



Government of **Western Australia**
Department of **Commerce**
Consumer Protection

DUTIES OF SETTLEMENT AGENTS

*Legislative functions and
job and person requirements*

**Distance Learning
Student Manual**

Acknowledgment

This educational material was prepared by the Australian Institute of Conveyancers Western Australia (AICWA) and Tom Morris for the Consumer Protection Division of the Department of Commerce (the Department). It has been developed to satisfy the prescribed educational activity requirements of the Compulsory Professional Development Program (CPD) for Settlement Agents.

This material should not be taken to be legal advice or to pre-empt government policy.

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1. Introduction

The purpose of this distance learning unit is to examine and clarify the duties of real estate settlement agents as prescribed in legislation administered by the Department of Commerce.

The unit provides for the translation of the three layers of legislation under which settlement agents operate into a statement of the *Job and Person Requirements of Settlement Agents* and unlicensed staff.

A key aspect of this exploration is the recognition that all staff must abide by a prescribed *Code of Conduct*. In particular, it is suggested that the 'supervision and control' duties have implications for all Settlement Agents, not only the person in *bona fide* control.

The material also provides for the clarification of a range of terms as they are used in the legislation. This includes clarifying who can call themselves a settlement agent, who or what is a licensee, and what if anything is the difference between the manager and the person in *bona fide* control.

The legislative definition and use of terms like licensee and settlement agent is currently being reviewed (submissions closed on 28 June 2013). The following material has adopted the convention of capitalising the phrase 'Settlement Agent' to indicate that this phrase is being used in a particular way. The definition is based on an interpretation of the legislation that is explained below, in section 2.1. This terminology was found to be useful for the current purpose but should not be seen to pre-empt the outcomes of the review by the Department of Commerce.

Structure of the unit

The unit commences with a look at the three layers of legislation that define the duties and responsibilities of Settlement Agents: the *Settlement Agents 1981* (the SA Act), the *Settlement Agents Regulations 1982* (the Regulations) and the *Settlement Agents Code of Conduct 1982* (the Code of Conduct).

It is also noted that the Code of Conduct almost exclusively refers to the responsibilities of the licensee. This leads to a discussion of who, or what, is meant by the term 'licensee'.

A distinction is drawn between the role of Settlement Agents as the manager in *bona fide* control and Settlement Agents as licensed conveyancers. This distinction is explored in some detail using a draft statement of the *Job and Person Requirements* of Settlement Agents derived from the Schedule 2 of the SA Act and the Code of Conduct.

The session wraps up with a discussion of the duties of Settlement Agents in respect to recommending legal advice; acting expeditiously; and the disclosure of pertinent facts.

Activity 1 - Orientation

The material in this Student Manual and the Assessment Submission document have been specifically modified for Settlement Agents undertaking their CPD by distance learning. The intention is that you read through the manual and complete each of the activities as you proceed.

Having read Section one it is highly recommended that before you attempt Activity 1 in your Assessment Submission that you skim read the rest of the Student Manual (at least flick through the pages and read the headings and have a look at the diagrams). This will orientate you to the material and the task ahead of you.

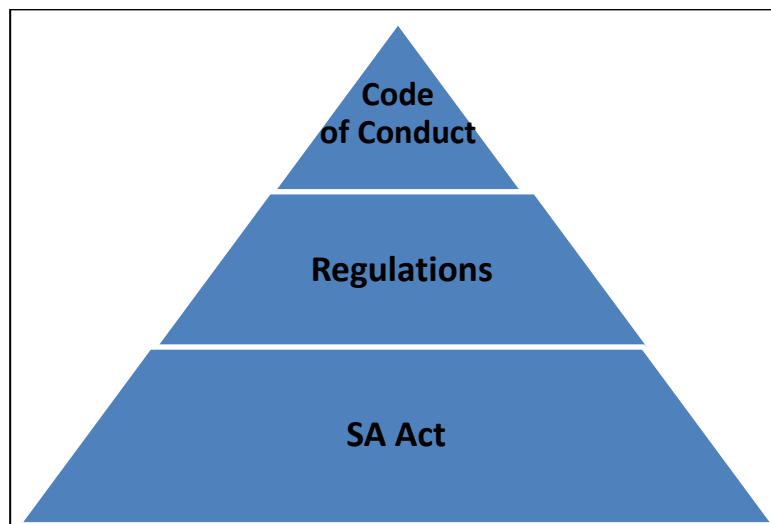
All the best... and please note that Activity 11 is for you to provide feedback to us on your distance learning experience, the material in this manual and the assessment, we are keen to hear back from you.

2. Legislative Requirements

This session is concerned with the functions and duties of Settlement Agents. The first thing we need to do is ensure that we have an agreed understanding of what we mean by Settlement Agent and where these duties are prescribed.

The duties of Settlement Agents are prescribed in three layers of legislation. The first layer is the SA Act. This layer is the most fundamental and provides the foundation on which the other two layers have been built. On top of the SA Act sit the Regulations, and on top of them the Code of Conduct.

Diagram: The legislative layers



2.1. The Settlement Agents Act 1981

The SA Act commenced on 1 July 1981. After this date, the legal use of the term Settlement Agent was restricted to licensed persons holding a current triennial certificate.

It is actually an offence, punishable by a fine of up to \$20,000, to call yourself a 'Settlement Agent' if you are not licensed and hold a current triennial certificate.

26. Settlement agents must be licensed

(1) On and after the appointed day a person shall not carry on business, or by any means hold himself or itself out, as a real estate settlement agent, or a business settlement agent, or both a real estate settlement agent and a business settlement agent, unless he or it is licensed as such under this Act and holds a current triennial certificate in respect of the licence.

Penalty: \$20 000.

