



Sale by offer and acceptance

This brochure provides general information about buying and selling property by way of offer and acceptance.

Scope of this publication

This publication provides general information and explains the law in simple language. It is no substitute for the legislation. You should get expert or legal advice about your particular situation.

Most properties in Western Australia are sold through an offer and acceptance process. A person makes a formal offer in writing to buy a property, and the seller, sometimes called the vendor, can either make a counter offer, reject the offer, or accept it and communicate that acceptance to the buyer.

Usually an offer to buy property is made using both the *Contract for Sale of Land or Strata Title by Offer and Acceptance* form, commonly called the O & A; and the *Joint Form of General Conditions for the Sale of Land*, commonly referred to as the General Conditions. Together, the O & A and the General Conditions constitute the standard contract for the sale of real estate in Western Australia.

The wording of the O & A is owned by the Real Estate Institute of Western Australia (REIWA) which is the peak industry body representing the interests of real estate agents. The General Conditions document is owned jointly by REIWA and the Law Society of Western Australia.

Although there are other versions of these two contractual documents, the versions produced by REIWA and the Law Society of Western Australia are the most widely used in this State.

In 2011, the General Conditions were amended to reflect changes to the Duties Act 2008. Buyers and sellers are advised to ensure that the latest version is used when a contract is being drawn up.

Importantly, the O & A form can be amended to include any agreed special conditions that meet the needs of the seller and/or the buyer. The General Conditions document is a standard set of contractual conditions that are not usually amended, although it is possible to 'contract out' some of these conditions.

Making an offer

If you decide to buy a particular property, approach the real estate agent or the seller if it is a private sale. By law, agents must act in the best interests of the person who engaged them. If an agent is the listing agent or even a conjunctive agent then they must represent the interests of the seller and no one else, although they are obliged to act fairly and honestly.

If you are a buyer and want an agent to look after your interests, then you may wish to engage a buyers agent who will act for you alone. If you decide to do this, you will need to enter into a written contract with the agent in the same way that a seller enters into a written contract with their agent. The fact sheet *Real estate fees – negotiating with an agent* gives more information about entering into a contract with an agent.

If you are keen to buy the property, carefully consider the terms of the offer you wish to make. You or your agent can ask the seller or their agent anything about the property that may be of concern to you. There is

no mandatory seller disclosure statement when selling property in Western Australia. However, the agent must find out or verify pertinent facts about the property transaction and promptly communicate them to the potential buyer. This only applies to facts that a prudent agent knows or should know from reasonable inquiry.

Apart from asking the seller or their agent to see a copy of the Certificate of Title, you should conduct your own inquiries to check if there are any restrictions on the title affecting the property. Be aware that not all land interests are recorded on the Certificate of Title; it is recommended that you refer to the Landgate website:

www.landgate.wa.gov.au for further information on land interests. You should contact the relevant local authority regarding matters which are regulated by them, such as extensions and pool fencing.

Please be mindful that there is no mandatory 'cooling off' period for real estate contracts made in Western Australia. Cooling off refers to a set period of time when a buyer can withdraw from a contract without incurring any cost or penalty. If the contract is to include a cooling off period then the parties need to agree to have one inserted into the contract.

Should you decide to make an offer to the seller or their agent to buy a property, ensure that the O & A form shows:

- your full name as the buyer;
- the date on which your offer is made;
- the address of the property;
- confirmed details of the Certificate of Title for the property;
- the purchase price being offered;
- details of chattels, fixtures and fittings that are to be included as part of the sale (for further information, see the section on chattels and fixtures);
- the manner in which the deposit and the balance will be paid;
- the amounts of any loans you may need to buy the property and the financial institution (the lender) you plan to approach to provide finance;

- special conditions you or the seller may want included such as replacing a broken window, termite inspection, or offer subject to sale of another property (see the section below on special conditions for more information); and
- the intended settlement date.

You may write in the O & A the name of any settlement agent or solicitor you wish to engage to conduct settlement for you. You have the right to choose your own settlement agent or solicitor, or you can conduct the settlement yourself. Useful information on selecting a settlement agent is given in the fact sheet *Choosing a settlement agent* produced by Consumer Protection. It is available at www.commerce.wa.gov.au/consumerprotection or by calling 1300 30 40 54.

Make sure the O & A is completed properly and any amendments are initialled by you before you sign. The seller's real estate agent or an independent witness must witness your signature.

