

July 2014

SETTLEMENT

NEWS

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

Communicating pertinent facts

Obtaining and communicating all available pertinent facts to your client is an essential part of the settlement process and is a requirement under the Settlement Agents Code of Conduct 1982 (the Code). The following case highlights the importance of this obligation.

In this particular instance, a property transaction involved the purchase of a block of land in Mandurah. Settlement occurred approximately 18 months after the Offer and Acceptance contract was signed due to delays in completing the subdivision.

After settlement had been finalised, the buyer became aware of a memorial existing on the certificate of title which indicated the land was situated on estuarine soils. The new owners were subsequently advised that the footings of any building structures on the property would need to be designed in accordance with relevant Australian standards.

The buyer stated she was not aware of the memorial at the time she signed the contract of sale. She also claimed her settlement agent did not inform her of the memorial's existence prior to settlement.

The buyer claimed the memorial reduced the value of the property given the need for costly footings (the property was subsequently sold for considerably less than the purchase price).

The memorial was lodged approximately one month prior to settlement which was after the Offer and Acceptance contract had been signed. The settlement agent had obtained a title search of the property but did not obtain a copy of the memorial as they had failed to notice that it was registered on the title.

Name	Initials

Trust account management

Trust account management is one of the most important aspects of the day-to-day running of a settlement agent's business. Agents should therefore maintain the highest standards of practice in relation to their trust accounts at all times.

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Conflict of interest:

Acting for both
parties



Communicating pertinent facts

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In disciplinary proceedings brought against the agent, the former Board considered the memorial should have been detected and searched prior to settlement at which time a copy should have been provided to the buyer.

The former Board found the buyer's settlement agent had breached Rule 16 of the Code by failing to communicate pertinent facts to their client when it was necessary or prudent to do so.

Furthermore, the buyer's settlement agent had breached Rule 11 of the Code in failing to recommend their client seek legal advice in relation to the transaction when it was prudent to do so.

Finally, when the transfer document was sent to the buyer for execution, the encumbrance section was blank. The former Board found the settlement agent had not alerted the buyer to the fact that the encumbrance section of the transfer document was incomplete.

The settlement agent was fined for breaching the Code and ordered to pay costs.

Currently, Rule 18 of the Code provides that a licensee shall make all reasonable efforts to complete work for the client as soon as is reasonably practicable and shall use due care and skill. It is the Department's view that an agent's failure to alert their client to an incomplete transfer document may constitute a breach of rule 18 of the Code.

Trust account management

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The *Settlement Agents Act 1981* (the Act), the *Settlement Agents Regulations 1982* (the Regulations) and the Settlement Agents Code of Conduct 1982 (the Code) require strict maintenance of trust account records. The trust accounting system aims to ensure all trust moneys held by agents are accurately accounted for at all times.

The following case highlights the importance of maintaining trust accounts in compliance with the requirements of the profession's governing legislation.

The former Board was alerted to an agency's trust accounting practices when it failed to lodge its annual audit report by the due date. Furthermore, a subsequent interim audit was lodged as 'qualified'.

Investigation revealed the agent withdrew money from the trust account on numerous occasions for purposes other than completing the settlement between the parties to the transaction. This was a contravention of section 49(4) of the Act, which prohibits the withdrawal of moneys from a trust account except for the purpose of completion of the settlement, or in compliance with the contract of sale, or as otherwise authorised by the Act, or by the prior written consent of all parties to the transaction.

The agent's failure to correctly balance the trust account shortfall was also a breach of the Code. Rule 23 of the Code provides that, if a trust account goes into deficit, it is the agent's duty to either balance it by his own money or by money placed at his disposal by someone knowing fully his financial position and to immediately inform all persons who could be affected by the deficiency.

The settlement agent in question did not fulfil any of the above requirements. Investigations also revealed the agent had continued to pay clients' money into the deficient trust account. This contravened Rule 24 of the Code which states that settlement agents must cease to pay clients' money into their trust account once they know the account is deficient.

It follows that agents must cease taking on business as soon as their trust account is found to be deficient. However, once the deficiency has been corrected, they may resume normal business.

The settlement agent in question was also found to have breached section 49(6)(a) of the Act by failing to keep full and accurate accounts of all money received and of all payments made with that money. Furthermore, the agent failed to correctly balance the trust account at the end of each month, thereby breaching section 49(6)(d) of the Act.

