



# settlement *news*

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

## Renewal applications now to be lodged at Department of Commerce

Based on industry feedback and after its own internal investigations, Consumer Protection has decided to discontinue the use of Australia Post for the lodgement of renewal applications.

There will be no change to the requirements for renewal, just the method of lodgement.

It is anticipated that this will result in reduced turn-around times, but only when complete renewal applications are lodged. Any applicants who lodge an incomplete application will be sent a request for the missing information and/or documents. Failure to complete the application within the timeframe specified (usually 21 days) will result in the lapsing of the application.

**Remember: Settlement Agent renewals must be approved by the Commissioner before the previous certificate expires so get your application in early!**

New (manual) forms will replace the online Australia Post lodgement forms for anyone who has a triennial certificate expiring from November 2012 onward.

Applicants who have already completed applications on the Australia Post website can continue to submit their applications with Australia Post until 31 October 2012. Alternatively, agents with upcoming renewals can elect to start using the

new forms for renewal and lodging them with the Department. **Australia Post forms cannot be lodged directly with the Department.**

In order to make this change a success, Consumer Protection provides the following reminders:

- All sections of the form should be completed before lodgement.
- All applicants are encouraged to understand the **statutory declaration requirements** and to ensure that they are completed and witnessed correctly prior to lodgement. A recent newsletter article (Issue 3) about incorrectly completed statutory declarations can be found at [www.commerce.wa.gov.au/ConsumerProtection/PDF/Real\\_Estate\\_industry/Publications/REBANews.html](http://www.commerce.wa.gov.au/ConsumerProtection/PDF/Real_Estate_industry/Publications/REBANews.html).

The renewal application forms can be downloaded from the Department of Commerce at [www.commerce.wa.gov.au/ConsumerProtection](http://www.commerce.wa.gov.au/ConsumerProtection).

If you need assistance in completing the forms, please contact 1300 30 40 64.

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## Code of Conduct reviews

Consumer Protection has commenced a review of the property industry codes of conduct and will shortly release a Discussion Paper for comment. The review will cover the **Settlement Agents' Code of Conduct 1982** (made under the *Settlement Agents Act 1981*), the **Code of Conduct for Agents and Sales Representatives 2011** (made under the *Real Estate and Business Agents Act 1978*) and the **Licensed Valuers Code of Conduct** (made under the *Land Valuers Licensing Act 1978*) (the Codes).

The Discussion Paper aims to stimulate dialogue and invite written submissions on the Codes from industry participants. The paper will take on a broad review of the Codes and follows amendments to introduce client identity verification requirements in 2011.

The review is being conducted to consider whether:

- the Codes promote and encourage fair trading practices;
- whether the Codes impose regulations that are excessive to

the requirements of Consumer Protection;

- there are any drafting and technical issues;
- the Codes are consistent with the Australian Consumer Law;
- the Codes reflect best regulatory practice; and
- any other issues that arise from the consultation process.

Submissions received will assist Consumer Protection in making recommendations to the Minister for Commerce on the content

of the Codes and any required amendments.

Copies of the Discussion Paper will be available on the Consumer Protection website once it is released (<http://www.commerce.wa.gov.au/ConsumerProtection>). The Discussion Paper will also be available from the Consumer Protection Contact Centre on 1300 30 40 54. The Department will advise the industry of the paper's release via eBulletin.

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## Review of maximum remuneration fees for settlement agents

Consumer Protection is currently reviewing whether the settlement industry's maximum remuneration fees need to be increased. The fees have not been increased since 6 May 2008. If the review finds that fee increases are warranted, they are likely to be based on the Consumer Price Index to compensate for inflation.

The review is being conducted in the context of other important developments which will affect the regulation of the settlement industry in Western Australia. Irrespective of the conveyancing industry's roll-in to the National Licensing system, possibly in 2014, the issue of fees will remain a State responsibility. In addition, the State Government is planning to consult on the proposal to deregulate settlement agents' maximum remuneration fees next year.

During the review, Consumer Protection will consider the following points:

- any cost increases incurred by settlement agents since the last fee increase;
- changes in workloads being undertaken by settlement agents since the last fee increase, and
- any other relevant evidence that may support the argument for fee increases.

Consumer Protection will also assess the impact of fee increases on consumers, for example, the extent to which settlement agents tend to charge the maximum fee, or well below it, and the reasons why they do so. The extent to which increases in maximum fees are likely to be passed on to consumers will also be assessed.

