



Settlement Agents NEWS

SETTLEMENT AGENTS SUPERVISORY BOARD

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Latest update: new rules on safety switches

The Electricity Amendment Regulations 2009 (the Regulations) came into force on 9 August 2009. The Regulations concern residual current devices (RCDs), otherwise known as safety switches.

The Regulations, which amend the Electricity Regulations 1947, require that from 9 August 2009 the owner of a residential premise must ensure that at least two RCDs are installed in accordance with the Wiring Rules:

- before the title to the premises is transferred; or
- before the owner enters into a residential tenancy agreement (with someone other than a person who was a tenant) in respect of the premises.

The penalties for non-compliance are:

- a) in the case of an individual – a fine of \$15,000; or
- b) in the case of a body corporate – a fine of \$100,000.

The penalty is imposed on the defaulting person or corporation.

With limited exceptions, the obligation also exists in relation to residential premises which are unoccupied.

New homes where the building construction licence was granted after 1 January 2000 already comply with these requirements.

Settlement agents need to be aware that the Joint Form of General Conditions for Sale of Land (the Joint Form) does not specifically contain provisions regarding the installation of RCDs.

Generally, buyers may not be in a position to delay settlement pending installation of RCDs by the seller unless there is a special condition in the contract relating to RCDs.

The exception is where an authority (an Inspector of which) has issued a notice under 18(2) of the Regulations which may activate 9(a) (1) of the Joint Form.

The Settlement Agents Supervisory Board is aware that some local government authorities may not be in a position to provide the building licence information to a buyer's settlement agent even where it is requested via EAS (Electronic Advice of Sale).

Acting for buyers

Settlement agents acting for a buyer should advise their client of the new requirements when they receive instructions to act. To protect the

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interest of their buyer, the seller or their representative should be asked to provide:

- evidence of the installation of two RCDs such as a receipt for installation or a written statement from an electrical contractor (in a form approved by the Director of EnergySafety) certifying that two RCDs are correctly installed in accordance with the Wiring Rules; or
- confirmation that construction started after December 2000.

While the responsibility for installation lies with the seller and it is the seller who may be liable for any penalty incurred for failure to comply, there is the possibility that sellers may refuse to install the RCDs or refuse to provide any confirmation that two RCDs have been installed at the premises.

In these circumstances settlement agents acting for the buyer should immediately inform the buyer and advise them to seek independent legal advice as to their rights and remedies. Where RCDs are required but are not or will not be in place prior

to settlement due to the electrician not being able to complete the installation, the buyer should also be advised to seek independent legal advice before settlement.

If the buyer wishes to proceed to settlement where there is no evidence/confirmation that RCDs are in place settlement agents should protect themselves by obtaining a written instruction and acknowledgment from their client stating that settlement is to proceed despite RCDs not being installed at the premises or despite the seller not providing evidence/confirmation that RCDs are in place.

The buyer may be credited the cost of installation of the RCDs at settlement or, as a last resort, funds can be retained pending installation by the seller. This however may not satisfy the requirements of the Regulations and may leave the seller in breach of the Regulations. There is also the unknown quantum of re-wiring which may need to be undertaken before RCDs can be installed.

Acting for sellers

Settlement agents acting for the seller should advise the seller of the new requirements when they receive instructions to act. It is recommended that they ask the sellers to provide:

- evidence of installation of two RCDs such as a receipt for installation or a written statement from an electrical contractor (in a form approved by the Director of EnergySafety) certifying that two RCDs are correctly installed in accordance with the Wiring Rules; or
- confirmation that construction started after December 2000.

Where RCDs are required but are not or will not be in place prior to settlement, or where the seller refuses to provide evidence or confirmation that two RCDs have been professionally installed, the settlement agent acting for the seller needs to advise the seller of the requirement of the Regulations and the penalties. The seller should be advised to seek independent legal advice before settlement.

If the seller wishes to proceed to settlement where there is no evidence/confirmation that RCDs are in place settlement agents should protect themselves by obtaining a written instruction and acknowledgment from their client stating that the client is aware of the penalties for non compliance and settlement is to proceed despite RCDs not being installed at the premises or despite the seller not providing evidence/confirmation that RCDs are in place.

The buyer may be credited the cost of installation of the RCDs at settlement or, as a last resort, funds can be retained pending installation by the seller. This however may not satisfy the requirements of the Regulations and may leave the seller in breach of the Regulations. There is also the unknown quantum of re-wiring which may need to be undertaken before RCDs can be installed.