Settlement Agents Act 1981, Version 06-f0-00.

The SA Act includes a large number of definitions and prescriptions about what Settlement Agents can and can not do. It is written with legal language and covers all manner of things from licensing and trust accounts, to the fidelity guarantee, and education and discipline matters.

Schedule 2 of the SA Act is of particular interest in the current context because it sets out the *Functions of a Settlement Agent*. (See Appendix 1.) You will notice that it is quite wordy and not easy to read. The essence of Schedule 2 is to set out the conveyancing functions of Settlement Agents.

2.2. Settlement Agents Regulations 1982

The Regulations sit on top of the SA Act and provide more of the day to day and operational detail. The Regulations include, for example, fee schedules and a list of the subjects that may be included in the compulsory professional development program.

More information - CPD Regulations

The Department of Commerce's authority to prescribe educational requirements is established in section 31(2a) of the SA Act. However, it is the Regulations (sections 4B and 4C) that provide the detailed guidance. Schedule 1A of the *Regulations* presents a list of the eighteen (18) subject areas the Department may draw the Compulsory Professional Development (CPD) activities from (see Appendix 2).

Unlike the SA Act, additions and changes to the Regulations do not need to go through Parliament. Regulations can be made and changed by the 'Governor'. The Governor, as the SA Act explains, may make such regulations as they consider necessary in support of the purposes of the SA Act (Section 123). The Regulations nevertheless have the full status of Western Australian law.

More information – the governor

The current governor of Western Australia is Her Excellency Kerry Anderson AO. The Governor is the chair of the Executive Council, a committee comprised of all Cabinet Ministers. The Executive Council is the supreme decision-making body of government. The Council advises the Governor on matters relating to the government of the State and can give legal form to Cabinet decisions (in the form of Regulations) which otherwise would have no legal status.

The SA Act, the Regulations and the Code of Conduct may be downloaded for free from the Government of Western Australia: State Law Publisher. Remember to make sure you check that you have access to the latest version. You can also do an internet search of 'settlement agents' amendment regulations' to find out what has been added or changed.

More information – the Regulations and recent changes

The Regulations are largely administrative in nature but the implications for a Settlement Agent may still be significant. Interestingly, although the introduction of electronic conveyancing has resulted in amendments to the SA Act and the Code of Conduct, to date there have not been any changes to the regulations.

Recent changes include:

- Notice 2013 which sets out the fees that may be charged by settlement agents, effective from October 2013.
- The fees the Department of Commerce charge for Triennial applications and renewal as per Schedule 1 of the Regulations were amended and came into effect July 2013.
- A reference to the withdrawal of a 'memorial under the *Water Services Act 2012*' was amended in 2013.
- Schedule 6 Form 1 was amended in relation to the *Fines, Penalties and Infringement Notices Enforcement Act 1994*. To add to the existing penalty options the suspension of driver's licence and/or vehicle licence, vehicle immobilisation, number plate removal, and the seizure or sale of property.

2.3. Settlement Agents Code of Conduct 1982

At the top of the pyramid, and the most significant for the day to day duties of Settlement Agents is the Code of Conduct.

Rule 4 of the Code of Conduct says that at all times the licensee must have a complete knowledge of the Act, the Regulations and the Code of Conduct. Rule 20 goes on to state that a lack of knowledge of the rules is not an excuse for a settlement agent or any employee.

Knowledge of the Act, Regulations and the Code - Code of Conduct, Rule 4

A licensee shall ensure that he has at all times a complete knowledge of the SA Act, the regulations thereunder and this Code of Conduct as amended from time to time and the duties and obligations imposed upon him by the SA Act, the Regulations and the Code of Conduct and shall duly comply with all requirements thereof.



You may have noticed in the above rule the reference to the licensee. The current Code of Conduct almost exclusively refers to the requirements and duties of the licensee. Despite this continual reference to the licensee, the Code of Conduct has real and important implications for all Settlement Agents, not just the licensee.

There is a notable exception in the Code of Conduct to the responsibilities of licensees. In Rule 20, the reference is to the responsibilities of Settlement Agents and all their employees to be aware of and observe the Code of Conduct.

Rule 20 makes the very important point that all Settlement Agents and – all employees – need to observe the Code of Conduct. And furthermore, that a lack of knowledge of the Code of Conduct is not an acceptable excuse for non-compliance.

Ignorance no excuse - Code of Conduct, Rule 20.

Neither a settlement agent nor any of his employees shall be excused for nonobservance of the terms of this Code by reason of any claimed ignorance of the terms of the Code.

When Rule 20 is read together with all the rules in the Code of Conduct, it is evident that the licensee is responsible for making sure every employee understands and abides by the Code of Conduct. Clearly this is an important and significant responsibility.

In the next section, we will clarify the meaning of the term licensee, and person in *bona fide* control so as to be able to move towards clarifying the supervision and control responsibilities of Settlement Agents.

Activity 2 – Legislative Requirements

This activity includes three questions about the three layers of legislation that are relevant to you as a Settlement Agent.

3. The Licensee

To ensure we are on the same page it is important that we clarify the meaning of three terms: settlement agent, licensee, and the person in *bona fide* control. While these terms are related and may in some business structures refer to one and the same person, this is not necessarily always the case.

A practical way to come to grips with the differences is to reflect on the Triennial Certificate application and renewal requirements. There are three types of Triennial Certificates for Real Estate Settlement Agents:

1. Firm/Partnership;
2. Body Corporate; and
3. Individual.

Firm/Partnership or Body Corporate

If the business is constituted either as a firm/partnership or as a body corporate, then the licensee is actually the firm/partnership or body corporate, not an individual. (The licensing requirements for firms and body corporates, as set out in Clauses 28 and 29 of the SA Act, are reproduced in Appendix 4 at the back of this manual.)

