

SETTLEMENT

NEWS

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

Retain the integrity of original documents

Settlement agents are reminded that when completing forms to be submitted to Consumer Protection, such as licensing forms, that they ensure all relevant information that is required to be provided is complete and accurate.

It is also important to submit all pages of the form even if the information is not required to be completed in your particular case. This is important in demonstrating that all issues have clearly been considered by you.

Should an error be made on the form, the incorrect information can usually be crossed out and the correct information inserted with all parties (ie applicant/s for licensing forms) signing/initialling

and dating the alteration to show their agreement that the amended information is correct.

If other documentation is required to be submitted to Consumer Protection, the original document or certified copy (if acceptable) must not be altered in any way.

For example you have already submitted a licensing renewal application and you still need to provide a National Police Certificate, you should either submit the original document in the same condition as you received it from the issuer or provide a certified copy of the unaltered original document. If you wish to provide reference information for the document, you should attach a separate note with this information rather than writing it anywhere on the original document or certified copy.

Upon receipt of a National Police Certificate from the issuer, you should

Name	Initials


review the information that it contains, including your name and date of birth, to ensure the information is accurate. Should the information be inaccurate, subject to where the error originated, you may either be able to obtain a reprinted certificate with the correct information or need to apply for a new certificate.

Be aware that inappropriately amending a form or original document can be seen as a fraudulent act and may be a contravention of the Settlement Agents' Code of Conduct 1982.

Should you have any queries about the submission of a form or document which may hold incorrect information, you can contact Consumer Protection on 1300 30 40 54 to seek advice.

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Update: 
Review of the
Settlement Agents'
Code of Conduct
1982

Update: Review of the Settlement Agents' Code of Conduct 1982

The Minister for Commerce has recently approved the drafting of amendments to the Settlement Agents' Code of Conduct 1982 (the SA Code).

The proposed amendments are as a result of a review which commenced in 2013 when the Department of Commerce (the Department) released a discussion paper seeking submissions from industry and peak representative bodies in relation to a review of the property industry codes

regulated by the Department, including the SA Code.

From the submissions received by the Department, the general consensus was in support of the need for the SA Code to provide greater detail and clarity on matters relating to an agent's duties. It was also concluded that the Code should be consistent with the Code of Conduct for Agents and Sales Representatives 2011 (the RE Code) and the Licensed Valuers Code of Conduct (the LV Code).

The proposed amendments to the SA Code aim to allow for consistency with the

RE Code and the LV Code in regulating the property industry as a whole.

The proposed amendments will take into account a number of generic duties required under all three codes and will also provide for specific provisions relevant to the needs of each industry.

The drafting of the amendments by Parliamentary Counsel's Office is currently underway and the Department will seek further consultation with each industry once the draft amendments have progressed.

RCDs within premises sold or leased in Western Australia

In 2009 the State Government enacted legislation requiring a minimum of two Residual Current Devices (RCDs) being installed and operational whenever residential premises are sold or offered for lease.

The Department of Commerce (the Department) wishes to clarify that the residential premises is not only the home in which the occupant resides but also extends to outbuildings and sheds which have electricity connected and form part of the residential property either by being directly or indirectly attached to the home.

For outbuildings that are used solely for occupational purposes, the obligation to fit RCDs to the outbuildings falls under the Occupational Safety and Health Regulations 1996 which requires RCDs to only be fitted to the power circuits. The number of RCDs to be fitted is dependent

upon the number of power circuits for the outbuilding. RCD protection of lighting circuits is on a risk assessment basis.

If the outbuilding is solely used as residential premises or is used as a mixture of both a residential premises and for occupational purposes, the obligation to fit RCDs to the outbuilding falls under the Electricity Regulations 1947 which requires RCDs on both the power and lighting circuits.

The RCDs are able to be fitted either at the outbuilding's sub-distribution board or at the property's main switchboard.

However this is subject to the individual circuit arrangements.

Settlement agents are requested to remind clients of the requirements regarding RCDs. You may wish to refer to the **e-Bulletin issue 40** which outlines the current best practice for settlement agents in relation to RCDs.

RCDs save lives and the Department recommends that they be installed to protect **all** power and lighting circuits.

If you are unsure what is required in your client's situation, you can contact EnergySafety on 6251 1900.

Prescribed forms and required disclosures

Agents are reminded that rule 6A of the Settlement Agents' Code of Conduct 1982 (the SA Code) states:

- (1) An appointment to act as a settlement agent required under section 43 of the Act (whether contained in a separate appointment document or in an offer to purchase or a contract for sale) is to be in the form of, or contain the information set forth in, Form 1 in the Schedule.*
- (2) As soon as practicable after receipt of the appointment referred to in subrule (1) the appointed settlement agent shall either-*
 - (a) if he or she is unable to accept the appointment, notify the vendor or purchaser, as the case requires, of that inability to act; or*
 - (b) if he or she is able to act, sign the appointment and forward a true copy of the appointment document to his or her client.*

The Schedule in the SA Code contains the prescribed form titled Form 1 Appointment of Settlement Agent, which includes a provision for Acknowledgement of receipt of appointment form as well as for the Acceptance of appointment by the settlement agent.