The seller's agent will present the offer to the seller. The agent is obliged by law to communicate all written offers to his or her seller as soon as practicable. Your offer may be one of several presented to the seller by their agent. The seller is free to accept any one particular offer, or none of the offers, regardless of the order in which the offers are received.

Finance condition

If you are arranging finance to buy a property, you will need to complete and sign the box on the first page of the most recent version of the O & A titled 'Finance Clause Is Applicable'. The conditions associated with making an application for finance are shown on the second page in the section '1. Subject to finance'. Make sure you fully understand the implications of this section. Obtain professional advice if you are not certain. You should be aware that the finance clause may be in a different place in some of the older O & A forms.

You should never make a cash offer to secure property when a financial application is required, even if you anticipate approval, without taking professional advice.

Be aware that some finance conditions may be written to suggest that if the buyer is offered a loan by any financial institution or mortgage broker, then the buyer has been granted finance and the O & A becomes a binding contract. The implication of this is that the buyer would be legally bound to accept any loan offer, even if the terms of that offer may seem unreasonable.

To avoid the possibility of having to agree to unreasonable finance conditions, you should find out the usual terms and conditions offered by a particular financial institution before making a finance application. There is a clause on page one of the O & A where you can name your preferred lender (a financial institution or mortgage broker). If the loan is not granted by that particular lender, then the O & A is no longer binding on the buyer.

An alternative for buyers is to amend the finance condition on the O & A, either themselves or with the assistance of their professional adviser prior to making the O & A, to suit their own particular finance requirements.

If the buyer does not change the financial conditions in the O & A, then they need to be aware of the following requirements:

- the best endeavours of the buyer must be used to obtain finance by applying to at least one financial institution (such as a bank, building society, credit union, etc);
- if asked in writing the buyer must provide written evidence that a loan application was made;
- if a loan application is approved the buyer must immediately notify the seller or the seller's real estate agent in writing; and
- if a loan application is denied or not granted for the required amount the buyer must immediately notify the seller or the seller's real estate agent and should provide written evidence of the rejection.

Failing to obtain finance within the specified time can result in the contract being terminated. Therefore, if a loan application is delayed, or likely to be delayed beyond the agreed latest time for finance approval, the buyer should advise the seller's agent as soon as possible so that the seller can consider whether to extend the term of the contract. In other words, not obtaining finance by the specified time makes the O & A voidable. However, the O & A may still be enforceable until either the buyer or seller gives the appropriate notice.

If a lender places conditions on a finance approval such as an acceptable valuation or the sale of another property, then the buyer should not assume that finance has been approved. The finance can only be considered approved when all of the conditions set by the lender have been met.

If a loan is not required, the buyer should sign the box on the first page of the O & A titled 'Finance Clause Is **Not** Applicable'.

General Conditions

The General Conditions are a standard part of most contracts to sell a property and deal with many issues that arise between a buyer and seller entering into a contract. When an offer is made, a printed set of General Conditions is presented to both the buyer and seller.

It is important that both the buyer and seller read the General Conditions carefully, as they are an important part of the contract. People looking for a property to buy, or wishing to sell one, are encouraged to obtain a copy of the General Conditions beforehand. These can be purchased from REIWA or the Law Society of Western Australia.

The General Conditions include conditions relating to:

- encumbrances - a registered interest in the land by a third party which can hinder its use or transfer such as a mortgage, a lease agreement, an adjoining property owner's right of way, or a claim that has been lodged on the title;
- payment and holding of the deposit;
- settlement and delays in settlement - penalty interest rates are now nine per cent per annum calculated daily;
- possession - including vacant possession;
- representations that the seller makes about the land or strata titled lot;
- who is responsible for payment of costs such as the installation of underground power and connection to sewerage mains where relevant;
- errors, risk, default and interpretation of terms; and
- requirements for strata titles disclosure from the seller. Further information can be obtained from Landgate's publication titled, *Guide to Strata Titles* available from 'Landgate Practice Manuals' which is under 'Quick Links' on the Landgate home page at www.landgate.wa.gov.au or by calling 1300 556 224.

