection that:

- the account was finalised; and
- finalisation was in accordance with the Act.

The agent should also lodge a “Trust Account Information” form with Consumer Protection and inform them of the date the account was finalised.

If an agent who holds a current triennial certificate does not either:

- have any trust accounts to audit; or
- has not received any trust monies since the most recent annual audit, the agent may be exempt from the requirement to conduct a termination audit. The agent will, however, be required to sign a statutory declaration attesting this fact in accordance with section 67 of the Act.

To assist agents, there are two publications which cover all aspects of the auditing of an agent’s trust accounts including termination audits. These publications are available from Consumer Protection’s website at www.commerce.wa.gov.au/ConsumerProtection or by calling the Consumer Protection Contact Centre on 1 300 30 40 54.

Proactive compliance visits

Following recent feedback from industry members, Consumer Protection would like to take this opportunity to re-emphasise the goals and objectives of proactive compliance visits.

The proactive compliance visit program is not, as some agents may believe, designed to gather evidence to prosecute agencies for breaches of legislation or to commence disciplinary proceedings in the State Administrative Tribunal. Rather, the visits are designed to educate agencies on the roles and functions of Consumer Protection and to provide a question-and-answer forum in a one-on-one setting. Through these visits Consumer Protection aims to:

- assist agencies to gain a better understanding of the legislative framework and subsequently maintain a higher level of compliance;

- assist agencies to become and remain compliant through the provision of support and advice;
- help identify education and training needs within the industry; and
- provide a level of proactive protection to consumers and other stakeholders affected by the industry and its actions.

To obtain feedback on the proactive compliance visit program, the principal of each agency visited is asked to complete an evaluation form which rates the usefulness of the visit. This function provides important feedback and allows

Consumer Protection to assess and meet the needs of the industry.

To find out more about the proactive compliance program, agents are encouraged to visit the proactive web page found on Consumer Protection’s website at <http://www.commerce.wa.gov.au/ConsumerProtection/Settlement>

Under current policy, all new licensees are visited by proactive compliance staff within the first three months of commencing business and six months after the initial visit.

Additional documents settlement agents can prepare

Pursuant to Schedule 3 of the Settlement Agents Regulations 1982 (the Regulations), settlement agents are permitted to prepare a wide range of documents to assist their clients.

Consumer Protection reminds settlement agents that while they may be permitted to prepare these additional forms, they should only accept instructions regarding these documents if they possess the relevant expertise and knowledge to prepare them correctly.

While this article covers the additional forms settlement agents may prepare pursuant to the *Strata Titles Act 1985* (the STA), it does not cover all of the documents settlement agents can prepare. Agents can find a complete list in Schedule 3 and Schedule 4 of the Regulations.

Settlement agents are reminded that the additional forms they may prepare pursuant to the STA by themselves have no effect. They will form part of the documents required to carry out the decisions and agreements made by the strata company. Agents should obtain copies of the STA and the Strata Titles General Regulations 1996 and the *Landgate Practice Manuals* when dealing with any STA forms.

Schedule 3 Part C clause 1(a) of the Regulations refers to the documents for registration or lodgement pursuant to the STA.

- Application for registration of a strata plan or survey-strata plan. Most settlement agents will be familiar with this form.
- Notice to a buyer of notifiable variation pursuant to Section 69C of the STA. This notice is required if the information disclosed to the buyer in the contract is varied. Such variations can include but are not limited to a change in the size of the lot, increase in the levies, the developer deciding to

amend the standard bylaws or making an amendment to bylaws or management statement already disclosed.

Schedule 2 of the Strata Regulations lists a number of forms required for various purposes under the STA. Some but not all of these forms are included in Schedule 3 Part C clause 1(b) of the Regulations. As such, agents are reminded that when accepting instructions to prepare any strata forms they should check the Regulations carefully to ensure they are able to prepare the documents required.

The following list outlines the documents settlement agents are permitted to prepare:

- Form 10 – Conversion of a lot into common property.
- Form 11 – Consent by the strata company to the amendment of the unit entitlement schedule.
- Form 12 – Certificate of strata company authorising an application to be made to the State Administrative Tribunal for an amendment of unit entitlement.
- Form 13 – Certificate of the strata company to the acceptance of a transfer or lease to create additional common property.
- Form 14 – Certificate of the strata company agreeing to the transfer or lease of common property. This form can also be used for the grant of an easement or restrictive covenant over common property.
- Form 15 – Notification for the termination of a scheme. This form has the effect of ‘cancelling’ the existing strata plan.



Usually used when the ownership of all lots in the strata plan are in the same entity and the owner wishes to revert back to a green title and/or redevelop the site.

In developments where there is more than one owner they may choose to terminate the scheme to allow the rebuilding of all units and the creation of a new strata scheme.

- Form 16 – Notice to Landgate to amend the address for service of notices. On every strata plan there is a requirement for an address to be shown for service of notices on the strata company. In most cases it is the street address of the scheme. The owners/strata company can make a decision to change this so notices are issued to the Strata Manager or to a post office box address.

