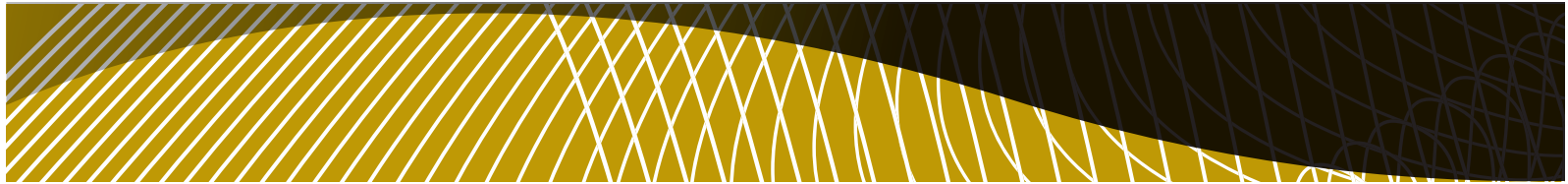




Government of **Western Australia**  
Department of **Commerce**  
**Consumer Protection**

# Guidance note



## **Code of conduct for settlement agents**

Client identification verification and real estate fraud prevention

DoC DP0987\_2011

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#### DISCLAIMER

The information provided in this publication should not be taken as a statement of law for which you should refer to the *Settlement Agents Act 1981*, the *Settlement Agents Regulations 1982* and the *Settlement Agents' Code of Conduct 1982*.

#### LEGAL ADVICE

The Department of Commerce strongly recommends that you seek legal advice of a competent experienced lawyer who practices in this area if you are uncertain about your obligations under the Act, the Regulations or the Code of Conduct.

This publication is available on request in other formats to assist people with special needs.

## Introduction

Identity fraud and scams are increasingly prevalent throughout the community, and the property industry is not immune to falling victim to such events.

Two highly publicised incidents in September 2010 and March/April 2011 resulted in properties being sold in Western Australia without the knowledge and consent of the lawful property owners.

These sales were undertaken by real estate agents who were contacted by criminals masquerading as the true owners. In both cases, the properties were tenanted and being managed by a real estate agent, prior to a fraudulent request being made to sell the property.

Also, in both cases, the criminals masquerading as the owners then became clients of settlement agents after an offer to purchase was accepted. A range of communications between the fraudsters and settlement agents then occurred with the entire proceeds of the sale being subsequently disposed to the fraudsters and the transfer of land to the unsuspecting WA based buyer.

To avoid devastating loss it is therefore imperative that settlement agents conduct their own ID checks on owners of property or people acting on their behalf and not just rely on a real estate agent's referral.

## Similarities in both frauds

While the circumstances relating to the fraudster's dealings with both settlement agents were slightly different, there are some distinguishing features in both cases:

- the settlement agents received referrals from real estate agents who had prior relationships with the real owners as a result of acting as their property managers;
- despite masquerading as owners of property in Western Australia, the fraudsters did not appear to know or fully understand the process of settlement in this state, which resulted in delays in them providing correct documentation and signatures to effect settlement;
- the fraudsters corresponded with the settlement agents via a generic email address eg hotmail, yahoo; and
- the fraudsters sought an urgent settlement to enable them to invest in a petro chemical plant and asked that the proceeds from settlement be deposited in a bank in China.

## The need to remain vigilant in all cases

In the two previous fraud cases the real owner of the property was overseas when the fraud was committed.

It is not necessarily the case that any future property fraud attempts will occur along the same lines as the two recent cases.

For example, it may not always be the case that a fraudster is out of the state, but instead approaches an agent in person requesting the sale and settlement of a property. It may even be that the property to be sold and settled is currently occupied by a person who masquerades as the owner, or alternatively the property for sale is vacant land.

A further possibility is that the person wanting to sell the property is a party to either a family/business dispute or fraud and has inside knowledge of the parties.

Therefore settlement agents need to be alert in all sales situations.

