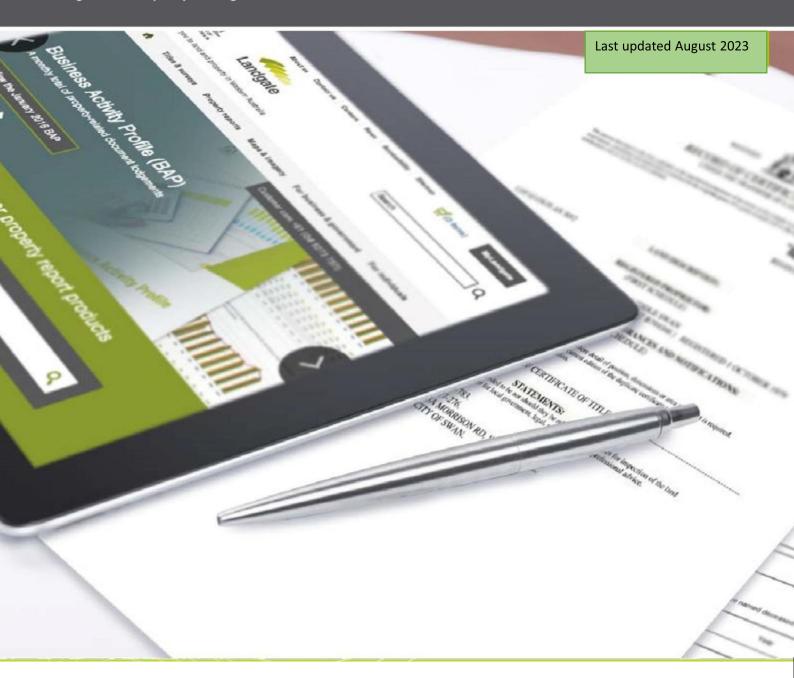


Lodge a Caveat

A guide to preparing the documents





How to Lodge a Caveat

This step-by-step guide provides general information relating to the lodgement of caveats.

To check if the lodgement of a caveat is appropriate in your circumstances, the services of a professional, such as a solicitor, should always be considered.

Landgate's advisory service **cannot** offer any assistance or advice relating to caveats, other than provide the information contained in this publication.

If you are completing the forms yourself, we advise you to exercise great care as the documents involved are legally binding. Consultation of a competent professional, such as a solicitor or settlement agent, should always be considered when preparing any caveat document.

It is important to read through the whole of this information guide. Being familiar with the information provided in the guide will assist if you need to contact Landgate to clarify any part of the process.

Contact details are listed on the back page.

What is a caveat?

The word **caveat** is not expressly defined in the *Transfer of Land Act* (TLA) but means generally **a caution or warning.** Caveats lodged under the TLA have a twofold effect until removed. These are:

- A warning to a person searching the register of an outstanding equity claimed by the caveator against any land lease, mortgage, or charge
- A caveat as a statutory injunction preventing the Registrar of Titles (Registrar)
 from registering any instrument either absolutely, or until after notice of the intended
 registration or dealing be given to the caveator, or unless such instrument be
 expressed to be subject to the claim of the caveator (the latter being commonly called
 a 'subject to claim caveat').

What is the purpose of a caveat?

A caveat confers no proprietary interest itself. Its purpose and function is to preserve and protect the rights of a caveator. It prohibits the caveator's interest from being defeated by the registration of a dealing without the caveator having first had the opportunity to invoke the assistance of a court to give effect to the interest. The interest may arise through the application of legal rules and principles or it may arise because a specific equitable remedy exists to protect it.

Registrar's role

It is not the Registrar's duty to determine the validity of a claim. The Registrar does not determine whether or not the particular claim made is a caveatable interest or that the evidence offered in support is sufficient to support that claim, or that the nature of the caveator's claim is appropriate.

The correctness and validity of a caveator's claim is for the caveator and, in appropriate cases, a court to decide. The Registrar's role is merely to:

- be satisfied that a caveat meets the requirements of form
- ensure that other statutory requirements (e.g. stamp duty) are met

- in appropriate cases, draw attention to perceived defects in the substance of the claim made or of the sufficiency of evidence and of the risks being run by the caveator
- record the caveat and give notice of the caveat to the registered proprietor or the judgment creditor named in any property (seizure and sale) order registered in respect of the judgment debtor's saleable interest in such land

Entry of a caveat

Provided a caveat is substantially in a form approved by the Registrar (see form C1 Caveat [under s.137 of the TLA]), sufficiently identifies the land sought to be affected and claims an estate or interest in land, entry on the Register is almost automatic. A caveat is effective from the time of its lodgement.