Special conditions

You can add extra clauses to the O & A as special conditions. These conditions must be as precisely worded as possible to avoid disputes later on. All amendments and extra conditions should be signed and dated by the seller and the buyer. It is advisable to seek expert advice to ensure that the special conditions are drawn up correctly. At the very least, any special condition should clearly state what action has to be done, by when, who is responsible for the action being done, who is responsible for payment of the action being done and what are the consequences if the action has not been completed by the due date.

Special conditions can cover a range of matters such as: the need for repairs to be made to the property; for electrical gas and plumbing fixtures and fittings to be in working order, or to allow for a building, plumbing or termite inspection. A buyer may insert a special condition that requires the O&A form be either accepted or rejected by the seller by a certain date.

A common form of special condition is the 48-hour clause used by sellers when a buyer makes the O & A conditional on the sale of another property. Sellers insert these clauses into the O & A to allow them to impose a 48-hour time limit on the buyer to make their offer unconditional should the seller receive an offer (generally unconditional) from another person (note: this is not a strict 48-hour time limit but the equivalent of two business days). If the first buyer cannot make their offer unconditional, any signed contract between the first buyer and the seller is cancelled and the seller is free to accept the unconditional offer from the other buyer. As there is often considerable variation in the wording and content of the "48 hour clause" you should consider seeking appropriate advice to ensure the contents of the clause are clearly understood before signing the contract.

Regardless of their type, special conditions need to be in writing and initialled by both parties to the transaction to indicate agreement.

Underground power

The latest version of the General Conditions contains a clause which sets out who pays the costs for connecting to underground power if a property is sold. The decision is based on what stage of the underground power connection process Western Power has reached by the date of the contract. The date of the contract means the latest date and signature or initial, by either the buyer or the seller that appears on the O & A.

The buyer pays if Western Power decides the property should be connected to underground power any time after the date

of the contract. The buyer also pays if, by the date of the contract, Western Power has decided that the property is to be connected to underground power and that a payment is required, but the details of cost, time and manner of payment have not been determined.

However, if before the contract date, Western Power has formally set out the costs and manner of payment of the underground power rate, then the seller is required to pay Western Power before settlement. Alternatively, the seller can pay these costs to the buyer at the time of settlement on the understanding that the payment will be made to Western Power.

While the seller's real estate agent may advise the buyer on the property's status regarding underground power, buyers should make their own inquiries with Western Power on 13 13 51.

Sewerage connections and septic tanks

Sewerage connection is an important issue because in some metropolitan and rural areas, land was developed without the provision of a sewerage system. Septic tanks were installed instead. When a sewerage connection becomes available, owners are given five years to connect their property to the sewerage main.

A person who buys a property that has a septic tank, and where sewerage connection is available, has 12 months to have the connection made. It is important for prospective buyers to determine whether the property is connected to the sewerage mains. While a buyer can ask the seller or their agent about the sewerage status of the property, it would be wise for the buyer to make their own inquiries with the Water Corporation on 13 13 85. The buyer can then amend their offer accordingly, taking into account the cost of plumbing services for connection to the sewer mains and cost of decommissioning existing septic tanks.

Buyers need to be aware that the Sewer Lines clause (Condition 12) of the latest

version of the General Conditions states that in the case of the property being already connected to the sewer system at the time of the contract date, the seller is obliged to pay the full connection costs before settlement, if these costs have not already been paid.

Alternatively, the seller may arrange to pay the buyer at settlement, who will then pass the money onto the Water Corporation.

If, however, the property is not connected to the sewer system by the contract date, the buyer is solely responsible for paying for connection costs. Under these circumstances, the buyer would still be responsible for paying the connection costs even if the Water Corporation had issued a formal written notice of connection before the contract date.

If you are buying a property that has been connected to the sewer main, but the septic tanks are yet to be removed, then be aware that Regulation 20A of the Health Amendment Regulations 1998 will require you to decommission any septic tanks or other such sewerage apparatus. This means that the septic tanks must be emptied in accordance with environmental guidelines and the tank removed. If this is not practicable, the base must be broken up and the apparatus backfilled with clean fill. Local councils are responsible for enforcing the decommissioning legislation.

Timber pests

If you intend to buy an established house, you should consider obtaining a timber pest inspection report on the property from a timber pest or building inspection company that inspects and reports in accordance with Australian Standard 4349.3-1998.