During proactive compliance visits, it is often found that these provisions are unsigned even where the agent is using the prescribed form. In addition there is provision on Form 1 for clients to make elections and delete the options which are not applicable. It would be prudent for agents to ensure clients initial their elections on the form.

Under rule 8 of the SA Code, an agent must provide the potential client with a written disclosure of interest using the prescribed Form 2 Disclosure of Interest found within the Schedule.

The Form 2 cannot be altered and any additional information, such as an explanation that the relationship is purely on the basis of professional referral only and that no reward is offered or accepted, must be part of the agent's covering letter and cannot be an addition to the Form 2.

Where the relationship exists between a real estate agent and a settlement agent please note that there is a separate legislative requirement for the real estate agent to make a written disclosure at **the time of** the signing of the offer and acceptance document.

Acting for both parties to a settlement transaction

The *Settlement Agents Act 1981* (the SA Act) contains provisions relating to instances where an agent acts on behalf of both the seller and buyer in a property transaction. Such situations may give rise to a conflict of interest, an example being where a party wishes to withdraw from the contract, or challenge a condition of the contract.

Section 46(3) of the SA Act allows an agent to act for both a seller and buyer provided that each party confirms in writing that they are aware the settlement agent proposes to act for both parties and gives their consent to the agent. This written confirmation from the seller and buyer must be provided **prior** to the agent commencing any actions on the transaction.

In accordance with rule 8 of the Settlement Agents' Code of Conduct 1982 (the SA Code), the Department of Commerce (the Department) suggests that the agent provide each party with written notification that they have been approached by the other to act on their behalf and seek acknowledgement and consent from the relevant party for the dual representation.

The notification could include an acknowledgement section similar to that contained in Form 1 so that a person can state that they have received the notification and consent to the settlement agent acting for both parties.

In addition, rule 7 of the SA Code requires that:

Subject to section 46 of the Act and to rule 5 a licensee may sometimes act for both parties. 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, however, 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.

If an agent is acting for both parties and a conflict of interest arises, they should cease acting for both parties.



Auditor independence

Agents are reminded that auditors are required under section 53(3) of the *Settlement Agents Act 1981* (the SA Act) to provide the Commissioner for Consumer Protection (the Commissioner) with disclosure of any factors that may be construed as a conflict of interest including relationships between the auditor and agent based on blood, marriage or de facto arrangements.

Each disclosure will be considered by the Commissioner on a case-by-case basis.

Auditors are also required to disclose to the Commissioner any business dealings with the agent.

Agents are also reminded that should they decide to change their auditor, they need to first obtain approval from the Commissioner. Agents can complete the **Change of Auditor** form and submit it to audits@commerce.wa.gov.au.

The Department of Commerce (the Department) places significant reliance

on audit reports in monitoring the compliance of settlement agents with the trust account requirements of the SA Act.

An agent's operation of their trust account/s is often a good indicator of their compliance practices in general.

Additional information on the disclosure requirements can be found within the Department's publication, *A guide to auditing settlement agents' trust accounts*, available from the Department's **website**.

Home Buyers Assistance Account

You can help to ensure first home buyers don't miss out on the Home Buyers Assistance Account (HBAA) up-to \$2,000 grant. Applications must be lodged **no more than 90 days after the date that the offer to purchase the dwelling was accepted**, even if not all information is available at the time.

The HBAA is a State Government scheme administered by the Department of Commerce (the Department) under the *Real Estate and Business Agents Act 1978*.

The Department seeks settlement agents' assistance in promoting and educating clients about this grant particularly at the time of appointing the settlement agent to act on their behalf.

The funding for the scheme comes from the interest paid on real estate agents' trust accounts and currently provides a grant of up to \$2,000 towards some fees, charges and other incidental expenses associated with buying a first home such as conveyancing/settlement fee, Landgate

transfer registration fee, mortgage registration fee, mortgage insurance premium, loan establishment fee, and pest/building inspection fees.

Other costs such as postage, bank cheque fees, and rates and taxes on the property cannot be considered as part of the grant.

To ensure the application is lodged within the required 90 day timeframe, the application form can be submitted to the Department without supporting documentation. The applicant can provide the outstanding documents, such as the final settlement statement, when it becomes available.

