



settlement **news**

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

Settlement agents, strata developments and trust accounts

In light of a recent State Administrative Tribunal (SAT) decision in the matter of *Wilson and Commissioner for Consumer Protection* [2012] WASAT 200, the Commissioner for Consumer Protection would like to remind settlement agents dealing with

strata developments that they must hold deposit moneys in a trust account and comply with the protections afforded to purchasers by the *Strata Titles Act 1985* (the Strata Act).

The main issue before the SAT in these proceedings was whether the conduct of the settlement agent in releasing deposit moneys in advance of settlement came within the meaning of 'defalcation'.

The definition of the expression 'defalcation by a licensee' is found in section 3 of the *Settlement Agents Act 1981*. The expression can be broadly described as criminal or fraudulent conduct by a licensee or any one of the servants or agents of the licensee in the course of the licensee's business and which causes a loss to any other person.

In the Wilson case, Shoalwater Settlements (Shoalwater), which held a settlement agents licence and a triennial certificate, received instructions to settle the applicants' purchase of proposed strata lots off-the-plan.

The developer and seller had not yet completed the purchase of the land to be subdivided and had not registered a strata/survey strata plan for the development. The contracts contained a clause which allowed the deposit moneys to be released to the seller for the purpose of the acquisition and development of the land to be subdivided. This clause breached section 70 of the Strata Act which requires deposits be held in trust until the registration of the strata/survey strata plan for the proposed strata title lots.

Section 70 of the Strata Act provides that any moneys paid by the purchaser prior to the registration of the strata/survey strata plan should be paid to the solicitor, real estate agent or settlement agent named in the contract of sale. If a developer sells a lot before the registration of the strata plan, or if deposit moneys are not held by a solicitor, real estate agent or settlement agent, then the purchaser may avoid the sale at any time prior to the plan being registered.

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If the strata plan is not registered within the time period stated in the contract or, in the absence of a contractual time period, within six months of the contract being signed, then the purchaser may avoid the sale at any time prior to the plan being registered.

Where a purchaser avoids a sale under s70 of the Strata Act, they will be able to recover all moneys – including the deposit.

In this case, the applicants' deposits were placed in Shoalwater's trust account and the agent then released the funds to effect the seller's acquisition of the land. The seller successfully purchased the land but the development failed and the strata lots were never created.

The company then went into liquidation and each applicant lost their deposit.

The applicants subsequently made claims on the settlement agents' Fidelity Guarantee Account (FGA) claiming their deposits should not have been released as this was inconsistent with the provisions of section 70 of the Strata Act.

In relation to settlement agents, the FGA helps to financially reimburse people who suffer pecuniary loss or loss of property through the criminal or fraudulent actions of a real estate or business settlement agent or their employees in the course of a real estate or business transaction.

When money is paid out from the FGA in whole or in part of any claims, the State is subrogated to the extent of that payment. This means that the Commissioner has the right to commence proceedings in the name of the claimant, against the person, body corporate or firm and the directors and partners of those entities for recovery of money paid out of the FGA.

Having considered the construction of the Shoalwater contracts, the SAT concluded the Strata Act required the deposits be held in trust pending the registration of a strata plan for the proposed lots. The release of the deposits therefore amounted to a defalcation and as such, the SAT ruled they were recoverable from the FGA.

Disputed funds in an interest bearing trust account post-settlement

The Department reminds agents that disputed funds retained after settlement can only be kept in the general trust account and not in an interest bearing trust account.

Regulation 6C of the Settlement Agents Regulations provides that a settlement agent can only open a separate trust account if either the amount of moneys paid to the settlement agent exceeds \$20,000 or the transaction in respect of which moneys are paid is not to be settled within 60 days. The Department is of the view section 49A of the *Settlement Agents Act 1981* (the Act) does not intend for funds to be held in interest bearing trust accounts post-settlement.

In the past, settlement agents have received court orders requiring them to deposit the proceeds of a settlement in an interest bearing trust account. In these

circumstances agents have no choice but to comply with the order of the court and deposit the money in an interest bearing account. Under section 49A, a settlement agent can only open a separate interest bearing trust account if they have a written request from the person paying the money. And, as mentioned, the Department believes an interest bearing trust account should only be opened **pending** settlement and is not meant to hold the proceeds from such transactions post-settlement.