If choosing to obtain a timber pest inspection report, a special condition on the O & A should be inserted. The special condition should state that if activity by timber pests is sufficient to cause, or have caused, damage, then the contract of sale is cancelled or the seller must pay for any repairs resulting from any damage caused by the timber pests prior to a set date (usually settlement). For more information, see the fact sheet

titled *Timber pest inspections* and reports available from Consumer Protection's website www.commerce.wa.gov.au/consumerprotection or by calling 1300 30 40 54.

Building inspection

Buyers can hire an independent expert such as a building surveyor, registered builder, architect or structural engineer to provide a written report on the structural soundness of a property. You can include as a condition of the O & A, a satisfactory report about the structural soundness of a property. Should you decide to include a special condition about a satisfactory building inspection report in the O & A, then specify that the inspection should comply with Australian Standard 4349.1-2007. You should check that the independent expert you appoint holds the appropriate professional indemnity insurance for the task you are appointing them to conduct.

Chattels and fixtures

The term chattels refers to items in a property which can be moved and which are regarded as not being part of the structure, such as curtains, blinds, rugs and mats. The term fixtures relates to items which are a fixed part of the property, such as carpets, light fittings and built-in air conditioners.

When a property is sold, generally fixtures remain with the property while chattels are removed by the seller, unless otherwise stated in the contract. Since it might not be clear as to whether some items are fixtures or chattels, buyers and sellers should list all items in the contract, even items like window fittings, garden sheds, dishwashers and wall-mounted tumble dryers. For higher cost items such as dishwashers, which the buyer expects to remain in the property after settlement, it is helpful if the brand and model (or even serial number) are specified in the contract. The buyer and seller should ensure the contract is clear on what items will remain with the property and those which will be removed before settlement. Doing this will assist to prevent disputes involving fixtures and chattels.

Some farm-related chattels may be exempt from transfer duty. Contact the Department of Treasury and Finance on 08 9262 1100 for further information about these types of chattels.

Pool and spa enclosures

It is the seller's responsibility to ensure that enclosures for pools and spas have been installed and maintained in accordance with the Building Regulations 1989 prior to the sale of the property. Sellers can seek approval from their local council, which is responsible for the enforcement of these requirements.

Safety switches

As per the 2009 amendments to the *Electricity Regulations Act 1947*, sellers must now ensure that two safety switches or residual current devices (RCDs) are fitted in residential premises prior to the sale of the property. Most homes built since 2000 already comply with this requirement.

Smoke detectors

Since 1 October 2009, it has been mandatory for the seller to ensure mains powered smoke alarms are fitted to all properties built before 1997 that are being sold. In dwellings where the construction of the building does not permit a space to conceal the wiring or where no mains power is available, smoke alarms with a 10 year battery life are permitted.

Counter offer

In some cases a seller may want to negotiate a special condition, or the price on an O & A submitted by a buyer. Sellers can make a counter offer to the buyer by amending the O & A. Each change on the O & A needs to be initialled and dated and the document signed in full and dated. The counter offer is then presented back to the buyer. The buyer can either accept or reject the seller's counter offer, or make further changes to the counter offer. The O & A will not be a legally binding contract until the buyer and seller agree on all of the terms in the O & A.

Accepting an offer

If you as the seller decide to accept an offer from a buyer, you need to sign the O & A presented to you by the buyer or your agent. The signed O & A becomes a binding contract of sale (now called the contract) once acceptance is communicated to the buyer. A signed copy of the contract must be given to each party. Remember, there is no cooling off period for real estate contracts made in Western Australia unless the parties agree to have one inserted into the contract.

Remember, if you decide to engage a settlement agent or solicitor to carry out the settlement process, you can indicate who that person is on the O & A. See the Consumer Protection fact sheet *Choosing a settlement agent* for more information.

Make sure the date on which you sign the contract is shown and that your signature is witnessed by the seller's or buyer's agent, or an independent witness. Once an offer is accepted, the parties involved must satisfy all special conditions before the sale is completed.

Buyers should note that they are required to lodge the original O & A for transfer duty assessment within a specified time. Failure to lodge can result in a penalty being imposed. Buyers should contact the Office of State Revenue on 9262 1100 to determine the relevant lodgement time for their contract. A settlement agent can help you with this.

Forms of ownership

Where more than one person buys a property, they must elect whether to hold the land as 'joint tenants' or 'tenants in common'.

In a **joint tenancy**, each owner owns all of the property jointly with any other owner and there is one title containing the names of all owners. If one of them dies, their interest in the property automatically passes to the other/s. Married couples often adopt this form of ownership.