# Disbursement Costs

**Settlement agents may often seek to recover disbursement costs incurred in the course of a settlement from their clients.**

Disbursement costs can include telephone calls, facsimiles, photocopying, postage, courier fees, bank cheque fees and stationery.

Where such disbursements are being recovered, Consumer Protection considers it best practice for settlement agents to keep an individual record on the client's file to verify the actual expenses incurred and claimed. The Australian Consumer Law (the ACL) has made it compulsory for traders to provide receipts for purchases over \$75 and customers have a right to ask for receipts for lower amounts. The ACL also requires businesses to provide consumers, when requested, with an itemised bill for services supplied. The itemised bill must contain: how the price was calculated, the number of labour hours and the hourly rate (if relevant) and a list of materials used and the amount charged for them (if relevant).

Agents should always bear in mind that the recovery of disbursement expenses is based on cost-recovery only.

As labour costs are part of the settlement fee, they are not to be included in calculating disbursement charges and there should be no mark-up over cost. For example, the agent's labour in photocopying cannot be charged as a disbursement.

Settlement agents who have been keeping individual disbursement sheets for a sufficient period of time may use that information to work out a flat charge to all clients for disbursements. However, the charge must still be able to be justified on the basis of cost recovery and must be based on a minimum cost of recovery. To do this, you should calculate the lowest number of each type of disbursement for a basic settlement for both the seller and buyer.

For example, the lowest number of phone calls in a basic settlement would be used as a basis for developing a flat charge for all settlements where disbursements are involved. Agents cannot use the average because this would result in some clients being overcharged,



which is prohibited by Section 44 of the *Settlement Agents Act 1981* (the Act).

Agents using a flat charge method should complete individual disbursement sheets for a period of time at regular intervals to ensure that the charge remains accurate and is therefore able to be justified.

Where any costs claimed are not incurred, refunds should be made to the client. Consumer Protection takes the view that where an agent charges an amount for disbursements greater than the actual cost incurred, the excess amount could be considered to be remuneration. If total remuneration exceeds the scheduled fee, the agent could be in breach of the Act.



## Insurance for settlement agents

The *Settlement Agents Act 1981* requires agents who carry on business to hold both professional indemnity and fidelity insurance. Jardine Lloyd Thompson (JLT) are the appointed brokers to the Settlement Agents' Master Policy Scheme (the Policy) for professional indemnity and fidelity insurance.

In recent years, the leading claims and notifications under the Policy include:

- inadequate searches and enquiries and/or failure to advise results to the client;
- incorrect assessment of and/or failure to advise the client concerning transfer duty responsibilities;
- public utility services not being connected to the site;
- unapproved building extensions or renovations;
- termite activity and inspections;
- mistakes in documentation;
- delays in settlement;
- failure to distribute or the incorrect distribution of funds; and
- conflicts of interest.

For each such event, it is important to understand why these circumstances arise. Many professional indemnity claims arise because of failure to manage the client relationship and client expectations before and during service delivery, such as:

- misunderstandings when setting up the engagement (eg as to whether you or your client is responsible for zoning enquiries);
- failure to keep the client informed, including the supply of relevant reports;
- failure to advise the client, including as to when they should take legal advice; and
- failure to identify and respond appropriately to an emerging conflict of interest.

New agents, or those recommencing to trade, must approach JLT to obtain the relevant insurance.



For further enquiries about the insurance requirements please contact the Licensing Branch on 1300 30 40 64 or via email at: [licensingenquiries@commerce.wa.gov.au](mailto:licensingenquiries@commerce.wa.gov.au)

## EBulletins

Consumer Protection regularly publishes Settlement eBulletins which are designed to provide agents with industry news and up-to-date information on Consumer Protection policy developments.

Recent bulletins have included articles relating to Compulsory Professional Development and Licensing.

Our eBulletin archive can be found under News, publications and forms on the Consumer Protection website at <http://www.commerce.wa.gov.au/ConsumerProtection/Settlement>.

If you would like to subscribe to our eBulletins, update your email address or if you have any queries, please email [pinews@commerce.wa.gov.au](mailto:pinews@commerce.wa.gov.au).

# Proactive Compliance visits

The function of Proactive Compliance is to assist agents in complying with legislative requirements, to identify and rectify areas of risk and provide advice to agents. This is achieved through voluntary agency visits and industry seminars.

The objectives of the Proactive Compliance program are to offer advice and support to industry in an effort to avert operational problems and to encourage high levels of industry best practice.

## How a visit is conducted

A proactive compliance visit entails:

- meeting with the person in *bona fide* control of the agency;
- a reconciliation of your current licensed staff to ensure the accuracy of Consumer Protection's database in relation to your staffing profile of licensed persons;
- reviewing notices and particulars on correspondence and documents (s.42 of the *Settlement Agents Act 1981*);
- examining an agency's trust account and trust accounting procedures; and
- reviewing a sample of the agency's current settlement files and settled transaction files.

The visit may be conducted by one or two proactive compliance officers and will take approximately two hours.

## What you will need

To ensure the visit is conducted with minimal disruption to your business operations we would be pleased if you would have the following available at the appointed time of our visit:

- the Licence, Triennial Certificate and Business Name Registration Certificate displayed [Section 42(1)(a) & (b)];
- a copy of the agency's letterhead [Section 42(2)(a) & (b)];
- copies of the standard documents used in your agency;
- your trust account bank statements for the previous three months;
- your trust account bank reconciliation statements for the previous three months;
- your trust account cheque book;
- your trust account receipt book; and
- current copies of:
  - *Settlement Agents Act 1981*
  - Settlement Agents Regulations 1982
  - Settlement Agents Code of Conduct 1982

We will select a sample of your current settlement files and settled transaction files for inspection during our visit.

As a minimum you should review the following prior to the visit:

## **Settlement Agents Act 1981:**

s.26, s.35, s.36, s.43, s.44, s.45, s.49, s.50, s.51, s.54, s.60, s.61, s.62, s.63, s.64, s.68, s.84

## **Settlement Agent Regulations 1982:**

r.6B, r.6D, r.6E, r.6C, r.8

## **Settlement Agents Code of Conduct 1982**

More information can be found under *Proactive Compliance* on the Consumer Protection website at <http://www.commerce.wa.gov.au/ConsumerProtection/Settlement>



# Are you settling the sale of an owner-built property?

The owner-builder market has expanded in recent years and this is reflected in the number of owner-built homes being sold.

Settlement agents should be aware of the legal requirements affecting owner-built properties as this will help facilitate a smooth settlement process.

The Building Commission has advised that an owner-built property can not be sold within three years of the date the building licence was issued. However, under extenuating circumstances, an owner can apply to the Building Commissioner seeking consent to sell earlier.

Owner-builders who wish to sell their property within seven years of the building licence being issued by the local government must tell their real estate agent or prospective purchaser that their property was built, extended or renovated by an owner-builder. They must also give the purchaser a valid insurance policy or Home Indemnity Insurance covering the remainder of the seven-year period.

The insurance is required to cover the possibility of a builder failing to rectify faulty or unsatisfactory workmanship for the balance of the seven-year period from the date the building licence was issued.

A settlement agent finalising settlement on an owner-built property should:

- obtain proof from the local government authority or if necessary, from the vendor, that home indemnity insurance is in place to cover the remainder of the insurance period (i.e. policy number and name of the insurer); and
- inform the purchaser in writing of the existing home indemnity insurance details and supply a copy of the local government authority's reply.

If home indemnity insurance is required, but not in place, a settlement agent acting for a purchaser should advise the purchaser of this fact in writing at the earliest possible time. The purchaser should also be advised to seek legal advice before settlement.

In some instances where home indemnity insurance is required, but is not in place, a purchaser may still wish to proceed to settlement. In such cases, settlement agents are advised to protect themselves from liability by obtaining a written

statement, signed by the purchaser, stating that settlement is to proceed despite the lack of indemnity insurance.

A settlement agent acting for a vendor/client might find that whilst an owner-builder licence covering the property has been issued, indemnity insurance has not been obtained. In such instances the vendor should be advised that indemnity insurance is required before they can sell the property, and that they must provide the insurance certificate to the purchaser. If the vendor does not meet these requirements prior to the sale, they can be prosecuted and fined up to \$10,000 under the *Home Building Contracts Act 1991*.

Further information about owner-builder requirements and home indemnity insurance is available from the [www.buildingcommission.wa.gov.au](http://www.buildingcommission.wa.gov.au).

This newsletter contains general information that was current at the time of publication. If you have specific enquiries arising from any material in this publication, you should write to the Commissioner for Consumer Protection, or seek independent professional advice. The producers of this publication expressly disclaim any liability arising out of a reader's reliance on information in this publication.

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