It is not necessary for all of the partners or directors of the firm/partnership or body corporate to be licensed Settlement Agents. However, the SA Act, the Regulations and the Code of Conduct, all make it clear that a 'natural person' must be nominated as the person in *bona fide* control of the business. This person must be an individually licensed Settlement Agent.

The 'person in *bona fide* control' translates from the Latin to mean the person who acts in 'good faith' (Collins dictionary, 2003). The person in *bona fide* control of a settlement agency is simply acting in 'good faith' on behalf of the licensee. It may now be seen that all of the rules that apply to the licensee apply to the Settlement Agent who is in *bona fide* control.

The SA Act, the Regulations and the Code of Conduct all require that this person 'give substantial attendance at the office of the business' so as to exercise the required control of the business and supervision of staff. (The attendance requirements of the person in *bona fide* control are outlined in Rule 13 of the Code of Conduct and are discussed below in section 6.2.)

Another interesting point is that the person in *bona fide* control may be a partner or director of the firm or body corporate, but this is not a requirement. The *Settlement Agent* in *bona fide* control may be an employee of the firm or body corporate. The person in *bona fide* control must, however, be specified on the Triennial Certificate of the licensed entity.

More information – composition of firms and body corporates

Sections 28 and 29 of the SA Act include rules on the composition of the licensee firm or body corporate. If the firm or body corporate is comprised of three partners/directors or less, at least one of these individuals must be a currently licensed Settlement Agent. For larger firms and body corporates, at least two of the partners or directors must be currently licensed Settlement Agents.

Individual

The individual Triennial Certificate is what confers the status of Settlement Agent on 'natural persons' under the SA Act. (The licensing requirements for individuals, as set out in Clause 27 of the SA Act, are reproduced in Appendix 3 at the back of this manual.)

If the individual Settlement Agent is operating a business as a **sole trader**, then by definition they are the 'licensee' of the business and the person in *bona fide* control.

In summary

While the licensee may be an individual person, or a firm, partnership or corporation, a currently licensed individual must always be nominated as the manager in bona fide control.

Activity 3 – The Licensee

Activity three includes five statements that you are required to determine whether they are True or False.

4. Managers and Conveyancers

The preceding discussion has explored the distinction that may exist between the licensee of a settlement agency and the Settlement Agent in *bona fide* control. Having clarified the distinctions and some of the complexities around the use of the term licensee, it is now possible to move to a simple dichotomy.

For most purposes, it is sufficient to distinguish two categories of Settlement Agents: managers and conveyancers. Remember to be called a Settlement Agent you must hold a current individual Triennial Certificate, so this is assumed to be the case for both the manager and conveyancer roles.

4.1. Managers.

Settlement Agent - Managers are the individually licensed person in *bona fide* control of the business.

This person is the licensee in the case of a sole trader, or where the licensee is a firm or body corporate the person in *bona fide* control may be a partner/director of an employee.

As a sole trader, the licensee is by definition an individual Settlement Agent and person in *bona fide* control. In this situation, the licensee is the manager in *bona fide* control.

In the case where a firm or body corporate is the 'licensee' the **manager** may be either:

- (a) a partner or a director of the firm/ body corporate; or
- (b) they may be an employee of the firm/body corporate.

Most people working in the settlement industry will be aware of the importance and status attributed to the person in *bona fide* control. However, it is not a term that runs as easily off the tongue as manager. (For example: "she is the manager" versus "she is the *bona fide* in control".)

The term manager is relatively clear and straight forward. It indicates that this is the person responsible for control of the business and the supervision of staff. There is no situation where the person in *bona fide* control can delegate the management role to another person. However, what a clever manager will do, where ever they can, is to engage the appropriate support of the team in meeting their supervision and control responsibilities.

The processes that can be used to provide for appropriate delegation and appropriate performance management rests to a significant extent on a clear definition of duties and job roles. This issue is explored in more detail in the second CPD unit for 2015: Performance



planning for Settlement Agents. A key purpose of the current session is to establish the basis for defining job roles and duties in the form of *Job and Person Requirements*. This is explored in some detail below.

4.2. Settlement Agent - Conveyancers

Settlement Agent - Conveyancers are individually licensed persons employed as conveyancers, but are not the person in *bona fide* control. However, as demonstrated in the discussion in section 2.3 above, Rule 20 in the *Code of Conduct* makes it clear that all employees need to observe the *Code of Conduct*, and that a lack of knowledge of the *Code of Conduct* is not an acceptable excuse for non-compliance.

All individually licensed Settlement Agents may be seen to have even less opportunity to use lack of knowledge as an excuse for non-compliance with the *Code of Conduct*. It may be seen that all Settlement Agents have qualification and Compulsory Professional Development (CPD) requirements that reinforce their responsibilities to understand and follow the rules established in the SA Act, the Regulations and the Code of Conduct.

A special case - Director/Partner only Settlement Agents

An interesting third category of Settlement Agent may exist in some businesses.

The Department's individual Triennial Certificate application forms indicate that Settlement Agents applying for their individual licence may be one, or a combination, of four options: person in *bona fide* control; branch manager; director; and conveyancer/employee.

This draws attention to the fact that there is a category of Settlement Agent that is an individually licensed director (partner) in a business; but they are not in *bona fide* control, they are not a branch manager; and are not a conveyancer/employee.