In a **tenants in common** situation, an owner holds a set share of the whole of the

property, with the remaining owner/s holding the rest of the share. Tenants in common can sell their share or leave it to someone else in their will.

If you are considering these forms of ownership but are not sure about the differences, seek professional advice about which is better for you.

Further information: Contact Landgate Title Searches and Survey Information on 9273 7333.

Deposit

No deposit is required, however, an amount can be negotiated. The buyer and seller should consider whether the amount offered is sufficient to demonstrate a commitment to purchase in light of their individual circumstances. Generally, the deposit would not be more than 10 per cent, but is often considerably less.

The deposit is generally paid to the seller's agent, who is required by law to deposit the money into a trust account. The agent holds the deposit as an independent person or stakeholder and must not release the money without either the consent of both the buyer and seller, proper notice issued under the General Conditions, or an order from the appropriate court.

In a private sale, the deposit should not be paid direct to a seller but to the trust account of the buyer's nominated settlement agent or solicitor.

The deposit can be paid in more than one part. At least some of the deposit should be paid when the offer is accepted. Generally, all of the deposit is paid within seven days after the offer has been accepted.

If the buyer's deposit payment to the agent is by cheque, the buyer needs to ensure that the cheque is made payable to the agent's trust account and is marked not negotiable. The instruction, 'or bearer' should be deleted. Until settlement takes place, the deposit must be held in the trust account of the seller's agent.

The operation of trust accounts by agents is controlled by the *Real Estate and Business Agents Act 1978* for real estate agents or the *Settlement Agents Act 1981* for settlement agents. Money paid into trust accounts held by licensed agents is covered by a Fidelity Guarantee Account, which protects consumers against misappropriation of money by an agent or any of their employees.

If a deposit is over \$20,000 or settlement is not within 60 days, buyers can request in writing that the agent places the money in a separate interest bearing account. Under the General Conditions, interest earned on money deposited into such trust accounts belongs to the buyer, minus bank fees and charges.

The contract is breached if the deposit is not paid in accordance with the terms of the contract, such as the money is not paid in time or the cheque is dishonoured. The seller's agent should verify that the buyer has paid the deposit on time. If the deposit is not paid on time, the seller can give notice to the buyer in writing to deposit the money within 48 hours or the contract will be cancelled.

Insurance

Before the settlement date, the seller is responsible for minimising any risk of damage to a property subject to an O & A. When the O & A is signed by both the buyer and the seller, then the buyer has what is known as an 'insurable interest' in the property, and should arrange their own insurance cover for the property.

If a seller agrees to allow the buyer to take possession of the property prior to settlement, then both parties should seek professional advice about the problems that could arise from such an arrangement.

Unfair contracts

On 1 January 2011, the Australian Consumer Law (ACL) came into effect, bringing into line the consumer laws across Australia, and replacing Commonwealth, State and Territory consumer protection legislation.

The ACL provides that unfair terms in certain standard form consumer contracts are void.

A term is 'unfair' when it:

- causes a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the supplier; and
- causes financial or non-financial detriment to a party.

For further information visit the ACL website: www.consumerlaw.gov.au

Further information

If you are uncertain about the terms and conditions of a particular O & A, you should seek the advice of a solicitor. However, if you have general inquiries about real estate matters, you can call the Consumer Protection Advice Line on 1300 30 40 54 for the cost of a local call from anywhere in the State.

Consumer Protection has produced other publications that could assist you which are available online at www.commerce.wa.gov.au/consumerprotection or by calling 1300 30 40 54:

- *Buying a home through an agent*
- *Buying vacant land*
- *Home buyers assistance scheme*
- *Real estate auctions*
- *Real estate fees - negotiating with an agent*
- *Timber pest inspections and reports - a guide for home buyers*
- *Choosing a settlement agent*
- *Property settlement*
- *Buying land or property off-the-plan*
- *Home Buyers' Survival Guide for WA*

National Relay Service: 13 36 77
Quality of service feedback line: 1800 30 40 59

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

Regional Offices

Goldfields/Esperance	(08) 9026 3250
Great Southern	(08) 9842 8366
Kimberley	(08) 9191 8400
Mid-West	(08) 9920 9800
North-West	(08) 9185 0900
South-West	(08) 9722 2888