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Additional documents settlement agents can prepare *continued from page 5*

- Form 17 – Notice of change of name of scheme and change of address for notices. The owners/ strata company may wish to change the name of the scheme. If, for instance, the name of a scheme is 219 St Georges Terrace but the building is colloquially known as Commerce Apartments, they may wish to have this recorded on the strata plan.
- Form 19 – Notice to vary, remove or add a restriction. Various restrictions can be placed on the use of a strata lot (for example, age restrictions, must only be used as a Doctors Surgery etc). This form allows these restrictions to be varied, removed or added to.
- Form 20 – Application for a re-subdivision of the strata plan. Used when an existing strata plan has been changed due to the addition of another building on a lot, for instance.
- Form 21 – Notification of change of bylaws. This form enables the strata company to delete, amend or add to the existing Schedule 1 and 2 bylaws.
- Form 22 – Disposition on subdivision. Used to allocate certain lots within the scheme to certain owners, allocate encumbrances to certain lots and detail if any consideration was exchanged between the various owners.
- Form 23 – Disposition on re-subdivision. Similar use to Form 22.
- Form 24 – Application to the Western Australian Planning Commission (the WAPC) for approval to strata plan. Essentially a cover sheet to be used when lodging the strata plan with the WAPC.
- Form 30 – Notice of resolution of merger of buildings. Used to extend the boundary of the lot from the internal surfaces to the external surfaces.
- Form 39 – Disposition on merger of land or conversion to a survey-strata scheme.
- Form 41 – Notice of termination of insurance order. Pursuant to section 103J of the STA, an application can be made to the State Administrative Tribunal (SAT) to exempt the strata company from the obligation to insure as required by sections 54 and 55(1) of the STA. Form 41 has the effect of terminating the order of the SAT.

Consumer Protection hopes settlement agents find this list useful in value-adding to their businesses by expanding the services they can offer to their clients beyond the scope of everyday property settlement.

Dispute resolution service

WA small businesses can now access a low-cost way to resolve disputes, through the introduction of a Small Business Commissioner and the Alternative Dispute Resolution (ADR) service.

The ADR service, which came into operation March 2012, provides small businesses with a way to deal with disputes without the need for legal action. This means small businesses have an opportunity to resolve problems before they reach the State Administrative Tribunal or the courts.

Small Business Minister Simon O'Brien said the Government recognised that small business disputes could be time-consuming and expensive.

"One of the main functions of the Commissioner, under the amended

Small Business Development Corporation Act 1983, will be to receive and investigate complaints about unfair market practices affecting small business, and to provide help to resolve those complaints.

"Currently when faced with a commercial dispute the first resort is the courts; the State Government is confident the small business community will embrace a low-cost alternative."

About half the calls to the Small Business Commissioner since the new service began have related to conflicts over commercial tenancies.

While Consumer Protection has its own resolution service between traders and consumers, the ADR service focuses more on disputes between businesses, particularly landlords and small business tenants.

For more information on the ADR service please visit: www.smallbusiness.wa.gov.au/Alternative-dispute-resolution



The *Contaminated Sites Act 2003* and real estate in WA

Real estate professionals, including settlement agents and conveyancers, should conduct reasonable and timely searches of published contaminated sites information as part of any regular due diligence enquiry.

Pursuant to Section 68 of the Contaminated Sites Act 2003 (the Act), any transaction which involves the sale, lease or mortgage of a contaminated site must include formal disclosure (**Form 6**) of the contamination at least 14 days before completion of the transaction.

The Department of Environment and Conservation's (DEC) **database** of contaminated sites in WA outlines seven potential classifications for contaminated land. Those of relevance to the settlement industry are:

1. Contaminated – Remediation Required
2. Contaminated – Restricted Use
3. Remediated for restricted use

Additionally, if a notice under Part 4 of the Act has been issued (such as an Investigation notice), this will be shown as a Memorial.

A settlement agent searching the DEC database and/or **Landgate's interest enquiry portal** for evidence of contamination, as represented by the three classifications above, will find the relevant information displayed along with the Memorial for the property. Again, searches must be finalised and disclosed at least 14 days prior to the property transaction being completed.

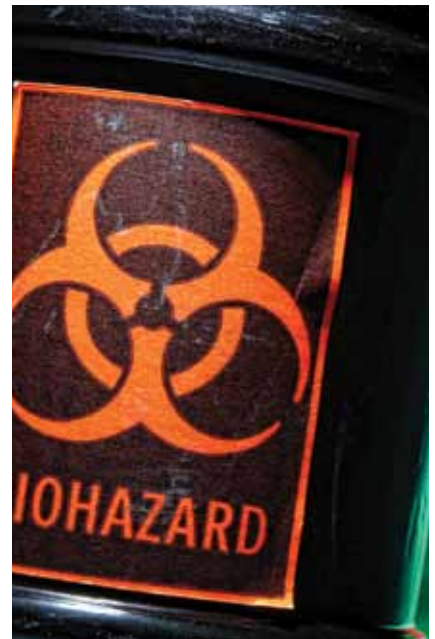
There is no duty to disclose for land with classifications other than the three listed above.

Once the **Land Owner's Disclosure before Completion of Land Transaction** (Form 6) has been completed, a copy must also be provided to the CEO of the DEC.

It is important to note that examining and remediating contaminated sites may involve considerable costs which sometimes exceed the value of the land.

Settlement agents may find the following DEC publication beneficial: **Potentially Contaminating Activities, Industries and Landuses**. This guideline provides a comprehensive list of land uses which have the potential to cause contamination.

The DEC has a page specifically for real estate agents and settlement agents on the contaminated sites website at: <http://www.dec.wa.gov.au/content/view/6856/2430/>



Easier access to Commerce web addresses

Consumer Protection has introduced shortened webpage addresses to make the user experience more efficient.

A new shortened URL is listed below. Please note that typing in the longer URL would also still take you to the desired webpage.

Settlement

Current in full: http://www.commerce.wa.gov.au/ConsumerProtection/Content/Licences/Settlement_Industry/Settlement_Industry.html

Shortened: <http://www.commerce.wa.gov.au/ConsumerProtection/Settlement>





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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 64

consumer@commerce.wa.gov.au

www.commerce.wa.gov.au/consumerprotection/settlement