If the application will be lodged outside the 90 day timeframe, it must be accompanied by a written explanation as to the reason for the late lodgement and the applicant should include documentation that may support the reason for late lodgement.

As the eligibility criteria may be subject to change, you can view the current information and form on the Department's **website**. Should you have any queries in relation to the HBAA, you can contact the Department for assistance on 1300 30 40 54 or by email at hbaa@commerce.wa.gov.au

WA property scam conviction

In December 2014 the Lagos High Court in Nigeria convicted Mr Ntuen Promise Ekemini on five counts and sentenced him to one year's imprisonment for his involvement in attempted real estate fraud.

Ekemini's attempt to sell a home in Falcon using forged documents began in December 2012 when Ekemini contacted the Mandurah real estate agency managing the property claiming to be the owner of the home.

Ekemini used a Yahoo email address in the name of one of the real owners to request property documents, which were provided to him, and requested the agency change its records of the owners' contact details, instructing all future communication be directed to a new email address and new mobile phone number.

A month later, the agency was then approached by Ekemini to sell the property. He completed a sales agreement using false signatures and provided copies of fake passports of the two owners, along with forged documents purporting to be from the Australian High Commission in Pretoria confirming their identities.

Following property fraud training received by a member of the agency's staff, suspicions were raised resulting in WA's fraud squad being contacted. An operation was then undertaken where a feigned sale proceeded to try to snare the fraudsters.

Ekemini was arrested in August 2013 in Nigeria when he attempted to collect documents related to the supposed settlement of the Falcon property using a forged licence in the name of the South African based owners.

The arrest came after an eight month investigation and joint operation of State, Federal and overseas authorities.

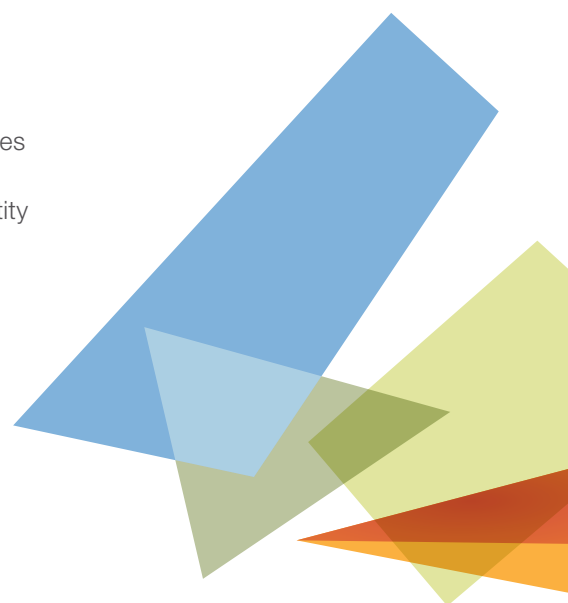
It had generally been thought that people attempting to perpetrate frauds from Nigeria were beyond the reach of the law. This prosecution has shown that, while difficult, prosecution is not impossible.

The imprisonment of Mr Ekemini should send a strong message to other potential fraudsters in Nigeria that they are not beyond the law.

As you will be aware, in November 2011, the Settlement Agents' Code of Conduct 1982 (the SA Code) was strengthened to incorporate strict identity verification guidelines for all transactions, particularly involving overseas owners. The SA Code can be viewed on the State Law Publisher's [website](#).

Advice on property scams and the Guidance Note on the Code of conduct for settlement agents are available on the Department of Commerce's [website](#).

Landgate's strict fraud prevention measures can also be viewed on its [website](#) and within the below article, Verifying the identity of a person.





Verifying the identity of a person

Rule 10(2) of the Settlement Agents Code of Conduct 1982 requires settlement agents to, as soon as practicable after being appointed to act for a person, identify each person claiming to be entitled to dispose of the property to a real estate transaction and verify their authority to do so, prior to settlement occurring.

Landgate implemented the Western Australian Registrar and Commissioner of Titles Joint Practice: Verification of Identity (the Practice) on 1 July 2012 which operates to reduce the chances of land title fraud resulting from identity theft or other improper dealings.

The Practice requires settlement agents to take reasonable steps to verify the identity of their client and the client's authority to give instructions when dealing with a particular property.

This verification of identity includes the client being able to produce originals of current photographic identity documents and, where possible, for the settlement agent to conduct a visual 'face to face' meeting to enable a comparison of the photographic identity document to the person being identified.

The settlement agent can appoint, by way of a formal agreement, a trusted third party to undertake the verification of identity on the settlement agent's behalf when the client is unable to present themselves to the settlement agent. Certain Australia Post outlets may offer a **verification of identity service**.

The list of recommended identity documents, depending upon the location of the client, can be found within the Landgate publication, **Land Titles Registration Practice Manual**, which is available from Landgate's **website**.