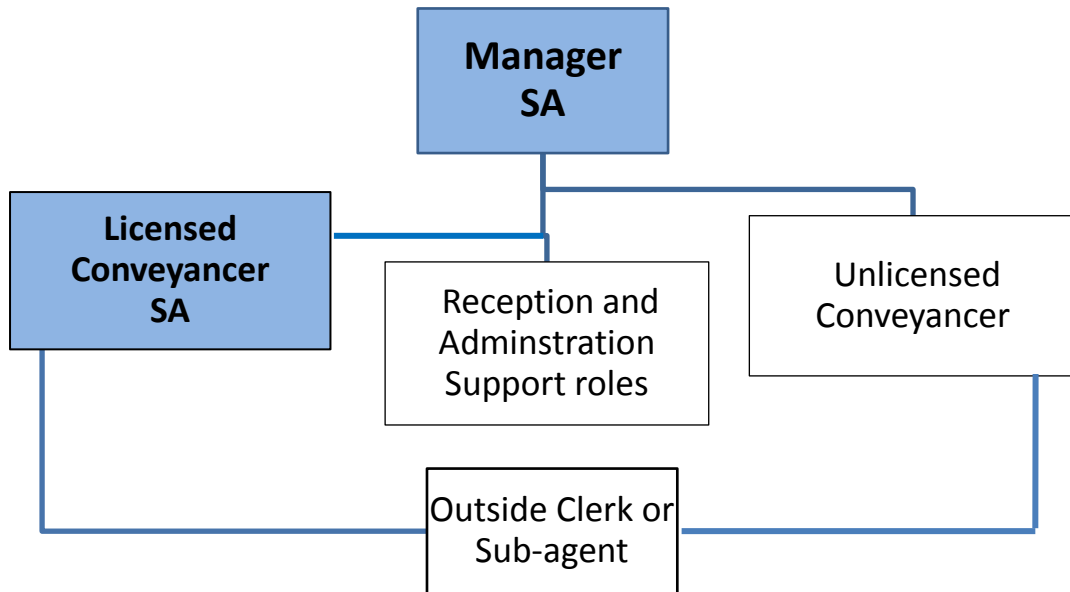
These persons may be a partner or director of a firm or body corporate in which another partner or director, or indeed an employee, is the nominated person in *bona fide* control. (Note: this person may be actively involved in other aspects of the business and has responsibilities in corporate law as a director.)

In summary

All staff have a responsibility to understand and comply with the Code of Conduct. Settlement Agent - Conveyancers have a greater level of responsibility by virtue of their education and training. The Settlement Agent – Manager has responsibility for supervising all employees to ensure they have the appropriate knowledge of the Code of Conduct and comply with its rules.

The following diagram presents a simplified job role structure for a typical five or six person settlement agency. The lines indicate the reporting relationships. This diagram shows licensed and unlicensed conveyancers and reception/administration support roles reporting directly to the Manager. The diagram indicates that the reporting relationship for the outside clerk or sub-agent (for regional and remote agencies) is to the licensed and unlicensed conveyancers.

A simple job role and reporting structure for you to modify to suit your agency...



Activity 4 – Job roles in your agency

Activity four asks you to consider the simple job role and reporting structure presented above and answer three questions about the roles and reporting relationships.

5. Job and Person Requirements

The purpose of the following section and activities are to look in more detail at the job roles of Settlement Agents as managers and conveyancers; and to have a look at the job role of unlicensed conveyancers.

At the very back of this manual, you will find a generic *Job and Person Requirements* draft. This draft document is presented for discussion – it does not have any legal standing other than what you might give it. If you adopt any part of it in your agency, it is recommended that you seek legal advice if you, or other staff, have any concerns about what it might mean for their job role and responsibilities.

The value of developing a *Job and Person Requirements* document for all employees in your agency is that it provides the basis for supervision and control and the performance planning process (that will be explored in the second CPD unit for 2015).

The *Job and Person Requirements* have been drafted from Schedule 2 of the SA Act and the *Code of Conduct*. They are, therefore, a sound starting point for monitoring and reviewing your own performance and the performance of all employees.

The duties have been grouped into three broad functions to make them easier to digest and work with. The three groups of duties are:

1. conveyancing functions;
2. business practice and financial responsibilities; and
3. leadership and professional development.

Each of these three groups of responsibilities is discussed below as the basis for Activity 7, and analysis of the job roles and duties of (1) Settlement Agent - Managers; (2) Settlement Agent - Conveyancers; and (3) unlicensed conveyancers.

5.1. The Conveyancing Functions

As mentioned above, Schedule 2 of the SA Act sets out the 'functions of a real estate settlement agent' or more put simply, the *Conveyancing Functions* of Settlement Agents. As you can see, Schedule 2 is written in the legal language of most legislation. (See Appendix 1 at the back of this manual.)

The Conveyancing Functions in the draft *Job and Person Requirements* were extracted from Schedule 2 of the SA Act with the addition of the phrases 'promptly' and 'as soon as practicable' to embrace Rule 18 of the Code of Conduct, requiring work to be done quickly and well. (It is hoped you will find the language in the duties statements easier to work with than the language of legislation.)

You may be aware that Schedule 2 in the SA Act and the Code of Conduct were recently modified to make way for some significant changes to the duties of Settlement Agents. The following activity explores the nature and reason for these changes.

Activity 6 – recent amendments to Schedule 2

Turn to Schedule 2 from the SA Act in Appendix 1 at the back of this Student Manual and identify the amended sections. Then answer the two questions in Activity 6 in your Assessment Submission workbook.

5.2. Supervision and Control of Employees

In addition to the conveyancing responsibilities of Settlement Agents, licensed Settlement Agents, particularly those in management, and senior positions have a broad range of supervision and control responsibilities.

More information – attendance requirements

The Regulations (regulation 14) state that the person in *bona fide* control shall not, without the prior approval in writing of the Commissioner, absent himself from that business for more than 4 continuous weeks in any one calendar year.