A settlement agent's fiduciary responsibilities in relation to trust account management are very exacting. It is critical that the large amounts of money involved in a property transaction are handled professionally and honestly by licensed agents and in accordance with agents' obligations under the Act, Regulations and Code.

Trust Account Handbook

The Department's **Trust Account Handbook** is designed to assist settlement agents establish and maintain a trust account management system that complies with the Act and the Regulations.

Conflict of interest: Acting for both parties

A settlement agent must act in the best interests of their client at all times, and not put this duty in conflict with their own interests or those of any other party.

While each case will turn on its own facts, in general, a conflict of interest may potentially arise in three ways:

1. When a settlement agent has a business or financial association with a person or body such as a real estate agent, real estate sales representative, developer or financial institution. The settlement agent therefore has an interest in the settlement being effected.
2. When a person or body such as a real estate agent, real estate sales representative, developer or financial institution has a business or financial association with a settlement agency. The person or body therefore has an interest in the settlement being effected.
3. When a settlement agent is acting for both the buyer and the seller of a real estate transaction or a business transaction.

Section 46(3) of the Settlement Agents Act (the Act) provides (s 46(3)) that a real estate settlement agent may not act for more than one party in settlement of a real estate transaction unless each of the parties for whom he is to act acknowledges in writing that he is aware that the licensee proposes to so act and gives his prior written consent to the licensee so acting.

The Settlement Agents Code of Conduct (the Code) provides that a licensee may sometimes act for both parties (see rule 7). The test to apply is to consider whether in the interest of one, he should withhold some information or advice from the other. If he should, then he should inform both clients that he is embarrassed and, subject to the following, should cease to act for both. He may continue to act for one of them in the same matter, unless he has received some

confidential information from the other which it would be improper to use against him, yet which should be used in the interest of the selected client.

The Appointment of Settlement Agent Form 1 contained in the Schedule to the Code provides that a settlement agent may act for both vendor and purchaser where:

- both parties acknowledge in writing that they are aware the settlement agent proposes to do this;
- both parties give prior consent to the settlement agent acting for the buyer and the seller; and
- the settlement agent is able to provide all information and advice to both parties.

It follows that when a settlement agent is acting for both parties to a transaction, the appointment to act must clearly show the client/s agrees to this. In other words, the client/s must make the necessary election as to whether the agent is permitted to act for both parties or for one.

A prudent agent would require their client to initial this election in the Form 1 Appointment of Settlement Agent.

Agents should not elect to work for both parties before sending the Appointment to Act to their clients, as this may place an agent in breach of the Act and/or the Code.

Failure to do any of things required in section 43(1) and (2) of the Act can render the appointment to act invalid, and an agent may not be entitled to remuneration (subject to section 43(5)) for the services they have provided to their client.

If a conflict of interest arises, or foreseeably could arise, the agent must cease to act in the transaction to ensure their client's best interests are protected.

Settlement disputes

Minor disputes sometimes arise at the last moment in a property settlement.

A common way of allowing settlement to go ahead is for settlement agents to hold funds to cover the dispute in trust until the matter is resolved. However, it appears some settlement agents may not follow proper procedures when holding funds.

In one particular instance, a purchaser of a Thornlie property conducted a final inspection but was not satisfied with the state of the home. The purchaser therefore instructed her settlement agent to withhold a small sum to meet the costs of repairs and cleaning.

Both the seller and the seller's settlement agent agreed to the proposal.

Settlement went ahead and the purchaser carried out the repairs and cleaning. However, when the purchaser asked her settlement agent to release the funds held to meet the expenses, she was told the agency was not holding the funds in trust.

Without obtaining the client's instructions, the purchaser's settlement agent had arranged before settlement for the seller's settlement agent to hold the funds.

The seller subsequently refused to authorise their settlement agent to release the funds. The purchaser's settlement agent could only suggest seeking legal advice to resolve the dispute.

The purchaser's settlement agent made two major errors in the procedure they adopted. Firstly, they should have followed the purchaser's instructions to withhold the funds regardless of industry practice or convenience. In short, the funds should have been retained by the agency.

Secondly, the terms of how to settle the dispute and the basis on which the funds were to be released should have been agreed to in writing.