Improper entry of caveat

Under s.138 of the TLA the registered proprietor may summon the caveator to appear before the Supreme Court or a Judge in Chambers to show cause why the caveat should not be withdrawn.

Section 140 of the TLA provides that a caveator lodging a caveat without reasonable cause shall be liable to pay such compensation for damage caused as a Judge on a summons in chambers may order.

Interest in land capable of supporting a caveat

The grounds upon which a caveat may be lodged are many and complex. Many cases have been argued before the courts, and much of the law on caveats is based on decisions of the court rather than laid out in a statute. In such circumstances the law is subject to change as new decisions extend, modify or further explain the grounds on which a caveat may (or may not) be maintained on the register.

Despite the fact that the interest claimed is not one (yet) decided by the courts, a caveat that is procedurally correct and expressly sets out the nature of the estate or interest claimed will be accepted by the Registrar. However, caveators will be required to complete a statutory declaration that clearly and concisely states the estate or interest claimed and the facts on which that claim is based.

It will then be for the courts to determine whether or not the particular estate or interest is a caveatable interest in land. The Registrar will not reject a caveat that complies with the statutory merely because the Registrar considers that the claimed estate or interest is not caveatable or is inadequately described. If there are defects on these areas, then the registered proprietor has a remedy under s.140 of the TLA for damages or compensation from the caveator.

As a general rule, a caveator's claim should arise through some dealing with the registered proprietor. Where the caveator is not dealing directly with the registered proprietor the caveat must clearly recite the step-by-step events which tie the caveator to the registered proprietor.

Where the claim arises out of rights under an easement or restrictive covenant, such claim must be made by or through the proprietor of land appurtenant to the land against which the caveat is lodged.

The document by virtue of which a caveat is lodged must normally be signed by the registered proprietor of the land against which the caveat is lodged or by his/her duly appointed representative. However, where such document is a contact of sale, it may be signed by the solicitor or a licensed estate agent on behalf of the vendor. Contracts by a married couple signed by one party both personally and on behalf of his or her partner, are also acceptable.

Registered proprietor's caveat

The registered proprietor of land may lodge a caveat against land registered in his or her name. Such caveats are usually lodged in the following circumstances:

- the caveator/registered proprietor has revoked a power of attorney but has been unable to contact the attorney to give advice of the revocation
- the caveator has lost possession of a signed instrument e.g. transfer of land and has not been paid.

The evidence to support such a caveat would be a statutory declaration by the caveator setting out the facts and repeating the claim of the caveator. A caveat correct as to form, by a registered proprietor against his or her land would be accepted by the Registrar.

Caveat to prevent improper dealings

In order to reduce the risk to WA Landowners from being the subject of improper dealings on their property, a caveat (Improper Dealings) can be lodged with Landgate. The caveat, once lodged, will stop the registration of any instruments or documents that would ordinarily need to be signed by the owner.

The caveat (Improper Dealings) form C4 must be made in the name of all registered proprietors. If a registered proprietor does not want to be part of the caveat, then the document cannot be lodged. The caveat can be signed and lodged with Landgate by the registered proprietors themselves or a solicitor acting on behalf of all the registered proprietors.

A licensed settlement agent does not currently have authority under the Settlements Agents Regulations 1982 to sign and lodge a caveat to precent improper dealings on behalf of landowners.

Please note that registered proprietors who have mortgaged properties should review their mortgage terms and consult with their lending institution before lodging a caveat (Improper Dealings) from C4 as the terms and conditions of the mortgage may prevent the lodgement of any caveat without the consent of the mortgagee.

Due to the operation of law, the Caveat (Improper Dealings) will not prevent the following, including but not limited to:

- Mortgagee exercising a power of sale would be able to use section 138B of the Transfer of Land Act 1893 as the application is not being signed by the owners
- Sale of the property by a local government for non-payment of rates
- Sale by the Sheriff under a Property (Seizure and Sale) order
- Sale under the Criminal Confiscation Act 2000

In order to remove the caveat, all owners must present themselves in person at the same time at Landgate's Midland office and satisfy, as a minimum, the requirements of a 100-point identity check using original documents, not copies.