Acting for both parties

A settlement agent acting for both the buyer and seller also needs to be aware of their obligations under rule 7 of the Settlement Agents' Code of Conduct 1982. If a seller refuses to install RCDs prior to settlement, such a position may give rise to a conflict of interest where

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the agent may have to cease to act for both parties and recommend that the parties seek legal advice.

Rule 7 states:

“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.”

Common property – strata schemes

There are also requirements for RCDs to be installed in switchboards servicing common property in strata schemes. At least one RCD must be installed in each switchboard controlling lighting and socket outlet final sub-circuits by 9 August 2011.

Exceptions to requirements

Regulations 16 and 17 allow for exceptions to the Regulations where the premises are to be demolished within certain timeframes or where the switchboard cannot accommodate two RCDs. Where the switchboard cannot accommodate two RCDs one RCD must be installed.

It is recommended that settlement agents familiarise themselves with the details of the Regulations, available on the State Law Publisher

website at www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_1357_homepage.html.

An example of a form certifying that a premise complies with the Wiring Rules is available through www.energysafety.wa.gov.au/rcd.

Further information on the requirement to fit RCDs can be obtained by visiting this website or by phoning EnergySafety WA on 9422 5200.

Changes to payment of transfer duty

The State Government has announced planned changes allowing for transfer duty to be paid as part of the settlement process, easing cash flow pressures for property buyers.

Buyers currently have to find the money for the duty themselves or try to organise a pre-release for a portion of their loan in order to produce a stamped transfer document at the time of settlement.

Treasurer Troy Buswell said the planned solution was multi-faceted, involving legislative change, significant computer system enhancements and the use of the Office of State Revenue's electronic assessment system by settlement agents.

“Significant industry consultation, including with the Australian Institute of Conveyancers (WA), has taken place on the design of the new arrangements,” he said.

Mr Buswell stated he intended to introduce legislation into State Parliament in the second half of 2009 and hoped the new arrangements would commence by the start of the 2010–11 financial year.

For further information please phone the Treasurer's office on 9222 9111.



A reminder about settling owner-built properties

The Board would like to remind agents of the legal requirements affecting the settlement of properties that are owner-built or have owner-built additions.

The Builders' Registration Board has advised that an owner-built property or renovation exceeding \$20,000 in value cannot be sold within **three** years from the date of when the building licence was issued. However, under extenuating circumstances, an owner can apply to the Commissioner for Consumer Protection seeking consent to sell earlier.

The *Home Building Contracts Act 1991* requires that an applicant is able to prove that there has been a change in circumstances and that if an application for permission to sell was refused that the person would suffer hardship.

If an application is subsequently refused and a contract of sale has already been signed by the buyer and seller, the seller may be prosecuted by the Builders' Registration Board if the property settles. A penalty of \$10,000 applies. If settlement is delayed until the Commissioner's approval is obtained and there is no special condition in the contract requiring the approval, the buyer may issue a default notice on the seller and seek penalty interest and other costs.

In addition, owner-builders who wish to sell their property within seven years of the building licence being issued must tell their real estate agent or prospective buyer that their property was built, extended or renovated by an owner-builder, and give to the buyer a valid home indemnity insurance policy covering the remainder of the seven year period.

The insurance is required to cover subsequent matters against failure to rectify faulty or unsatisfactory workmanship for the balance of the seven year period from the date of obtaining the building licence. It is not required for 'associated work' such as pergolas, fences or swimming pools.

Settlement agents finalising settlement on an owner-built property should:

- obtain proof (i.e. the policy number and name of the insurer) from the local government authority or, if necessary, from the seller, that home indemnity insurance is in place to cover the remainder of the insurance period; and
- inform the buyer 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, the settlement agent acting for the buyer should advise the buyer of this fact in writing at the earliest possible time. The buyer should also be advised to seek legal advice before settlement.

In some instances where insurance is required, but is not in place, the buyer may still wish to proceed to settlement. As the Joint Form of General Conditions does not deal with the issue of home indemnity insurance, buyers may not be in a position to delay settlement.

Settlement agents are advised to protect themselves from liability by obtaining a written statement, signed by the buyer, stating that settlement is to proceed despite the lack of home indemnity insurance.

A settlement agent acting for a seller might find that while an owner-builder licence covering the property has been issued, insurance has not been obtained as it is only obtainable when the owner-builder sells, relating to the benefit conferred on the subsequent owner. In such instances the seller should be advised to seek legal advice as home indemnity insurance is required before they can sell the property, and that they must provide the insurance certificate to the buyer. If the seller 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*.