The Department suggests settlement agents involved in negotiations where the parties are estranged should ensure the

parties come to an agreement prior to settlement as to the placement and distribution of any funds that are in dispute. The clients should be informed as soon as possible that the settlement agent is unable to place the funds in an interest bearing trust account after settlement and as such the parties should decide whether the funds are to be paid to one of their solicitors who can then place the funds into an interest bearing account or deposited into an account in joint names.

Settlement agents should ensure that such agreements are in writing and signed by both clients.

Dealing with interest bearing trust accounts

Settlement agents need to be aware of issues surrounding interest bearing trust accounts.

Agents are required to open separate interest bearing trust accounts for a client if a written request is received from that individual for an amount in excess of \$20,000, or for money needed for a transaction that will not be settled within 60 days.

Under regulation 6B(3) of the Settlement Agents Regulations 1982, the title of an individual interest bearing trust account should include:

- the words 'SA Trust Account – IB';
- the name of the holder of the triennial certificate, and any business name of that holder as recorded in the register;
- the words "in trust for" followed by the name of the person who requested the separate account; and
- the letters "TC" followed by the triennial certificate number recorded in the register.

An example of a correctly titled interest bearing trust account is as follows:

ABC Pty Ltd (ABN 12 345 678 912) T/A XYZ Settlements in trust for John Smith SA Trust Account – IB TC 12345
Zyx Bank Morley Branch
Account number 6031 11111
\$x,xxx.xx

The 'IB' component of the designation denotes that the account is interest bearing.

When opening an interest bearing account, the client's tax file number should be quoted to avoid tax being withheld at the top marginal rate.

Interest paid on the account is to be credited to the individual who requested the creation of the account.



Importantly, the monthly trust account reconciliations should include periodic adjustments for interest accruing on interest bearing trust accounts.

Interest bearing trust accounts need to be correctly recorded on the trial balance. As and when interest is credited to the interest bearing trust account, it needs to be recorded by the settlement agent in terms of adjusting the balances for trust moneys held (in this case, external to the general trust account of the agency).

When money is to be released for a client, it is important the settlement agent debits the specific interest bearing trust account and not the general trust account.

For more information please refer to the Department's publications:

- *SASB Trust account handbook*; and
- *A guide to auditing settlement agents' trust accounts*,

Both publications are available under *News, Publications and Forms* on the Department's website at www.commerce.wa.gov.au/CP/settlement

The Department's website



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

The website has a dedicated section for settlement agents available at www.commerce.wa.gov.au/CP/settlement which covers a range of subjects including Compulsory Professional Development requirements, licensing information and various application forms.

The Department is committed to the continuing development and improvement of the website and welcomes feedback from the industry. Comments can be sent to pinews@commerce.wa.gov.au.

Titling documents correctly

The settlement industry has kept pace with many technological innovations since the implementation of the *Settlement Agents Act 1981* (the Act), the most obvious being the widespread use of emails and websites.

Not surprisingly the Department has noticed that many agents are confused by the requirements under the Act to identify the correct licensee details on all documents and correspondence within a contemporary business environment.

The Department considers business related emails to be ‘correspondence’ and as such the first email in any chain of electronic correspondence should include the necessary details. These details can easily be included by automatic electronic ‘signatures’ or ‘mastheads’.

Section 42(2)(a) of the Act states:

(2) On all correspondence, and on the outside of all documents prepared, in the course of business of a licensee at his registered office and every branch office—

(a) the licensee shall be identified as a real estate settlement agent or a business settlement agent, or both, and the registered office of his business shall be shown.

A document may be physical or electronic and includes:

- any appointment to act prepared by the agency;
- any receipt issued by the agency; and
- correspondence emanating from the agency.

The name of the licence holder, together with the business name and the address of the registered office (not a post office box), must be identified on all documents and correspondence as being a licensed real estate or business settlement agent.

See examples below.