Only the owners of the property can remove the caveat in person. For example, if the property was owned by three persons as tenants in common, and one of the owners did not wish the caveat to be lodged, then the other owners would not be able to lodge a Caveat (Improper Dealings). In the same way, once a caveat (Improper Dealings) is in place, if one of the (say) three owners did not want it to be withdrawn, then the other two owner could not successfully lodge a Withdrawal of Caveat form.

The Withdrawal of Caveat (Improper Dealings) can only be lodged at the time of witnessing

A power of attorney cannot be used to withdraw the caveat.

The strength of a Caveat (Improper Dealings) is the fact the caveat can only be removed when all of the owners attend together in person to Landgate's Midland office, where they are required to identify themselves to the satisfaction of the Registrar of Titles. All of the owners are then required to sign a withdrawal of caveat document, in the presence of an Assistant Registrar of Titles, before lodging the withdrawal of caveat document to remove the caveat. This process cannot be conducted at any other Landgate office, the caveat can only be removed at the Midland office in WA.

Traditional Interests that support a caveat

To assist caveators the following forms of interests have been accepted by the Courts as caveatable interests and may be used as a guide:

- a purchaser under an agreement for the sale of land
- a person having an option to purchase the land
- the grantee of an easement
- a mortgagee
- an equitable mortgagee
- as chargee
- a lessee of a lease of land
- the beneficiary of a trust, against land held by a trustee for the trust
- the holder of an unregistered instrument
- a person who is to receive a portion of the proceeds of land upon a sale
- a person entitled to an annuity charged on the land
- the grantee of a right to take from the land some natural product of it, such as peat, stone, or timber, or to shoot game thereon, and to take it away for the grantee's own benefit
- a person having the right to a restrictive covenant running with the land
- a claimant who bases his or her claim upon the doctrine of resulting trusts.

In addition, s.6 of the *Chattels Securities Act 1987* creates a securable interest over goods attached to land owned by a third party. The interest will support a caveat.

Nature of the caveator's claim

A caveator can restrict dealings by a registered proprietor with three types of claim, which are outlined below.

Absolutely

An absolute caveat bars the registration of any instrument affecting the estate and interest, except a property (seizure and sale) order and as provided in s.142. Parties to a transaction wishing to register an instrument must either negotiate its withdrawal or have it removed by initiating action by the Registrar under s.138 or 138B of the TLA, or action by the Commissioner under s.141A, or action by the courts under s.138 or s.138B.

Unless such instrument be expressed to be subject to the caveator's claim

Instruments showing the caveat as an interest may be registered. If the parties to the transaction do not wish to register their instrument subject to the caveator's claim they either negotiate its withdrawal or have it removed by initiating action by the Registrar under s.138 or s.138B of the TLA, action by the Commissioner under S.14A, or action in the courts under S.138 or 138B.

It should be noted that while the Registrar may not question the type of claim made by the caveator, the courts may do so. In general terms a claim based on an interest in fee simple, such as a purchaser's caveat, may be absolute, and caveats based on a lesser interest, such as an equitable mortgage, should be made **subject to claim.**

Until after notice of any intended registration or dealing to be given to the caveator

Caveats in this form are useful for those caveators whose claim will not be defeated by the registration of any change of interest in the land, and who merely wish to be informed of any change in interest occurring on the title. If the change in interest is detrimental to the caveator the caveator may choose to negotiate with the parties or obtain an injunction to prevent the registration of the instrument.

Verification of Identity

The caveator in this type of application will be subject to the Verification of Identity process as of 5 June 2018.

This process is completed by Australia Post for self-represented parties. Refer to the https://auspost.com.au/id-and-document-services/identity-checks-for-property-transfers to complete your verification of identity.

For more information regarding the Verification of Identity Practice refer to the <u>Verification of Identity webpage</u> on the Landgate website.

Forms to use

Caveats under s.137 must be prepared on a form approved by the Registrar. There is a printed form of caveat, designated form C1, available for this purpose. The form can be used for caveats over freehold or Crown land. The form C4 is available for caveats (Improper Dealings).

Caveats under s.30 must be prepared on a form approved by the Registrar. Printed form C3 (under s.30 and 223A of the TLA), is available for this purpose.

Caveats under s.176 and 223A must be prepared on a form approved by the Registrar. There is a printed form of caveat, designated form C3, available for this purpose.

Caveats lodged under section 137 of the TLS and section 20 of the Land Administration Act 1997 (LAA)

Who may lodge a caveat over freehold land?