Home indemnity insurance can be obtained by the owner-builder by contacting an approved insurance provider. A list of providers is available on the Builders' Registration Board website at www.builders.wa.gov.au.

Further information about owner-builder requirements and home indemnity insurance is available from the Builders' Registration Board website or by calling 9476 1200.



Common Proactive Compliance issues

The Board has noticed a number of recurring areas of concern in the reports of visits to settlement agencies by its Proactive Compliance Officers.

Required disclosure of interest

An agent must disclose certain types of interests (such as a business or financial relationship with a real estate agent, real estate sales representative, developer or financial institution) to a potential client **before** the appointment to act is signed. If such an interest is unknown at the time of agreeing to act for a client, then disclosure should be made as soon as practicable. A disclosure notice must be in writing in the form of Form 2 of the Schedule to the Settlement Agents' Code of Conduct 1982 (the Code of Conduct).

Appointments to act

Section 43 of the *Settlement Agents Act 1981* (the Act) requires settlement agents to have a valid appointment to act in order to be entitled to remuneration for performing services on behalf of a client. The appointment to act must contain the information prescribed in Form 1 of the Schedule to the Code of Conduct.

The appointment to act should be provided to the client as soon as possible. Once the appointment is signed by the client the settlement agent needs to accept or decline the appointment. This should be communicated to the client as soon as possible. If accepting the appointment the settlement agent should sign and return a true copy to the client.

When acting for both parties to a transaction, the appointment to act must clearly show that the clients agree to the settlement agent acting for both parties. It is the **clients, and not the agent**, who must choose whether the agent is permitted to act for both parties or just for one, and who must strike out the relevant section of the appointment to act. It would also be prudent for the clients to initial this election. The Board is aware that some agents are making the election before sending the appointment to act to their clients, and this action may result in the agent being in breach of the Act or the Code of Conduct.

An agent must also include on the appointment to act (Form 1) and on the disclosure of interest (Form 2), information identifying them as a real estate settlement agent or business settlement agent, or both, and their registered business office details. This can be easily achieved by printing the forms on correctly titled agency letterheads.

Failure to do any of the things required by section 43(2) of the Act can render the appointment to act invalid, and the agent may not be entitled to remuneration for the services they have provided to that client. This is, however, subject to section 43(5) which provides that in certain circumstances an agent may be remunerated for services rendered even if they did not have a valid appointment to act.

Further information can be found in the article titled 'Appointments to act and

required disclosures' in the *Settlement Agents News* Issue 36 (Spring 2006), available from the SASB website at www.sasb.wa.gov.au.

Accuracy of disbursements

The Board was recently made aware of an agent recouping the cost of title searches when such searches were obtained for free through an association with a real estate agency. Agents are reminded that they may only recover costs incurred, and should review the accuracy of the disbursements that they charge.

Further information can be found in the article titled, 'A reminder on calculating disbursements' in the *Settlement Agents News* Issue 35 (June 2006), available from the SASB website at www.sasb.wa.gov.au.

Document storage

It would be prudent for an agency to hold security documents in its possession (such as duplicate certificates of titles, negotiable instruments etc) in either a safe, lockable fireproof cabinet or in a safe custody packet with a financial institution. Further information can be found in the article titled 'Document Tracking and Storage' in the *Settlement Agents News* Issue 17 (December 2001).

Agents who rely on electronic documentation for general documents and files may also benefit by referring to the article 'Electronic storage of agency files' in Issue 38 (Autumn 2007). Both are available from the SASB website at www.sasb.wa.gov.au.

Addressing the order of priority on a sale

In today's financial climate some property owners are selling properties they can no longer afford but are failing to do their homework to establish the 'real cost' of selling the property. Settlement agents need to consider that in order to provide an unencumbered property at settlement a number of entitlements must be addressed.

The pay-out order on a sale includes the following:

- 1) land tax;
- 2) property rates (council and water);
- 3) amounts owing to authorities;
- 4) first mortgagee;
- 5) subsequent mortgagees;
- 6) caveators and other registered interests;
- 7) strata levies; then
- 8) all other unsecured creditors, including the seller's settlement agent and real estate agent.

The cost of selling may result in a shortfall between the sale price and the actual amount required to provide clear title to the buyer. Settlement agents should note that where there is a shortfall between the sale price and secured creditors such as the bank, the rating authorities and any other parties with a registered interest, monies payable to unsecured creditors such as the real estate agent and the settlement agent are to be used to pay the secured creditors to clear the debt. Real estate agents and settlement agents will only be paid if there are sufficient funds available once the secured creditors are paid and they have the client's consent to pay valid commissions and fees.