Settlement agents should ensure they have specific authority to release funds from their trust account. Agents are reminded that section 49(5) of the *Settlements Agents Act 1981* requires that:

“Settlement monies received by a settlement agent in the course of arranging or effecting a settlement shall not be withdrawn from a trust account except for the purpose of completing the settlement, or in accordance



with the contract entered into between the parties to the transaction, or as otherwise authorised by this act, or by the prior written consent of all parties to the transaction involved”.

The failure to establish an effective procedure to resolve this minor dispute caused it to escalate, and created additional costs for both parties.



Unlicensed settlement agents

The Department requests settlement agents report any instances of unlicensed people completing settlements.

The *Settlement Agents Act 1981* (the Act) protects the public by ensuring that only people who are qualified can hold a licence and undertake settlements of real estate and business transactions.

Unlicensed individuals may undertake the settlement of a real estate or business transaction on their own behalf, but they are unable to undertake settlement for other parties, even if no fee is charged.

If you receive instructions and the other representative is not readily identifiable as a settlement agent or solicitor, it is advisable to contact them immediately and determine what qualifications they hold. If they are not a licensed settlement agent with a current triennial certificate or a lawyer with a current practising certificate, you may inform them that they are unable to assist in the settlement. The other party to the settlement will therefore have to appoint a suitably qualified person to act on their behalf.

If the other party to the settlement subsequently nominates a suitably qualified person then you are not required to do anything further. However, if the person insists on continuing to act for the buyer/seller, you can advise them that you may report their activities to the Department of Commerce.

It is recommended you confirm the conversation with the unlicensed person in writing. If the unlicensed person claims

the buyer/seller will attend to their own settlement, here are some guidelines to follow:

- Ensure all of your communication is written directly to the buyer/seller.
- Check all correspondence you receive to ensure it has actually come from the buyer/seller.
- Compare the signatures on the Electronic Advice of Sale and any correspondence from the buyer/seller. If the signatures do not belong to the buyer/seller then the unlicensed person may still be involved in the settlement.
- Ask who will be attending settlement. If you believe the unlicensed person is still involved in the settlement process, you are encouraged to report the matter to the Department for investigation.

Settlement agents will be aware of the problems and additional work created by an unlicensed individual's lack of industry knowledge.

Furthermore, unlicensed persons do not carry professional indemnity insurance, nor are they covered by the Fidelity Guarantee Account. As such, consumers may have no protection from errors or oversights made by the unlicensed person.

If you discover you are dealing with an unlicensed person, information you should provide to the Department could include:

- a copy of the contract showing the nomination;
- a copy of the information sheet showing the name of the person nominated to act;
- details of any telephone conversations you have had with the unlicensed person;
- a copy of any correspondence you have sent to the unlicensed person;
- a copy of any correspondence you have received that may show the signature of the unlicensed person; and
- confirmation of the unlicensed person attending the settlement.

Industry members are encouraged to report unlicensed operators as it helps support industry professionalism and enhances consumer protection.

The Commissioner reserves the right to take such action as she considers appropriate in respect of unlicensed agents, including prosecution action. Depending on the severity of the matter, a warning may be issued to an unlicensed individual who will also be informed of the requirements of the Act.

Settlement agent to pay \$150,000 after raiding trust account

A former settlement agent has been ordered to pay more than \$150,000 in fines and compensation by the Joondalup Magistrates Court after making unauthorised withdrawals from a trust account.

Renee Lee Matthews, formerly trading as Saachi Settlements of Ocean Reef, was fined a total of \$9,000 on 18 March 2014 after pleading guilty to five charges of breaching the Settlement Agents Act. She was ordered to pay \$129,422 to the Fidelity Guarantee Account, \$11,889 in court costs and \$923 to a former client.

Consumer Protection told the court that Ms Matthews had failed to pay stamp duty to the Office of State Revenue (OSR) that she had collected from the settlement of five properties in Clarkson, Pearsall, Port Kennedy, Bassendean and Butler between February and April 2010. Ms Matthews surrendered her settlement agent's licence in September 2010.

An investigation of Ms Matthews' trust account revealed that a portion of the stamp duty collected from the property transactions had been used to pay off previous OSR debt and the majority of the funds had been transferred out of the trust account.

Under the Settlement Agents Act, money can only be withdrawn from a trust account for the purposes of completing a settlement or by the written consent of the parties. All trust funds must be paid to the person/s lawfully entitled to receive them.