Any person or corporate body capable of taking a registered interest in land, a mortgage, a lease, or a charge may lodge a caveat. Unincorporated bodies must caveat by their trustee personally and business associates or firms by all the individual member of the business or form in their personal capacity.

Identity of the trustees as 'trustees of' or members of a firm 'trading as' is permitted.

Certain persons with statutory authority may lodge caveats. Minors can lodge a caveat, but a court order will be required if the caveat is to be withdrawn before the minor attains full age.

Who may lodge a caveat over Crown land?

All persons, corporate bodies, trustees, and minors in the same capacities as set out in s.137 of the TLA, may caveat as to an interest in Crown land. A caveat over Crown land can only be lodged under s.20 of the LAA in respect to:

- a registered interest or an interest approved by the Minister for Lands under s.18 of the LAA but not registered or
- an unregistered interest created pursuant to a management order or vesting where the management order or vesting is created or vested for purposes of another Act.

The registered proprietor panel of the caveat form should show the party against whom the caveat is lodged. State of Western Australia is shown where they are the only one shown on the Crown title or there is a management order or lease on the Crown title, but the caveat evidence is based on an agreement (e.g. easement) between the State of Western Australia and the caveator.

The management body is shown in the registered proprietor panel for evidence (e.g. leases) based on a management order or vesting. The lessee is shown in the registered proprietor panel for evidence (e.g. mortgages) based on a lease.

Notice to registered proprietors

The registrar is required by s.138 of the TLA to give notice of the lodgement of a caveat to the registered proprietor.

The notice consists of a memorandum containing the essential details of the caveat and is sent by ordinary mail to the address of the registered proprietor showing in the Register. Notice will also be sent by ordinary mail to any other later address of which the Registrar has knowledge.

Section 31 of the TLA required the Registrar to notify a person applying to bring land under the TLA that a caveat has been lodged prohibiting the Registrar from proceeding with the application.

Applicants are also notified of caveats lodged against applications under s.176 and 223A of the TLA.

Address for service of notice

Each caveator must state either an address or a fax number (one or the other, **not both**), within Australia where notices relating to the caveat may be served.

Change of address for service of notice

Each caveator may make application under s.240A of the TLA to change the postal or email address given on a caveat for the service of notice. The application must be made on an application for A5 and contain:

- a description of the land caveated
- the name and address of the caveator
- the document number of the caveat
- a request to amend the address or the number for a facsimile machine for the service of notices from the old address or facsimile number to the new address or facsimile number
- the date and signature of the caveator

The address for service of notices to the caveator is most important. Caveators and persons acting on their behalf should ensure that such address is kept current.

The caveator's responsibility for the caveat does not end when the caveat is lodged. Caveators must deal with any statutory notice sent to them, as their rights will always be affected. If they do not understand the nature or effect of the notice, they should immediately seek legal advice.

What do I need for my caveat?

- Title Search (recommended) used to complete the caveat form
- Forms caveat form C1/C3/C4
- Verification of Identification statement issued by Australia Post
- Copy of any evidence to support the claim as stated in the caveat (including original signed statutory declarations if required)
- Registration fees payable to Landgate

Title Search – a copy of the current Certificate of Title

A title search is optional, however highly recommended, as the search provides you with a complete up to date copy of the title at the date and time the title search is obtained.

For a fee, you can conduct a title search online using an address and <u>order a copy of a Certificate of Title.</u>

Caveat forms C1/C3/C4

Caveat forms are available from a Landgate office or online from the <u>Landgate Website</u>.

Please note that only original signed forms can be lodged for registration and all forms must be printed on white A4 size paper in duplex style, so both sides of the paper are printed upon.

A copy of any evidence referred to in the caveat – Refer to the 'checklist' for evidence requirements

Checklist for preparing your caveat

The notes below provide additional information to assist with completing the relevant panels of a caveat for C1 and augment the notes on page 2 of the form.

If you are uncertain of your rights or interest to claim, please seek professional legal advice. Landgate staff are **not** able to give legal advice or draft your caveat.

NOTE 1: Description of land

The land being caveated must be accurately described in this panel on the caveat form. Please refer to the sample form in this guide to assist you.

Where the interest claimed is against a mortgage, lease, or charge the appropriate qualify word "as to" must precede the land description. For example, in the case of a mortgage, the words "as to mortgage F123456" must precede the land description.

Attaching sketches

Where a 'portion' of the land is being caveated there is a need to ensure that no more land is caveated than is necessary. It is therefore desirable that the land description is supported by a sketch which identifies that portion of the land being caveated. Please refer to the section **Land** in this guide for further information about attaching sketches.

NOTE 5: Estate or Interest being claimed

The claim of the caveator must be set out clearly in the caveat. The example below should be used as a guide only and, where required, insert information pertinent to your claim, i.e. dates etc.

NOTE 6: The caveator claims an estate or interest being specified by virtue of

In all caveats the estate or interest being claimed is required to be supported by documentary evidence of that claim.

For example, where the caveator's claim arises from a contract of sale, insert into Note 6: "a contract of sale dated 30 August 2015 made between the Registered Proprietor as vendor and the caveator as purchaser".

The duty stamped contract of sale (or a photocopy showing stamp duty has been paid) must be produced as evidence.

Please refer to the section **Evidence required to support the claim of the caveator** for guidance on types of documentary evidence.

NOTE 7: And forbids the registration

In this panel, insert the wording of one of either:

- Absolutely
- Unless such instrument be expressed to be subject of the caveator's claim
- Until after notice of any intended registration or dealing be given to the caveator

Please refer to the section **Nature of the caveator's claim** in this guide for an explanation of claim types.

NOTE 8: Who can sign my caveat?

Caveat may be signed by:

- the caveator(s) personally
- the caveator's solicitor, signing as his or her solicitor and agent
- a licensed estate agent, signing as agent for the caveator
- a principal of a settlement service, signing as agent for the caveator
- a responsible officer for a caveator company, i.e. director, secretary, or manager
- the attorney or senior securities officer of a bank being a caveator
- the attorney for the caveator.

Evidence required to support the claim of the caveator

Document or deed

Where a claim is alleged to arise out of a document/deed, a signed copy of the document or deed must be lodged to support the claim stated in the caveat.

If the document/deed required duty (stamp duty), the document/deed must have duty paid prior to being lodged as evidence with the caveat. If Revenue WA is holding the document/deed pending duty assessment, that a letter from Revenue WA explaining the document is held by Revenue WA pending duty assessment or a copy of the document/deed endorsed by Revenue WA is required. Alternatively, a statutory declaration may also be provided by the caveator stating that the document/deed has been lodged with Revenue WA for duty assessment, together with a copy of the fully signed document/deed.

Statutory declaration

Where the claim of the caveator is not provided in a document/deed, a statutory declaration will be required. The statutory declaration must set out the nature of the claim and how the claim arises in a manner that complies with s.137 of the TLA.

The statutory declaration must state:

- "nature of the estate and interest claimed" as per Note 5 of the caveat
- the title to the estate or interest claimed arises by virtue of (include separate statements that clearly define how the claim arises).

Insufficient evidence produced

If a caveat is lodged and the supporting evidence is excluded or if the evidence produced is not of a sufficient standard to support the claim stated in Note 5 of the caveat, a requisition notice will be issued under s.137 of the TLA requesting the production of evidence seven days from the date of the requisition notice.

Additional fees are payable when a requisition notice is issued.

Failure to provide sufficient evidence within seven days of the date of the notice will render the caveat "null and void'.

Registration Fees

View the current <u>Registration and Search Fees</u> that can be paid by cash, credit card, EFTPOS, or by cheque/money order made payable to Landgate. Fees must be paid when lodging the document in person or included if posting the documents to Landgate.

Further Reading

For further information on this transaction type and further document requirements, please see the following links:

- Land Titles Registration Policy and Procedure Guides
- A Guide to basic requirements for the preparation of paper documents "<u>Getting it</u> Right – Reference Guide"
- Land Transactions Toolkit

Steps to lodging a Caveat

- 1. Complete the caveat form by using the title search. Type or print legibly in dark ink (preferably black).
- 2. Ensure the evidence stated in Note 6 of the Caveat is being provided. (including originally signed statutory declarations if required).
- 3. Lodge the originally signed forms with Landgate, **ensuring the registration fee** payment is enclosed if lodging by post.
 - In person at one of Landgate's lodgement offices. NOTE: any person can lodge the application document with Landgate; the lodging party does not need to be one of the persons named in the application document.
 - By post to:

Landgate Document Lodgement Section PO Box 2222 MIDLAND WA 6936

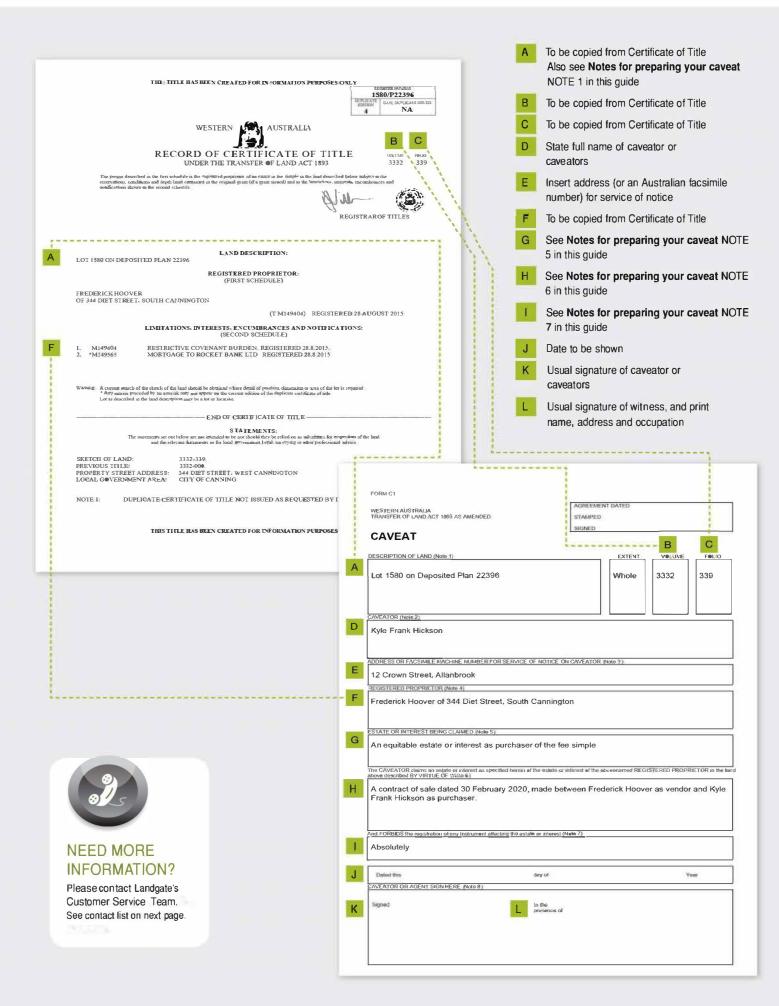
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Important

The information in this document should not be regarded as legal advice. In all matters, users should seek legal advice from an independent legal practitioner.



Contact List

Landgate Contacts

Landgate Office Hours 8.30am to 4.30pm (Lodgement Hours 8.30am to 4.30pm

Landgate – Midland Head Office 1 Midland Square MIDLAND WA 6056

TEL +61 (0)8 9273 7373

Email: customerservice@landgate.wa.gov.au

Website: www.landgate.wa.gov.au

Postal Address: PO box 2222, MIDLAND WA

6936

Document Lodgement Sites

Document lodgement hours strictly 8.30am to 4.30pm

Landgate - Midland Head Office

1 Midland Square MIDLAND WA 6056

Landgate – Perth Business Office

200 St Georges Terrace PERTH WA 6000

Australia Post Verification of Identity

Tel: 1300202287

Other Useful Contacts

Department of Finance Revenue WA

3rd Floor, 200 St George Terrace

PERTH WA 6000

Tel: +61 (0)8 9262 1100 Website: www.wa.gov.au

Department of Planning

140 William Street PERTH WA 6000

Tel: +61 (0)8 6551 9000

Website: www.planning.wa.gov.au

Family Court

150 Terrace Road PERTH WA 6000

Tel: +61 (0)8 9224 8222

Website: www.familycourt.wa.gov.au

Probate Office

11th Floor, 28 Barrack Street

PERTH WA 6000

Tel: +61 (0)8 9421 5152

Website: www.supremecourt.wa.gov.au

Registry of Births, Deaths and Marriages

141 St Georges Terrace PERTH WA 6000

Tel: +61 1300 305 021

Website: www.bdm.dotag.wa.gov.au

State Administrative Tribunal

6th Floor 565 Hay Street PERTH WA 6000

Tel: +61(0)8 9219 3111

Website: www.sat.justice.wa.gov.au