However, it should be noted that where a financial institution is offering a property for sale as 'mortgagee in possession', the financial institution appoints a real

estate agent to sell the property. In this instance, the real estate agent and settlement agent (or solicitor) are remunerated by the financial institution and not the registered proprietor of the property.

Early in the settlement process the seller's settlement agent should liaise with their client and the discharging mortgagee for confirmation as to the estimated amount owing on the mortgage, and all other secured creditors.

As soon as replies are received from rating authorities and estimated

payouts are received from the client or their bank, these should be incorporated into a statement which should be sent to the seller as soon as possible. At this time the seller's settlement agent should also provide a statement to the buyer's settlement agent.

Where there is a possibility that a shortfall will occur, settlement agents are advised to seek their client's confirmation that they will be in a position to pay the settlement agent's fees.

Send us your suggestions for website redevelopment

The Board is always listening to your feedback and we have heard from website users like you that it can be hard at times to navigate the current website or to find what you are looking for. The Board has therefore decided to redevelop its website.

The new website will improve accessibility to information and documents. It will be easier to navigate and will employ a more accurate and easier to use search function to assist you in finding information. Not to mention it will also have a great new look!

The Board would like to know what you look for in the website, what information or documents you access most frequently and what you think is missing from the website. This information will assist us in tailoring the new website to better meet your needs.

You can send us your thoughts, ideas or suggestions by simply emailing contactus@sasb.wa.gov.au. The Board appreciates your feedback and assistance in building an improved website.

New licence fees

New licence fees for settlement agents were implemented on 1 July 2009. The new fees were recommended after the Board conducted its annual review in accordance with the *Financial Management Act 2006* and relevant treasurer's instructions. The new fee structure is published in the Government Gazette (23 June 2009).

The table below sets out the new fee structure.

Settlement Agents Regulations 1982 Schedule 1		
Fee Structure	Old (\$)	New (\$)
Grant of licence individual	628	654
Grant of licence to firm	822	856
Grant of licence to body corporate	822	856
Renewal of triennial certificate	404	421
Fidelity Guarantee Account payment	150	150
Inspection of a register	10	10
Certificate as to an individual registration –		
• first page	20	20
• each subsequent page	2	2
Certificate as to all registrations in the register	134	140
For the purpose of section 30 (3a) (the holding fee)	190	198

What to do when Landgate goes off-line

The Board has been made aware that Landgate systems have intermittently gone 'off-line'. Agents have sought 'best practice' guidelines for this situation when trying to settle a property.

The Board recommends that a settlement agent address this issue by advising their client:

- 1) of the inability of doing a check search;
- 2) of the possible ramifications of proceeding without the check search;
- 3) of the three day period of grace as an option; and
- 4) to get independent legal advice.

Detailed notes of the conversation with the client should be recorded on the file. If the client wishes to proceed to settlement without obtaining legal advice on the ramifications of settling without a check search, the settlement agent should confirm these instructions in writing with the client as soon as possible by fax, email or post.

The written communication should state clearly that the settlement agent has advised the client of the risk; that the client has chosen not to seek legal advice on the ramifications and wishes the settlement agent to proceed to settlement on this basis. It is the buyer and/or their bank that makes the final decision to take the risk of proceeding to settlement without a check search.

Renewal applications now lodged at Australia Post

The Board has introduced important changes to the process for lodging triennial certificate renewal and licence on hold applications.

These changes mean that all renewal or licence on hold applications will be required to be lodged at Australia Post. The three month transition period permitting applicants to either lodge the revised form at Australia Post, or lodge a paper form via post or in person to the Settlement Agents Supervisory Board started in mid-September 2009. **However from 1 December 2009, renewal or licence on hold applications will**

only be accepted by lodgement at Australia Post.

Australia Post will only accept lodgement of **complete** applications. Therefore, applicants must ensure that their application contains all the required attachments and information to enable their application to be assessed. An incomplete application will be rejected at the Australia Post counter.

The revised renewal forms can be downloaded from the Board's website at www.sasb.wa.gov.au. Agents will also be advised of the new process in their renewal reminder notice. If you have any questions about the process for lodgement at Australia Post, contact the Board's licensing staff on 9282 0844, or through the Real Estate and Settlement Advice Line on 1300 30 40 64 for the cost of a local call statewide 8.30am – 5.00pm weekdays.



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 Registrar of the Settlement Agents Supervisory Board, 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.

THIS PUBLICATION WAS ISSUED BY THE SETTLEMENT AGENTS SUPERVISORY BOARD.

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