The Settlement Agent - Manager as the person in *bona fide* control is at 'all times' responsible for the actions of employees. And may not be absent from this role for more than four weeks in a row without the Commissioner's specific approval.

Supervision and control of employees Code of Conduct, Rule 13.

A licensee shall be responsible for the supervision and control of the work of unlicensed persons engaged in assisting in the conduct of his business, and for that purpose —

- (a) where the licensee of the business is a natural person —
 - (i) he shall give substantial attendance at his registered office and shall ensure that the managers of all branch offices of the business respectively give substantial attendance at the respective branch offices; and
 - (ii) the manager of a branch office of the business shall give substantial attendance at that office; and
- (b) where the licensee of the business is a firm or a body corporate —
 - (i) the partners of the firm or the directors of the body corporate, as the case requires, shall ensure that the person in *bona fide* control of the business gives substantial attendance at the registered office of the business;
 - (ii) the person in *bona fide* control of the business shall give substantial attendance at the registered office of the business;
the partners of the firm or the directors of the body corporate, as the case requires, and the person in *bona fide* control of the business shall ensure that the managers of all branch offices of the business respectively give substantial attendance at the respective branch offices; and
 - (iv) the manager of a branch office of the business shall give substantial attendance at that office.

While the above rule appears to narrow the supervision responsibilities of the person in *bona fide* control to unlicensed employees, Rule 17 makes it clear that the licensee is at all times responsible for the actions of all employees in all matters. It does not get more all embracing than that!

Licensee responsible for employees Code of Conduct, Rule 17.

A licensee is at all times responsible for his actions, and those of his employees in business relations with other settlement agents, solicitors, clients and the public.

Nevertheless, the reference to 'unlicensed persons' in rule 13 is interesting. It may be seen to draw attention to the more direct supervision and control responsibilities that exist with respect to unlicensed persons. The important point is that this rule reflects what we all would assume – it does not make sense to supervise all employees in the same way. The idea of clearly stated and agreed *Job and Person Requirements* is to develop appropriate supervision, control and delegation practices.

Supervision and control responsibilities may be seen to have two dimensions: ‘business practices and financial responsibilities’ and ‘leadership and professional development’.

Business practice and financial responsibilities

The business practice and financial responsibilities of Settlement Agents are essentially derived straight from the *Code of Conduct*.

The duties outline responsibilities in relation to how things are done and what constitutes appropriate behaviour. It picks up the rules in relation to behaving in good faith and with the client’s interests uppermost, and sets out the requirements for confidentiality, expedience, honesty and full disclosure.

Leadership and Professional Development

The third cluster of duties addresses the leadership and professional development responsibilities outlined in the Code of Conduct, and the Regulations and the SA Act.

In section 2.3 above, it is noted that the Code of Conduct requires the licensee to have a ‘complete knowledge’ of the SA Act, the Regulations and the Code of Conduct. Ignorance is not an excuse for non-observance of the Code of Conduct by the ‘settlement agent’ or any employee (Rule 20).

In 2011, the *Code of Conduct* was amended to reinforce the leadership and professional development responsibilities of settlement agents. Rule 18 was amended to add in a reference to ‘use due care and skill’ and the requirement to make all ‘reasonable efforts to complete the work for the client as soon as is reasonably practicable.’

Work to be done quickly and well – Code of Conduct, Rule 18

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.

The requirements of Settlement Agents to exercise leadership and undertake professional development is embedded as prescribed educational requirements in the SA Act, and as a list of professional development subjects in the *Regulations* (see Appendix 2 at the back of this manual).

The SA Act, the Regulations, and the Code of Conduct set out the functions and duties of Settlement Agents. The following section explores the value of translating these requirements into clearly documented and agreed *Job and Personal Requirements*.

Activity 7 – Analysing functions and duties

This activity explores a draft Job and Person Requirements description for the Settlement Agents to see if it is useful and in what manner these functions and duties might apply to other job roles.



6. Case studies – translating legislation into practice

In the following three sections, we will look at the practical task of translating legislation into everyday practice. The purpose of these exercises is to model the process that can be used to unpack the legislative requirements and review the documented Job and Person Requirements.

6.1. Recommending legal advice

The Code of Conduct (Rule 11) explains that Settlement Agents should recommend their clients to seek legal advice when necessary or prudent to do so.

Recommending legal advice – Code of Conduct, Rule 11

Whenever it is necessary or prudent to do so, a licensee shall recommend to his client that the client seek the advice of a solicitor in respect of the transaction or any aspect thereof.

What are the main situations when it is necessary or prudent to advise a client to seek legal

Activity 8 – Recommending legal advice

This activity explores the nature and specific rules that relate to recommending legal advice, and then asks you to look at the draft Job and Person Requirements document to determine where this requirement is addressed.

6.2. Requirement to act expeditiously

Rule 18 of the Code of Conduct was amended in 2011. The title of the rule was amended to replace the word ‘expeditiously’ with the phrase ‘quickly and well’. The phrase ‘due care and skill’ was added.

Work to be done quickly and well

A licensee shall make all reasonable efforts to complete work for the client as soon as is reasonably practicable and shall use all due care and skill.

Another way the Code of Conduct pushes expedience is to include the phrase ‘as soon as practicable’ or ‘as soon as reasonably possible’ in the rule.

Activity 9 – Requirement to act expeditiously

This activity explores the nature and specific rules that relate to the requirement to act expeditiously, and then asks you to look at the draft Job and Person Requirements document to determine where this requirement is addressed.

6.3. Requirement to disclose pertinent facts

Settlement Agents have a professional responsibility to ensure that all pertinent facts are disclosed to the client.

Client to be fully informed – Code of Conduct, Rule 16.