Should the client be located overseas, they can approach an Australian Diplomatic Mission where an Australian Consular Officer can take reasonable steps to ensure the person transacting in land is the person entitled to sign the land transaction document presented by sighting and certifying original identity documents.

WA's Registrar of Titles and Commissioner of Titles are currently reviewing the Practice to better align it with the e-conveyancing Participation Rules. Settlement agents are encouraged to integrate the verification of identity documents in the Participation Rules into their policies and procedures.

For further details on the Practice, you can contact Landgate on 9273 7373 or email advice@landgate.wa.gov.au



Renew on time

Agents are reminded to make sure that applications to renew their triennial certificate are lodged with Consumer Protection well before the expiry date to ensure that their businesses are not at risk.

The *Settlement Agents Act 1981* (the SA Act) explicitly states that a licensee is not entitled to carry on business as a settlement agent unless he or she holds a current triennial certificate. Renewal applications require preparation, including obtaining national police certificates and financial information. Once the application is lodged, it may take the Commissioner for Consumer Protection some time to make a determination about the application, particularly if the licensee or directors have convictions, consumer complaints, matters appearing on the credit report, or other issues requiring additional consideration.

To assist you with ensuring your triennial certificate remains current, Consumer Protection will send out two reminder notices. The first will be sent approximately three months prior to your expiry date and the second will be sent approximately one month prior. You are strongly encouraged to begin the renewal process when you receive the first reminder notice. Waiting until a month before the expiry date may not leave enough time to complete the renewal process if there are unforeseen problems such as delays in obtaining a national police clearance etc.

Please note that sending reminder notices is a courtesy service only. If you have not updated your address details with Consumer Protection or do not receive the notice for other reasons, your certificate will still expire if a renewal is not approved in time. It is your responsibility to remember to renew on time.

If you intend to cease trading when your triennial certificate expires, but you think you may recommence in future, you can place your licence on hold by paying the prescribed holding fee. As your triennial certificate will not be in place, you must cease all trading, close your trust accounts and arrange a termination audit. You cannot place your licence on hold and continue to trade while you finalise your renewal application.

If you are currently the licensed director and/or the person in *bona fide* control of an agency, expiry of your individual triennial certificate will affect the ability of the trading business to continue to operate. If your triennial certificate expires, the agency will also have to cease all activity, which includes dealing with new and existing appointments to act.

Licences already on hold

If your licence is already on hold, you must pay a holding fee before the holding period expires if you do not want your licence to expire. These holding fee payments cannot be accepted after the expiry date in any circumstances and failure to make the payment will result in the immediate expiration of your licence. Once again, we will endeavour to assist you with this requirement by sending a reminder notice approximately two months in advance of the expiry date.

The renewal forms are available on Consumer Protection's [website](#). Should you have any queries in relation to the application process, you can contact the licensing advice line on 1300 30 40 64 (option 4).

Correctly titling documents

Consumer Protection has noticed that some agents are confused by the requirements under Section 42(2)(a) of the *Settlement Agents Act 1981* (the SA Act) to identify the correct licensee details on all documents and correspondence.

Consumer Protection 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 SA 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 registered address (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
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 - Licensee
Trading as ABC Settlements
Address
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
Licensed real estate (and/or business) settlement agent



Correctly titling documents

Please note there are additional identification requirements for companies 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 refer to: www.asic.gov.au.

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

Agents are also reminded to ensure that their business name is currently registered with ASIC.

The registered business name is required to be recorded on the agent's Triennial Certificate in accordance with section 41(1)(a) of the SA Act.

Contact details

In order for your enquiry to be handled efficiently, please note the following:

- If your enquiry relates to your **licence** or licence application or the structure of your business, please contact Licensing on **1300 30 40 64, Option 2**.
- If you need to inform the Commissioner for Consumer Protection of a change to your details, please email **licensingenquiries@commerce.wa.gov.au**. Please include your licence number.
- If you have an enquiry, including any relating to a proactive visit, please contact **Proactive Compliance** on **(08) 6552-9592** or email **proactivecompliance@commerce.wa.gov.au**
- If you have a trust **account or auditing** enquiry, please call **(08) 6552-9583** or email **audits@commerce.wa.gov.au**
- If your enquiry relates to **CPD** (contact trainers directly for bookings) please call **(08) 6552-9582** 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 of Commerce (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 information about the professional indemnity insurance master policy as well as information about e-conveyancing. An e-Bulletin and publication 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 queries, please email **pinews@commerce.wa.gov.au**

Website

Consumer Protection'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 settlement agents, which covers a range of subjects including Compulsory Professional Development, proactive compliance and licensing information. The **website** also contains a wide range of application forms.

Consumer Protection 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**