Sole Trader

Where Mary Smith is licensed and trades solely using a business name such as ABC Settlements, the following identification must appear on all documents and correspondence:

Mary Smith—Licensee
Trading as ABC Settlements
Address of registered office
Licensed real estate (and/or business) settlement agent

Partnership

Where a partnership consists of two or more persons such as Mary Smith and Bill Jones and trades as ABC Settlements the following applies:

Mary Smith and Bill Jones—
Licensees
Trading as ABC Settlements
Address of registered office
Licensed real estate (and/or business) settlement agent

Body Corporate

Where a licence is issued to a body corporate such as ABC Pty Ltd, and uses the business name of ABC Settlements the following applies:

ABC Pty Ltd—Licensee
Trading as ABC Settlements
ACN/ABN
Address of registered office
Licensed real estate (and/or business) settlement agent

Please note the identification requirements that also arise under section 153 of the *Corporations Act 2001*. The name of the company and its ACN/ABN number must appear on all public documents including:

- documents required to be lodged with the Australian Securities and Investments Commission (ASIC);
- statements of account, including invoices;
- receipts;
- orders for goods and services;
- business letterheads;
- official company notices;
- websites;
- cheques; and
- brochures and leaflets advertising a specific service.

For more information about the above points please refer to the ASIC website at: www.asic.gov.au.

The Department recommends agents’ websites also conform to the identification styles outlined above.

The Department does not regard business cards, ‘With compliments’ slips and personalised envelopes to be documents. However, if these are attached to the front of (or surround) prepared documents (including receipts), in the absence of a correctly titled cover sheet then they should also include the necessary identifying details. It is not deemed necessary to attach identifying details to forms prepared pursuant to Schedule 2 clause 1(2)(c) of the Act (such as transfer of land and Strata Titles Act forms).

Settlement agents are encouraged to review their documentation to ensure it complies with the above requirements.



Preparing tax invoices at time of settlement

The Department wishes to reiterate that the *Settlement Agents Act 1981* does not authorise settlement agents to prepare tax invoices on behalf of the seller.

If Goods and Services Tax (GST) is being paid at settlement, whether it is included or in addition to the purchase price, then the seller must provide a tax invoice to the buyer unless the GST is being calculated using the margin scheme.

Remember that in order to charge GST on the supply of a property, the registered proprietor must have an ABN and must be registered for GST. It is necessary for settlement agents to check this as sellers who are not registered for GST cannot charge GST on the supply of the property.

Settlement agents acting for a seller must ensure the seller provides the tax invoice to them prior to settlement. A copy should be faxed to the buyer's settlement agent to ensure they can have it vetted by their client.

The original tax invoice should be provided to the buyer's settlement agent at settlement. If acting for a buyer, the settlement agent should request in writing, a copy of the tax invoice prior to settlement.

The tax invoice should contain the following minimum information:

- It must be titled: "Tax Invoice".
- Name of the seller/entity selling the property.
- The entity's ABN (the settlement agent should double check this against the searches undertaken and address any discrepancies).
- The address of the property being purchased (in other words, what is being supplied).
- The buyer's details (for example, if the buyer is a trustee, ensure the full details are shown on the tax invoice).
- The purchase price.
- The GST payable.
- The total amount payable.

It is important to note that if the GST has been calculated using the margin scheme, the seller may not be obliged to provide the buyer with a tax invoice. In most circumstances, the buyer is unable to claim an input tax credit for GST that has been calculated using the margin scheme.

For more information on GST and tax invoices visit the Australian Tax Office at www.ato.gov.au.





Online licence search

The Department of Commerce's online licence search facility is a quick and easy way to check whether an individual, partnership or company is licensed or registered in WA. This applies to all settlement agents, real estate and business agents and sales representatives.

The online licence search also lists any conditions the Department has imposed on a licence and allows you to verify an address or the business branch addresses.

Buyers and sellers of property can, if they wish, use the online search facility to check whether a settlement agent is licensed.

The online licence search can be found on the Consumer Protection website at www.commerce.wa.gov.au/ConsumerProtection/licencesearch

E-Bulletins

The Department regularly publishes Settlement e-Bulletins which provide agents 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 the National Occupational Licensing Scheme, a thwarted real estate scam and a successful phone porting scam.

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

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

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