A licensee shall ascertain and communicate to his client (when requested by the client or when it is necessary or prudent to do so), all available pertinent facts concerning any service or transaction he undertakes as a settlement agent so that in providing the service and handling the transaction he will avoid error, deception or mis-representation.

To assist you to think about the relevant, pertinent facts it is useful to think about the following four aspects of the settlement process and what needs to be communicated to the client. Please feel free to consult friends and colleagues to assist you in answering completing activity 10.

The four aspects of the settlement process to consider in relation to the disclosure of pertinent facts include facts that:

- arise from and examination of the dates and conditions in the Offer and Acceptance contract;
- are revealed by searches, orders and requisitions;
- arise from legislative requirements related to properties and buildings – particularly recent changes; and
- may include some 'optional extras' that it might be prudent to bring to the clients attention and provide information about.

Activity 10 – Requirement to disclose pertinent facts

This activity explores the nature and specific rules that relate to the requirement to disclose pertinent facts and then asks you to look at the draft Job and Person Requirements document to determine where this requirement is addressed.

7. Wrapping up

The legislation that prescribes the duties of Settlement Agents has three layers, the SA act, the Regulations and the Code of Conduct.

Two things are quite clear from the legislation:

1. every settlement agency must have a manager who is in *bona fide* control and provides for the supervision and control of all employees (Code of Conduct, Rules 13 and 17); and
2. all employees must understand and observe the Code of Conduct rules – lack of knowledge is not an excuse for non-compliance (Rule 20).

It is not sufficient for each member of staff to be handed a Code of Conduct and told to make sure they follow the rules.

The requirement is that the Settlement Agent - Manager provides effective supervision and control of all staff. A critical first step in this process is to ensure that each member of staff is aware of their duties and responsibilities.

It has been demonstrated that documented *Job and Person Requirements* provide a useful framework for the communication and agreement of job roles and duties. Well-constructed and agreed *Job and Person Requirements* clarify expectations and Code of Conduct responsibilities.

The session concluded with a review of the duties of Settlement Agents to recommend legal advice, act expeditiously and disclose pertinent facts.

In the second session of the 2015 CPD, the *draft Job and Person Requirements* used in this session will be used to explore performance planning. Session Two outlines a simple and effective process for using documented *Job and Person Requirements* in the supervision and control of staff.

Activity 11 – Wrapping up

This activity simple asks you to reflect on the material and activities covered in this unit and list at least three key ideas that this material has reinforced or brought to your attention.

You might also like to include some comments on whether the issues and ideas raised are relevant, useful and met your expectations.

8. References

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Appendix 1 – Functions of a Settlement Agent

Settlement Agents Act 1981, Version 06-f0-00, as at 3 June 2014.

The underlined clauses in the extract below have been added to indicate the recent amendments to address the move to electronic conveyancing – they are not underlined in the Act.

Schedule 2 — Functions of a settlement agent

1 Real estate settlement agent

(1A) A word or expression that is defined in the *Electronic Conveyancing Act 2014* section 3 has the same meaning in subclause (2A) as it has in that section.

- (1) A licensee who holds a real estate settlement agent's licence and a current triennial certificate may perform the following functions —
- (a) searching land titles and dealings in the records of the Western Australian Land Information Authority established by the *Land Information Authority Act 2006* section 5 (the **Authority**) and searching for caveats against any of those dealings;
 - (b) searching and inquiring at other Government offices and at the offices of statutory authorities and local governments, and obtaining certificates therefrom, in respect of records, plans and policies and making inquiries with respect to adjustment of rates, taxes and other outgoings of a periodical nature in respect of the real estate the subject of the transaction involved in a settlement;
 - (c) preparing a settlement statement and an authority for the payment or receipt of moneys in respect of the transaction involved in a settlement;
 - (d) arranging the payment of duty imposed under the *Duties Act 2008*, and any other imposts or fees on documents in respect of the real estate transaction;
 - (e) arranging and attending on settlement, including exchanging documents and receiving and disbursing moneys to effect the settlement;
 - (f) lodging documents in respect of the real estate transaction with the Authority or other Government offices or the offices of statutory authorities for registration;
 - (ga) providing certifications required in respect of the lodging of documents to which paragraph (f) applies;
 - (g) uplifting such documents from the Authority or other Government offices or the offices of statutory authorities;
 - (h) completing powers of attorney in such form and subject to such conditions as are prescribed;
 - (i) subject to any conditions imposed by the code of conduct, drawing or preparing and arranging the execution of the documents set forth in subclause (2);

- (j) reporting on the progress of the settlement to the party to the transaction by whom the licensee was appointed to arrange or effect the settlement.

(2A) A licensee who holds a real estate settlement agent's licence and a current triennial certificate may perform any function necessary to enable a conveyancing transaction to be completed by means of an ELN, including (without limitation) the following functions —

- (a) entering into a client authorisation to act as a subscriber;
- (b) with respect to registry instruments and other documents that a licensee is authorised by this Act to prepare —
 - (i) preparing them in electronic form for lodging by means of an ELN;
 - (ii) digitally signing them;
 - (iii) lodging them in electronic form with the Authority or other Government offices or the offices of statutory authorities by means of an ELN;
 - (iv) providing certifications required in respect of, or in connection with, the lodging of those registry instruments or other documents by means of an ELN;
- (c) doing anything necessary to enable the completion of an associated financial transaction.