The property industry's Fidelity Guarantee Account, operated by Consumer Protection, had paid the outstanding debt to the OSR on behalf of former clients of the agent. The compensation fund, which derives its revenue from licence fee charges and the interest from settlement agents' trust accounts, ensures that the parties involved in property transactions in WA are not financially penalised by the fraudulent actions of a licensed real estate, business or settlement agent.

In handing down the penalty, Magistrate De Vries said this type of offending is a betrayal of the trust placed in settlement agents and brings the profession as a whole into disrepute. However, he also took into account Ms Matthews' difficult personal circumstances at the time the offending took place.

Commissioner for Consumer Protection, Anne Driscoll said it is critical that the large amounts of money involved in a property transaction are handled professionally and honestly by licensed agents.

“The laws put in place strict procedures related to the transfer of funds during property transactions in WA and are designed to protect consumers in what's undoubtedly one of their biggest financial investments,” Ms Driscoll said.

“Agents must adhere strictly to these laws as there are serious consequences for any breaches, and may result in the settlement of properties being delayed at great expense and inconvenience to both buyers and sellers.”

More information on the obligations of settlement agents can be found on the Consumer Protection website at: www.commerce.wa.gov.au/settlement and enquiries can be made by email: consumer@commerce.wa.gov.au or by calling **1300 30 40 54**.

Compulsory Professional Development 2014



Compulsory Professional Development (CPD) is a requirement for all licensed settlement agents. Failure to complete your CPD requirements may mean your triennial certificate will not be renewed.

In each calendar year, participants must obtain a total of six points of CPD approved activities. Of these six points, at least four points are to be earned from the core activities and the remaining two points from either core or elective CPD activities.

The Department of Commerce has contracted the Australian Institute of Conveyancers (AICWA) to provide CPD activities in 2014. The first session started on 14 April 2014.

Agents are encouraged to complete their CPD training early as sessions are already filling up and lack of course availability will not be accepted as a valid reason for not complying.

Information about the CPD program and details on both the core and elective CPD sessions can be found on the Department's **website**.

To obtain a registration form to book a session, please contact the AICWA office on **(08) 9361 1166** or email **admin@aicwa.com.au**

Please do not contact Consumer Protection to make a booking or enquire about courses.

Settlement agents who operate more than 100km from Perth or Busselton can get specific information about CPD attendance on the Department's **website**. A course outline for 2014 can also be found on the website.

National Occupational Licensing Scheme

On 13 December 2013 the Council of Australian Governments (COAG) decided not to proceed with national occupational licensing (NOLS).

Most jurisdictions identified a number of concerns with the proposed NOLS model, including the potential costs.

States have instead decided to investigate alternative approaches that will increase labour mobility and deliver benefits to businesses and governments.

As a consequence of the COAG consultations, the States agreed to work together via the Council for the Australian Federation (CAF). The CAF will seek to develop alternative options for minimising

licensing impediments, improving labour mobility and to manage the orderly disestablishment of the National Occupation Licensing Authority from early 2014.

It is understood the CAF will not be considering property occupations.

Contact details

In order for your enquiry to be handled 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**. Please include your licence/registration number.
- If you have an enquiry, including any relating to a proactive visit, please contact Proactive Compliance on **(08) 9282-0874** or email **proactivecompliance@commerce.wa.gov.au**
- If you have a trust account or auditing enquiry, please call **(08) 9282-0926** 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 issues. You can telephone **1300 30 40 54** or email **consumer@commerce.wa.gov.au**

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 Landgate's property interest reports, fake testimonials and another attempted property scam involving a fraudulent cheque from Nigeria.

Our 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**



Website

Consumer Protection's website was recently redesigned.

The website has a fresh new look, improved navigation and better tools that lets you find the information you need more quickly and easily. It includes a new feature that will allow all pages to be printed as standalone factsheets or handouts.

Here are some of our key content listings to help you update your old links:

- **Tenancy laws including forms and notices** ● **Buying a selling a home** ● **Retirement villages** ● **Residential parks** ● **Seniors housing**
- **Selling goods and services** ● **Consumer rights** ● **Consumer complaints** ● **Licensing and registrations for Motor vehicle industry, property industry, employment agents, travel agents and debt collectors** ● **Charities** ● **Associations** ● **Licence search**

You can also visit the other divisions:

- **Building Commission** ● **EnergySafety** ● **Labour Relations** ● **Industry and Innovation** ● **WorkSafe**

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

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