For all of these reasons it is imperative that:

1. When effecting the settlement of a property, a settlement agent confirms he/she is dealing with the true owner, or the person legally entitled to sell the property.
2. At all times when dealing with a client, a settlement agent is vigilant to ensure they continue/are dealing with the true owner or the person legally entitled to sell the property.
3. Documented procedures are in place and consistently applied to ensure verification of identities for all settlements.
4. Appropriate arrangements are in place to ensure security of documents and privacy of clients' information.

## What is being done to minimise the risk of property fraud?

Action is being taken on several fronts.

1. Amendments have been made to the Codes of Conduct for settlement agents (and real estate agents) to require Client Identity Verification (CIV) to be undertaken.
2. Changes have been implemented by Landgate to improve identity security through new witnessing and CIV requirements for overseas sellers in the execution of transfer of land documents. A new form of caveat to prevent improper dealings has also been introduced.
3. In addition, Landgate is preparing an identity certification regime that will apply to all transferors, regardless of where the seller resides.
4. All lenders have been alerted to ensure careful scrutiny before releasing mortgages over Certificates of Title.
5. In 2012, CIV and other procedures to manage fraud risks will be included as part of mandatory Compulsory Professional Development training.

## Amended Code of Conduct

To minimise the risk of successful property fraud, the Settlement Agents' Code of Conduct (the Code) has been amended effective from 1 November 2011.

The Code has been amended to include a new rule which requires settlement agents to exercise due care and skill. The insertion of this requirement brings the Code more into line with the Agents and Sales Representative Code of Conduct and the Australian Consumer Law.

As a general practice, given recent events agents should exercise due care and skill in taking measures to reduce the risks of identity fraud, to ensure documents are carefully evaluated and procedures are in place and applied to safeguard transactions.

A new article has also been included in the Code. Under the amended Code, as soon as practicable after receiving instructions to act in the settlement of a property and prior to effecting settlement, an agent must ascertain the names of the owner(s) of the property and make all reasonable efforts to: verify the identity of the owner(s); the identity of the person issuing the instructions; and their authority to settle (transfer) the property.

These Notes are a guide to assist agents in their compliance with the amended Code, however, are not exhaustive.

**In carrying out CIV checks, for overseas sellers, settlement agents must follow CIV protocols issued by the Registrar of Titles for CIV and witnessing requirements if transfer documents are executed outside of Australia.**

Until such time as the Registrar issues further CIV protocols for all other property transfers, settlement agents should put in place, as a minimum, a 100 point CIV check to verify the identity of the owner(s) or the identity of the person issuing the instructions to meet the requirements of the amended Code.

Once the Registrar of Titles issues instructions for CIV for non overseas sellers then those protocols for identification will replace the protocols for identification in this guidance note.

<b>Guidance Note 1</b>
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<b>When effecting the settlement of a property, confirm that dealings are with the <u>true</u> owner(s) of the property (i.e. the owner registered on the Certificate of Title at Landgate) or their properly appointed representative.</b>
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To ensure an agent is dealing with the true owner when effecting the settlement of a property there are three key elements:

- 1. Verify the name(s) of the registered owner(s) of the property**  
Ascertain all the names of the current registered owner(s) from the duplicate Certificate of Title registered with Landgate.
- 2. Verify the names of the person(s) entitled to deal on behalf of the owner**  
There will be cases where the person with a legal right to effect settlement of the property may not be the registered owner. These would include but are not limited to: the holder of a Power of Attorney or Enduring Power of Attorney, an executor, a mortgagee in possession or a person with an appropriate Court order.

In this situation, the original or a copy that has been certified as a true copy of the document conferring the authority to act on behalf of the current registered owner must be obtained, and where possible, confirm with the current registered owner(s) that the person is authorised to act on their behalf.

- 3. Confirm that each of the person(s) representing themselves as the owners or their properly appointed representatives, are who they say they are**

For all transfers executed overseas this will be by following the CIV protocols issued by the Registrar of Titles for transfer documents executed outside of Australia.

Prior to the Registrar of Titles issuing CIV protocols for all other transactions, agents must confirm the identity of each of the owners or the person or persons with the legal right to effect the settlement of a property via a 100 point CIV. The methodology associated with this process is at Attachment 1.

The 100 point CIV should ideally be undertaken face-to-face. In carrying out such checks, agents should sight original documents to verify identity wherever possible.

It is accepted that in some instances clients are not directly accessible to settlement agents to enable face-to-face CIV. In instances where this is not possible, agents must ensure that the documents used by the person or persons to meet the 100 point CIV check are sighted and verified as a true copy of the original, by a suitable independent and verifiable witness.<sup>1</sup>

If agents deviate from this method, then the onus will be on them to prove they have taken and documented reasonable steps to confirm the person's identity.

These checks must be done as soon as practicable after receiving instructions, and prior to settlement.

Strictly speaking the amended Code requires all settlements that take place after 1 November 2011 to conform to the new CIV requirements. This includes settlements that commenced prior to 1 November 2011. However, in recognition of the length of time that settlements take, the Department acknowledges that it may not be practicable for agents to fully comply with the new requirements for all transactions commenced prior to 1 November 2011. However, to protect your clients we would recommend that agents apply the new requirements to these transactions to the fullest extent possible in this transitional period.

The Department will however expect that agents fully comply with the new CIV requirements, in every case where instructions to act in settlements are received on or after 1 November 2011.

Agents should retain copies of all documents obtained in the process of verifying identities and in verifying the authority of a person to act in the sale and settlement of a property.

<b>Guidance Note 2</b>
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<b>At all times agents should be vigilant to ensure they continue/are dealing with the <u>true</u> client (i.e. the registered owner(s) on the Certificate of Title at Landgate) or their properly appointed representative.</b>
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<sup>1</sup> The Oaths, Affidavits and Statutory Declarations Act 2005 lists various occupations/professions available for witnessing purposes – some of these include a Justice of the Peace, doctor, police officer, Australia Post branch managers, pharmacist.

While identity checks are one tool to detect fraud, other measures are necessary. The nature of settlement transactions is such that, in most cases, dealing face-to-face with clients does not occur. Therefore, it is imperative that agents are especially vigilant if the client is overseas or remote.

Steps a prudent agent should take include:

Correspond only to addresses (postal or electronic) held on file, which are already known to be genuine.

If a client changes their contact details, confirm new contact details and addresses by corresponding with all original and new contact points.

- Seek original rather than facsimile or scanned/PDF signatures.
- Carefully check signatures of property owners against any original signatures held on file and the previous transfer of land documents, and any major differences should prompt further investigation.
- If doubts about the authenticity of a document arise:
  - seek to have it independently verified by the issuing authority;
  - contact the Police; and
  - do not act if doubts remain.
- When replying to an e-mail, type in the known genuine e-mail address from agency files rather than simply clicking on the 'reply' button – an e-mail received may have a hidden address embedded in it.
- During the course of providing a customer service do not inadvertently disclose information or documents with signatures that might be misused.

Warning signs of a possible fraud a settlement agent should be alert to include:

- The transaction involves people residing, or documents issued from overseas, especially from countries known for scams.
- There is a request for funds to be sent to a different bank account to that previously used by the client (in cases of tenanted properties) - including but not limited to offshore accounts.
- Advice is received that the settlement is urgent for reasons such as to finance a petro chemical plant investment.
- Email addresses being used are generic such as hotmail, yahoo or gmail.
- Communication and or understanding of the land transfer system is not in a style normally expected of an existing owner of property in Australia or the English that is used may be poor.

<b>Guidance Note 3</b>
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<b>Documented procedures are in place to ensure verification of identities for all settlements, security of documents and the privacy of your clients.</b>
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It is expected that agents will have documented processes and procedures to ensure the requirements of the Code relating to CIV are met.

Some form of periodic internal cross checking to confirm that these procedures are being routinely applied should also be undertaken and it is advisable to record these processes. Proactive reviews of agents by the Department of Commerce (Consumer Protection Division) will include checks to ensure that appropriate CIV processes are in place and are being adhered to by agents.

Some of the information collected about clients to confirm identities may be personal information. The National Privacy Principles enacted under the Commonwealth Privacy Act 1988 will be applicable to some agents and for others the Principles provide guidance on the issues which agents should consider in collecting and managing client information.

Agents may obtain further details from the Office of the Australian Information Commissioner about the Privacy Act 1988 implications associated with the collection of personal information of clients. As copies of identification documents will be held by the agent, appropriate security for this information should be in place.

Consumer Protection encourages agents to ensure that they have implemented within their businesses, appropriate data management policies and systems so as to enable the collection, storage, security and disposal of sensitive client information in compliance with the National Privacy Principles.

[www.oaic.gov.au/publications/index.html](http://www.oaic.gov.au/publications/index.html)

## Schedule: Documents from which the 100 point identity check may be undertaken

<p><b>Primary Documents</b></p> <ul style="list-style-type: none"> <li>• Birth Certificate or Extract</li> <li>• Citizenship Certificate</li> <li>• International Travel Document <ul style="list-style-type: none"> <li>○ a current passport</li> <li>○ expired passport which has not been cancelled and was current within the preceding 2 years</li> <li>○ other document of identity having the same characteristics as a passport (e.g. this may include some diplomatic documents and some documents issued to refugees)</li> </ul> </li> </ul> <p><i>Note: Do not score additional points for more than one document in this category.</i></p>	<p><b>70 Points</b></p>
<p><b>Name of person verified from one of the following (but only where they contain a photograph or signature that can be matched).</b></p> <ul style="list-style-type: none"> <li>• A licence or permit issued under law of the Commonwealth, a State or Territory (e.g. an Australian driver's licence)</li> <li>• An identification card issued to a public employee</li> <li>• An identification card issued by the Commonwealth, State or Territory as evidence of the person's entitlement to financial benefit</li> <li>• An identification card issued to a student at a tertiary education institution</li> </ul> <p><i>Note: Additional documents can be awarded 25 points</i></p>	<p>40 Points for first document from this category.</p> <p>25 Points for additional document/s from this category.</p>
<p><b>Name and address of person verified from any of the following:</b></p> <ul style="list-style-type: none"> <li>• A current employer, or a previous employer within the last 2 years</li> <li>• A rating authority (e.g. land rates)</li> <li>• The Credit Reference Association of Australia (subject to the Privacy Act 1988)</li> <li>• Land Titles Office Records</li> </ul>	<p><b>35 Points</b></p>

<p><b>Name, address and telephone number verified:</b></p> <ul style="list-style-type: none"> <li>• By reference to the latest telephone directory published by Telstra or by advice provided by Telstra; and</li> <li>• By telephone contact with the signatory on that telephone number.</li> </ul>	<p>25 Points</p>
<p><b>Name of person verified from any other secondary identification document.</b></p> <ul style="list-style-type: none"> <li>• E.g. marriage certificate (for maiden name only), credit card, council rates, telephone account, foreign driver's licence, Medicare card etc.</li> </ul> <p><i>Note: More than one document may be counted, but points scored from a particular source may be counted only once. E.g. If MasterCard and Visa Card issued from the same financial institution, only one may be counted.</i></p>	<p>25 Points</p>
<p><b>Name and address of the person verified from any of the following:</b></p> <ul style="list-style-type: none"> <li>• The records of a public utility</li> <li>• A record held under a law other than a law relating to land titles (for which see No.3)</li> </ul>	<p>25 Points</p>
<p><b>Name and date of birth of person verified from any of the following:</b></p> <ul style="list-style-type: none"> <li>• The records of a primary, secondary or tertiary education institution attended by the signatory within the last 10 years</li> <li>• The records of a professional or trade association of which the signatory is a member.</li> </ul>	<p>25 Points</p>