- (2) A licensee who holds a real estate settlement agent's licence and a current triennial certificate may draw or prepare the following documents —
- (a) an offer and acceptance form in such form and subject to such conditions as are prescribed;
 - (b) requisitions on title in such form and subject to such conditions as are prescribed;
 - (c) such documents that are to be registered or lodged under or for the purposes of the —
 - (i) *Land Act 1933*⁵; or
 - (ii) *Registration of Deeds Act 1856*; or
 - (iii) *Strata Titles Act 1985*; or
 - (iv) *Transfer of Land Act 1893*,as are prescribed and subject to such conditions as are prescribed;
 - (d) a statutory declaration to support any of the documents that are referred to in paragraphs (a) and (b) or that are prescribed under paragraph (c);
 - (e) a declaration to confirm that a power of attorney remains unrevoked.



Appendix 2 – Prescribed Professional Development

Settlement Agents Regulations 1982, Version 06-c0-00, as at 1 July 2014.

The following is the list of the subject areas in respect to which the educational activities approved for the core and elective Compulsory Professional Development (CPD) activities are prescribed each year for Settlement Agents.

Schedule 1A — Professional development subjects

1. Joint Form of General Conditions
2. Conflicts of interest and disclosures
3. Reconciliation of trust accounts
4. Risk management — Professional indemnity insurance claims
5. Business management practices
6. Communication
7. Customer service skills
8. Disciplinary proceedings
9. Law of contract
10. Managing agency risk
11. Legislation regulating the carrying on of business as a settlement agent in Western Australia
12. Settlement of commercial property
13. Strata title settlements
14. Understanding real estate and settlement documents
15. Valid appointment to act
16. Office of State Revenue rulings and practices
17. Landgate practices and procedures
18. Legislative change affecting conveyancing

Appendix 3 – Licencing of Natural Persons

Settlement Agents Act 1981, Version 06-f0-00, as at 3 June 2014.

27. Natural persons, licencing of

- (1) Subject to this Act, a person, not being a body corporate, who applies to the Commissioner for a real estate settlement agent's licence or a business settlement agent's licence, or both, and pays to the Commissioner the prescribed fee for the licence shall be granted and may hold a licence if the Commissioner is satisfied that —
 - (a) he is of or over the age of 18 years; and
 - (b) he is a person of good character and repute and a fit and proper person to hold a licence; and
 - (c) he has sufficient material and financial resources available to him to enable him to comply with the requirements of this Act; and
 - (d) he is ordinarily resident in the State; and
 - (e) he understands fully the duties and obligations imposed by this Act on settlement agents.
- (2) In subsection (1)(b) **fit and proper** includes being qualified in accordance with Schedule 1 to this Act subject to the savings and exceptions provided therein and elsewhere in this Act, but nothing in that Schedule shall derogate from the discretion conferred on the Commissioner by subsection (1) in the granting of a licence.

Appendix 4 – Licencing of Firms and Body Corporates

Settlement Agents Act 1981, Version 06-f0-00, as at 3 June 2014.

28. Firms, licencing of

- (1) Subject to this Act, 2 or more persons constituting a firm who apply to the Commissioner for a real estate settlement agent's licence or a business settlement agent's licence, or both, and pay to the Commissioner the prescribed fee for the licence shall be granted and may hold a licence if the Commissioner is satisfied that —
 - (a) all of the natural persons, if any, by whom the firm is constituted and all of the directors of, and all of the persons concerned in the management or control of, any body corporate by which the firm is constituted are persons of good character and repute and are persons fit to be concerned as directors of, or in the management and control of, a settlement agent's business; and
 - (b) the persons by whom or by which the firm is constituted have sufficient material and financial resources available to them to enable them to comply with the requirements of this Act; and
 - (c) where the firm is constituted by not more than 3 persons, at least one of them is licensed or where the firm is constituted by more than 3 persons at least 2 of them are licensed; and

- (d) the person in bona fide control of the business operated under the licence is —
 - (i) in the case of an application for a real estate settlement agent's licence, licensed as a real estate settlement agent and holds a current triennial certificate; and
 - (ii) in the case of an application for a business settlement agent's licence, licensed as a business settlement agent and holds a current triennial certificate; and
 - (iii) ordinarily resident in the State.
- (2) The provisions of clause 10 of Schedule 1 apply to a licence granted under this section.

29. Bodies corporate, licensing of

- (1) Subject to this Act, a body corporate which applies to the Commissioner for a real estate settlement agent's licence or a business settlement agent's licence, or both, and pays to the Commissioner the prescribed fee for the licence shall be granted and may hold a licence if the Commissioner is satisfied that —
 - (a) all of the directors of the body corporate, and all of the persons concerned in the management or conduct of the body corporate, are persons of good character and repute and are persons fit to be concerned as directors of, or in the management and control of, a settlement agent's business; and
 - (b) it has sufficient material and financial resources available to it to comply with the requirements of this Act; and
 - (c) unless for good cause shown by the applicant the Commissioner otherwise determines, where there are not more than 3 directors of the body corporate at least one of them is licensed where there are more than 3 directors of the body corporate at least 2 of them are licensed; and
 - (d) the person in bona fide control of the business operated under the licence is —
 - (i) in the case of an application for a real estate settlement agent's licence, licensed as a real estate settlement agent and holds a current triennial certificate; and
 - (ii) in the case of an application for a business settlement agent's licence, licensed as a business settlement agent and holds a current triennial certificate; and
 - (iii) ordinarily resident in the State.
- (2) The provisions of clause 10 of Schedule 1 apply to a licence granted under this section.

BONA FIDE REAL ESTATE SETTLEMENTS

SETTLEMENT AGENT DUTIES

At October 2014

The following is a draft statement of the *Job and Person Requirements* developed for use in the 2015 CPD program – Duties of a Settlement Agent. It is not to be taken as legal or contractual advice.

The following worksheet is designed to provide a convenient way to review the range of functions and duties of three Job Roles: Settlement Agent Managers, Settlement Agent Conveyancers and Unlicensed Conveyancers.

Use the following code to evaluate the list of job and personal requirements for each of the three job types: SA Manager, SA Conveyancer and a Unlicensed clerk/administrator.

- ✓ = the duty definitely applies to the job role.
- ? = the duty may apply or is partially relevant therefore would need modification to be included in the job and person requirements for the job role.
- ✗ = not relevant to the job role.

Job Requirements

The following is a *draft* summary of the functions, responsibilities and specific duties of the position.

Mgr = Settlement Agent: Manager

Cov = Settlement Agent: Conveyancer

UnL = Unlicensed Conveyancer

1. Real Estate settlement transaction – responsibilities:	Mgr	Cov	UnL
1.1. Promptly respond to the vendor or purchaser to formalise the appointment to act or to decline the appointment (CC6A).			
1.2. As soon as practicable (CC10) search land titles and dealings and search for caveats against any of those dealings.			
1.3. As soon as practicable (CC10) obtain certificates and make inquiries with respect to adjustment of rates, taxes and other outgoings.			
1.4. As soon as practicable (CC10) prepare a settlement statement and an authority for the payment or receipt of moneys; and			
1.5. Arrange the payment of duties and any other imposts/fees.			

	Mgr	Cov	UnL
1.6. Arrange and provide for the exchange of documents and receive and disburse moneys.			
1.7. Lodge and provide for the required certification, receipt and registration of documents.			
1.8. Ascertain and communicate all pertinent facts to clients (CC16); including the prompt notification of the receipt of money, documents or securities (CC25).			
1.9. Promptly and willingly provide cash accounts, payment of moneys, delivery of securities or a client's papers - whenever asked by the client or by another settlement agent/solicitor instructed by the client (CC25 and 26).			
1.10. Whenever necessary or prudent, recommend clients seek legal advice (CC11).			
1.11. Draw or prepare documents, including: a) offer and acceptance form in the format and subject to such conditions as are prescribed; b) requisitions on title in the format and subject to such conditions as are prescribed; c) documents for the purposes of the — (i) <i>Land Act 1933</i> , (ii) <i>Registration of Deeds Act 1856</i> , (iii) <i>Strata Titles Act 1985</i> , (iv) <i>Transfer of Land Act 1893</i> ; d) statutory declaration to support any of the above documents e) powers of attorney in the form and subject to the conditions prescribed; f) a declaration to confirm that a power of attorney remains unrevoked.			
2. Business practice and financial responsibilities.	Mgr	Cov	UnL
2.1. Act in the utmost good faith to the client (CC6) and if a conflict of interest or foreseeable conflict of interest could arise terminate the appointment (CC9).			
2.2. Make full and frank disclosure to clients of any interest in the transaction and if such interest is adverse to the client terminate the appointment (CC6).			
2.3. Maintain confidentiality in accordance with the provisions of privacy legislation and as instructed by the client (CC14).			

	Mgr	Cov	UnL
2.4. Work for clients to be completed as soon as reasonably practicable with due care and skill (CC18). Including: a) providing all services efficiently, honestly and without concealment or any form of deception or misleading representation (CC15); b) avoiding conduct likely to bring settlement agents into disrepute (CC19); and c) avoiding unnecessary steps or work while taking all steps advisable in the client's interest (CC27).			
2.5. Create and maintain proper accounts and keep such records available for inspection by the client and authorised officers of the Department of Commerce (CC21).			
2.6. Promptly pay all clients' money received to the client or into a trust account as per the Act (CC22).			
2.7. Maintain a positive balance in the trust account and if the account is deficient provide for the balance to be restored and all persons who could be affected informed (CC23). Never pay client's money into a trust account that is deficient (CC24).			
2.8. Accept that a client is entitled at any time to change settlement agent (or instruct a solicitor to act) without explanation and that this needs to be facilitated in a friendly and helpful manner (CC28).			
3. Leadership and Professional Development responsibilities:	Mgr	Cov	UnL
3.1. Provide for the development and implementation of the strategic and operational priorities of the business.			
3.2. Provide for the supervision and control of all employees (CC13&17).			
3.3. Provide for the professional development and performance reviews of all employees (CC13).			
3.4. Manage own work priorities and professional development (including required Continuing Professional Development) to comply with and maintain a complete knowledge of the Act, the regulations and the Code of Conduct (CC4).			
3.5. Convene and participate in internal and external meetings as required by the role.			
3.6. Prepare written reports and oral presentations as required.			

Skills, Knowledge and Experience

	Mgr	Cov	UnL
1. Complete knowledge of the Settlement Agents' Act, regulations, and Code of Conduct (CC4) and the duty to act in 'utmost good faith' to clients (CC5).			
2. Sound working knowledge of the Real Estate and Business Agents Act, Australian Consumer Law, Equal Opportunity legislation, Workplace Health and Safety, Privacy and other legislative requirements (e.g. the Building Amendment Regulations 2009, Electricity Regulations 1947, and corporate law, taxation, superannuation, and workers compensation policy and procedures).			
3. Highly developed conveyancing skills including the computing skills required for electronic conveyancing.			
4. Highly developed interpersonal communication, negotiation and client liaison skills.			
5. Highly organised with a demonstrated ability to manage competing priorities to meet required timelines.			
6. Excellent attention to detail and transcription accuracy.			
7. Good written communication skills as required, for example, in the preparation of explanatory letters to clients and other parties to settlement transactions.			
8. Ability to work in a team environment to achieve organisational goals.			

Qualifications, licences and other prerequisites.

	Mgr	Cov	UnL
1. Diploma of Conveyancing (FNS50410).			
2. Compulsory Professional Development – current and up-to-date.			
3. Current Triennial Certificate.			
4. Desirable - Drivers licence.			

Space for your notes and observations: