



**ESTATE AGENTS COUNCIL**

**MODERNISING THE  
ESTATE AGENTS ACT 1980**

**FINAL REPORT**

**OCTOBER 2009**

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## 1. Background

In November 2008 the Minister for Consumer Affairs, Hon Tony Robinson MP requested that the Estate Agents Council (the Council) conduct a review of the Estate Agents Act 1980 (the Act).

In particular, the Council was asked to review the Estate Agents Act and associated legislation to identify provisions that are central to the regulation of estate agents but most in need of modernising because they are:

- Unclear either in relation to the drafting of the provisions including the terminology or language used, the complexity of the section or the linkages between related but separate sections;
- Redundant in the context of contemporary industry practice or consumer needs;
- No longer effective in meeting their intended objectives;
- Inconsistent with, in part or full, or duplicate the sections of other Victorian or Commonwealth legislation that apply to the conduct and practices of the estate agency industry; or
- Unnecessarily burdensome for industry when weighed against the benefits for consumers.

The Council's Modernisation Review will contribute to a broader Consumer Affairs Legislation Modernisation (CALM) program, which the Minister has initiated via Consumer Affairs Victoria (CAV).

The objective of the CALM project is to:

- Reduce the number of acts and regulations within the consumer affairs portfolio;
- Provide a more readily accessible framework for ensuring consumer protection; and
- Review the terminology used in the legislation to ensure that it is user-friendly.

Furthermore the CALM project is directed to the Victorian Government's commitment to modernising Victoria's legislation so that all laws have been recently reviewed and modernised. The aim is to reduce the statute book by twenty per cent, and in doing so easing the regulatory burden on business. The respective reviews by CAV and the Council also support the wider reform agenda being undertaken by the Council of Australian Governments (COAG) which involves the introduction of national consumer law and uniform trade licensing for property agents across Australia.

## **2. Review Methodology**

The first stage of the Council's Modernisation Review produced a Position Paper which identified seventeen provisions within the Act that in its preliminary view were candidates for modernisation<sup>1</sup>. These provisions focussed on the role of agents' representatives, supervision and accountability, office processes, misleading or deceptive conduct and continuing professional development. In addition other areas of concern were raised regarding the overall drafting and structure of the Act, level of regulation and issues raised by stakeholders. The Position Paper was provided to the Minister in July 2009 and shortly afterwards to consumer and industry stakeholders, CAV, review contributors and a selection of estate agency practitioners representing the various segments of the market. The Position Paper was also publicly released via the EAC website. All officers in effective control throughout Victoria and subscribers to the EAC Bulletin received a summary of findings.

This Final Report essentially continues from where the Position Paper left off, concentrating on conduct provisions within the Estate Agents Act, although the regulations and other relevant pieces of consumer legislation and comparative statutes have been considered. The Council will not be looking at licensing given the introduction of national licensing for property agents nor administration or enforcement matters, which are outside the scope of this review. Rather this report will focus on the agents' representative role, management, office processes and representations about price and advertising, providing definitive recommendations and offering alternative policy models in some instances. Other provisions will also be identified as being in need of modernisation.

The aim of this Final Report is to convey the Council's review findings to the Minister, including the views of stakeholders and individual estate agents. The Council's next project will be examining impediments within the conduct provisions of the Act to the operation of a national licence. The Council expects that its work on these projects will contribute to the modernisation and improvement of estate agency regulation in Victoria for the benefit of both consumers and industry.

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<sup>1</sup> Estate Agents Council, Position Paper -Modernising the Estate Agents Act 1980, July 2009, [www.eac.vic.gov.au](http://www.eac.vic.gov.au)

### 3. Pricing and advertising representations

**Section 42 Advertising** requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents are held accountable for any misleading statements made in their advertising.

**Section 47A Seller must be given estimated selling price** establishes that prior to obtaining a person's signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor's reserve be the same amount.

**Section 47B False representation to seller or prospective seller** states that neither an estate agent or agents' representative should make a false representation to a seller or prospective seller of real estate regarding the estimated selling price of the real estate.

**Section 47C False representation to prospective buyer** applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent's representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.

**Section 47D Director may require information concerning estimates** requires agents with an authority or engagement to sell real estate to substantiate their estimated selling price if required in writing by the Director. This is a compliance mechanism to ensure that reasonable estimated selling prices are being set in accordance with section 47A and thus no false representations are being made to the seller or buyer as per sections 47B-C.

The Council's Position Paper contended that the current provisions concerning price and advertising representations within the Estate Agents Act should be recast with a focus on the obligations found in the Fair Trading Act 1999 and Trade Practices Act 1974, namely misleading and deceptive conduct and false representation. It argued that the use of a broader catch-all conduct requirement may be more effective than the status quo which is designed to outlaw the specific practice of underquoting.

This report contends that while the extent of the underquoting problem is not as significant as often suggested, the Council does advocate the modernisation of the price representation and advertising provisions as it appears that they are currently not working effectively in the market place.

The Council has surveyed stakeholders and practitioners and considered arrangements in other jurisdictions. Furthermore alternative policy options have been considered such as the increased use of education and enforcement activity, the disclosure of reserve prices, restricting advertising methods, requiring vendor authorisation of prices quoted, the use of evidence to support price representations made, setting a minimum prescribed advertising price and the establishment of a property sales data website.

However the Council is recommending that a substantiation model be added to the Estate Agents Act, in line with such clauses in the Fair Trading Act and Trade Practices Amendment

(Australian Consumer Law) Bill 2009. It is the view of the Council that this would focus the provisions on the misleading and deceptive conduct and false representations and would be linked to appropriate enforcement action. This builds upon the stance put forward in the Council's Position Paper advocating the greater use of broad fair trading principles.

### **Objective of the provisions<sup>2</sup>**

The Act features provisions which prohibit false or misleading representations concerning the price given by estate agents whether in writing, orally or through advertising material. This was part of the amendments to the Estate Agents and Sale of Land Act in 2003 which sought to address the practice of underquoting (and overquoting) whereby estate agents (or their agents' representatives) were either inflating the estimate of a property to secure the vendor's listing or giving prospective purchasers a low estimate of the selling price in order to encourage interest in the property or auction. The provisions were intended not to penalise agents who genuinely made an error in their price estimate or were unable to accurately value a property due to volatile market conditions, but rather those who knowingly flouted the law by engaging in misleading and deceptive conduct<sup>3</sup>.

The operation of these pricing provisions sought to establish a more user-friendly model providing detailed guidance beyond simply outlawing false representations generally as per advertising requirements in section 42. Rather section 47A required that the agent establish an estimated selling price before an authority is signed which was either a single amount or price range (where the range did not exceed ten per cent) that was based on their experience, skills and knowledge. However there was no requirement that the estimated selling price calculated by the agent and the asking price or reserve of the vendor needed to be the same amount. This was an acknowledgment that sometimes the actual value and the perceived worth by the vendor of a property can vary. Furthermore section 47B mandated that estate agents or agents' representative in their employment were not permitted to make false representations to the seller or prospective sellers about the value of their property. Section 47C outlined that they are not permitted to quote a price to prospective buyers while marketing real estate whether orally, in writing or featured in an advertisement published that is less than the agent's estimated selling price. In practice a false representation would also include advertising a price which is lower than the vendor's asking price or auction reserve price or less than a genuine offer made by a prospective buyer and subsequently rejected by the vendor<sup>4</sup>. It should be noted that underquoting is defined by not complying with section 47C of the Act as outlined above and not simply by a perception derived from a difference in the initial advertised price of a property and final sales price<sup>5</sup>. Section 47D enables the Director to require evidence from an agent regarding the reasonableness of the estimated selling price or price range set out in the engagement or appointment to sell real estate, thus providing a process to deal with those not complying with the price representation provision.

### **The extent of the underquoting problem, is it a case of much ado about nothing?**

There is widespread debate about the extent of the problem of underquoting in the Victorian real estate market. With opinion divided between the view that *systemic and deliberate*

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<sup>2</sup> Refer to Appendix 1 regarding the detail and objectives of the cited provisions.

<sup>3</sup> John Lenders, Minister for Finance, Second Reading Speech, Estate Agents and Sale of Land Act (Amendments), 22 May 2003, Source –VicHansard ([www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)).

<sup>4</sup> Consumer Affairs Victoria, Real Estate Guidelines for real estate salespeople –price advertising and underquoting, November 2007 ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)).

<sup>5</sup> Monash University prepared for Consumer Affairs Victoria, Department of Justice, Residential Property Advertising in Victoria, June 2008 and Consumer Affairs Victoria, Understanding Real Estate, Buying and Selling Real Estate section of the CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)) ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 6 August 2009.

*underquoting is an entrenched industry practice engaged in by many agents<sup>6</sup> or that the issue is simply ...a media-driven beat-up...<sup>7</sup> and ...a kneejerk reaction to a situation that will go away when the market settles down in spring<sup>8</sup>. The Council is inclined to the view that underquoting has gained a life of its own within the media, as it did in 2007 when the market was booming, which overstates the problem and makes the industry and indeed consumers' hyper-sensitive [about] the issue<sup>9</sup>. This comes at a time when there is economic uncertainty, a shortage of housing, an inflated first home buyers market buoyed by attractive government grants and a national consumer law set to be introduced in 2010 which is designed to crackdown on generic misleading or deceptive conduct including underquoting.*

The evidence suggests that underquoting occurring in the market place is not by any means at epidemic proportions with CAV receiving fifty seven complaints in the 2008-09 financial year, compared to ninety the previous year when the issue was considered at its peak<sup>10</sup>. Approximately two per cent of the 10,500 calls received by CAV in the last financial year regarding real estate enquiries concerned underquoting, comprising one hundred and forty five enquiries and fifty seven complaints<sup>11</sup>. An inspection blitz by the state regulator targeting price advertising practices was conducted in August 2009. Upon examination of a thousand individual property transactions and eighty estate agents across the north, west and eastern metropolitan area it was found that ninety per cent of sale files were in order. However inspectors found that two per cent of those had advertised a property below the estimated selling price stated in the vendor's authority in breach of section 47C, that five per cent of files did not feature an estimated selling price in accordance with section 47A and that four per cent did not have a vendor authority on file<sup>12</sup>.

That being said the Council does not contend that underquoting is not happening in the marketplace with not all instances of underquoting necessarily being reported, evidence of the practice difficult to establish, estimated selling prices capable of being cleverly manipulated and an overall consumer resignation to the problem. Rather the Council suggests that while underquoting is happening that the attention given to the issue of late is out of proportion with the apparent scale of the problem.

It should also be noted that underquoting does not seem to be registering as an issue in the regional or commercial segments of the market, rather that problems with the practice seem to be confined to the metropolitan residential sales sphere. Regardless the Council considers that provisions relating to price representation contained in sections 47A-C of the Act and regarding advertising in section 42 are significant and welcomes the opportunity to contemplate ways in which they could be modernised for the benefit of all concerned.

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<sup>6</sup> John Keating, Keatings Real Estate, as quoted in Caroline James, Under the microscope, Sunday Herald Sun, 2 August 2009.

<sup>7</sup> Chris Vedelago, Nervous agents upfront on property valuations, The Sunday Age, 26 July 2009.

<sup>8</sup> Barry Plant as quoted in James, opcit.

<sup>9</sup> Vedelago, opcit.

<sup>10</sup> Figures quoted in Scott Elliott, Agents divided on fines for low quotes, Australian Financial Review, 23 July 2009, featured in Understanding real estate underquoting, Buying and Selling Property section of the Consumer Affairs Victoria website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 20 August 2009 and confirmed with Consumer Affairs Victoria, Marketing and Education Branch, 21 August 2009.

<sup>11</sup> Enquiries refer to any call received seeking information, referral to the appropriate government agency or assistance. This is the initial point of entry for consumers dealing with CAV. An enquiry does not constitute a complaint necessarily, although a basic initial enquiry may escalate to a complaint being lodged and indeed enforcement action being taken depending on the outcome of the dispute resolution process.

<sup>12</sup> Real estate inspections how majority of agents comply with the law, Media Centre of CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au), 7 August 2009.

## Consumer detriment

It is important to contemplate the actual consumer detriment posed by underquoting when considering the provisions in the Act designed to address such practices. The average person is involved only infrequently in real estate transactions during their lifetime. Their property usually also represents their largest asset, spending their working life paying off the mortgage. Therefore the stakes are reasonably high, making both the vendor and purchaser potentially vulnerable to misleading or deceptive conduct by estate agency practitioners. While some argue that *so-called underquoting is a crime without a victim*<sup>13</sup>, putting aside lost time and any disappointment, there can be monetary loss incurred. The prospective purchaser can be out of pocket for building or pest inspections or professional advice sought before bidding at an auction for a property they intend to buy, which they are led to believe is within their budget based on the prices quoted to them by the agent. As one apparent victim of underquoting commented:

*Prudent buyers will pay hundreds of dollars, as I have done, for a building inspection when they find a house they like, and that they are led to believe will be within their budget. Underquoting may be good business for estate agents, but a few dodgy auctions in a row can sure put a hole in an unsuccessful bidder's bank account*<sup>14</sup>.

Although it could be contended that the potential purchaser spends money on building inspections and alike at their own risk with no guarantee of a successful outcome at the auction in which they are bidding. In general, consumer confidence in the real estate market<sup>15</sup> is also affected by underquoting as is the standing of the profession in the eyes of consumers. First home buyers have been singled out by the press as a group left particularly *disillusioned and out of pocket* by underquoting<sup>16</sup>. Although that being said it is not really the aim of the Act to legislate simply because some parties participating in the market may experience disappointment<sup>17</sup>. It is however an important function of the Act to prohibit misleading and deceptive conduct generally as part of the broader consumer protection framework, of which underquoting is one example.

## Effectiveness of the provisions in operation

The motivating force behind agents and their representatives engaging in the practice of underquoting would appear to be monetary gain or the desire to seek advantage in a highly competitive market. As noted by an unidentified agent who claims to engage in underquoting: *The most effective marketing tool I know...[is] by advertising at a lower price than I expect to get, I'm virtually guaranteeing my vendors that I will get them more money than a rival agent who uses realistic prices in their advertising*<sup>18</sup>.

The agent is also presented with a fundamental conflict as they are required to act in the interests of the vendor, the sale of who's property will result in the payment of their commission, while having to uphold their legal obligations in acting fairly with regard to representations made to the prospective purchaser. Thus it could be argued that such misconduct is the unfortunate but inevitable by-product of a profession reliant on

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<sup>13</sup> Terry McCrann, Home auction system just fine, Herald Sun, 21 July 2009.

<sup>14</sup> Am Toisma, Out of pocket with low quote, Herald Sun Letters, 23 July 2009.

<sup>15</sup> In 2008, 431,000 Victorians participated in buying and selling residential property and 3% (12,000) reported experiencing detriment. Consumer Affairs Victoria, Consumer confidence and market experience study, Research Paper 16 July 2008.

<sup>16</sup> Making the price right, Sunday Herald Sun, 19 July 2009.

<sup>17</sup> Confessions of an underquoter, Herald Sun, 8 August 2009.

<sup>18</sup> Ibid

commissions. Discouraging practitioners from resorting to misleading or deceptive conduct has posed a reasonably challenging regulatory task. While in theory there appears to be nothing particularly deficient in the current price representation provisions, the reality seems to be that they have been unsuccessful in stamping out underquoting entirely.

It remains reasonably challenging to establish whether underquoting has actually occurred in the legal sense, as opposed to simply the perception arising from a disparity between the advertised and sale price. The estimated selling price is supposed to be based on the knowledge, skills and experience of the agent despite the fact that...*estate agents are marketers, not valuers...*<sup>19</sup> and examples are not provided on how the agent is expected to arrive at an estimate, such as through the use of recent comparable sales in the area or evidence of capital improvement to the property. An agent could perhaps legitimately claim to be simply not very good at valuing in arriving at their estimated selling price or unable to predict a price in a volatile market in response to allegations of underquoting, rather than having consciously engaged in misleading or deceptive conduct. It has also been remarked that: *Only the very dumbest agents would advertise below [the estimated selling price] ...but the rest are smart enough to make sure the figure they put on the authority is well below the market price so they can get away with underquoting*<sup>20</sup>. It is the Council's view that this illustrates a problem with the provisions if breaches are hard to establish from the outset or can be justified, then it makes monitoring compliance more difficult.

There also seems to be some confusion regarding what is acceptable in terms of advertised pricing phrases with the use of such methods as price plus, opening bid and nearest offer classified as misleading according to the CAV guidelines and subsequently discouraged but not prohibited as such<sup>21</sup>. The Council acknowledges that some of this confusion may be convenient on the part of those intentionally engaging in such improper practices. However there is some merit in the argument which was illustrated by the need for CAV to issue guidelines reaffirming the obligations of real estate salespeople in price advertising in 2007<sup>22</sup>. It is the view of the Council that too much emphasis has been placed on advertising techniques related to price, when false representation related to pricing could be seen to be symptomatic of wider misleading and deceptive conduct by an individual agent or representative or their estate agency (or indeed the vendor) which is of greater concern in terms of consumer protection.

In the current market against a backdrop of intense media attention, inspection blitzes being conducted by the regulator, an unpredictable market and disgruntled consumers, price guides are being removed from real estate advertisements all together. This is counter to the intentions of the pricing provisions which intended to give the consumer some confidence in the prices quoted so that they were a useful guide for prospective purchasers yet prohibited misleading practices. Some claim that prices are not being cited in advertisements as it is just too difficult for agents to accurately estimate property value in current market conditions and therefore they cannot provide prospective purchasers with a realistic price guide<sup>23</sup>. Others speculate that nobody wants to incur the wrath of renewed CAV enforcement activity while underquoting is in the spotlight or be made an example of by the Australian Competition and Consumer Commission (ACCC) so are avoiding price estimates all together. Agents that are quoting prices are quick to cite valuations or reserve prices to support prices quoted conscious of allegations of underquoting<sup>24</sup>. One estate agency has gone to great lengths to avoid

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<sup>19</sup> Ian Carmichael, Bennison Mackinnon as quoted in Price pointer tactics pack a nasty punch, Herald Sun, 1 August 2009.

<sup>20</sup> David Morrell as quoted in Craig Binnie, Agents on notice, Herald Sun, 8 August 2009.

<sup>21</sup> CAV, op cit, 2007.

<sup>22</sup> Ibid

<sup>23</sup> Binnie, opcit.

<sup>24</sup> Vedelago, opcit.

allegations of impropriety or gain a market edge by taking the high ground and has published full page advertisements about the principles underlying their auction price range guide and the responsibilities of the vendor in setting their reserve and buyers in terms of doing their research<sup>25</sup>. It could be suggested that if it takes such scrutiny to solicit compliance by sections of the industry perhaps the current price representation provisions are not as effective as they should be and warrant further consideration in the context of modernisation.

### **Interstate comparison**

Legislative arrangements in other states of Australia provide some useful guidance as to how other jurisdictions tackle the issue of price representations made by agents. While Victoria is often touted as the auction capital of the world, underquoting and false and misleading representations regarding pricing are not unique to the local real estate market. The New South Wales, Queensland and South Australia legislative frameworks feature similar characteristics to the Victorian model of addressing such practices as underquoting through the establishment of an estimated selling price and outlawing misleading and deceptive conduct and false representations made in regard to the value of a property for sale. However the Queensland and South Australian models have additional features in terms of substantiating the price quoted and setting a prescribed minimum advertising selling price.

### **New South Wales<sup>26</sup>**

The provisions in the Property Stock and Business Agents Act 2002 in New South Wales (The NSW Act) regarding advertising and price representation are similar to those found in the Estate Agents Act in Victoria. Section 42 of the Act concerning advertising and sections 50 and 51 in the NSW Act feature similar themes in terms of the details of the licensee being required on all advertisements, prohibiting false or misleading representations regarding price being published and holding agents accountable for any such claims made. It could be contended that the NSW provisions are simply more generic in terms of style.

Similarly the content of sections 47A-C of the Act and sections 72-74 of the NSW Act are virtually identical with the NSW provisions arguably slightly more user-friendly. The only point of difference would be that while agents may be required to prove the reasonableness of any price estimate provided in NSW, it is not as specific regarding establishing the estimated selling price in terms of a single price or range based on the knowledge, skills and experience of the agent as is the case in Victoria. Thus the emphasis in NSW is on the estimated price being substantiated, not how the quote is arrived at or what pricing methods are used to communicate this value.

### **Queensland<sup>27</sup>**

Sections 123, 158, 195, 273 and 352 of the Property Agents and Motor Dealers Act 2000 (the QLD Act) feature similar provisions to Victoria in terms of requiring advertisements to feature the particulars of the estate agent and the business for the various segments of the market<sup>28</sup>. The QLD Act also has generic provisions outlawing misleading conduct (section 573A) and false representations (sections 573C and 574) which are in line with fair trading

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<sup>25</sup> Bennison Mackinnon, Bennison Mackinnon leads the way with responsible price guides, Melbourne Weekly Magazine (Stonnington edition), 12 August 2009.

<sup>26</sup> Refer to Appendix 2 for more detail regarding the respective provisions in Victoria and New South Wales.

<sup>27</sup> Refer to Appendix 3 for further information regarding the respective provisions in Victoria and Queensland.

<sup>28</sup> The Queensland Act is structured around the different segments of the market, such as real estate agent, residential letting agent, pastoral houses, property developer and commercial agents.

principles and are similar to those found in the Act regarding price representations made during the marketing of a property for sale.

In Queensland if an agent decides to give a vendor or prospective vendor information about the potential sale price of the property they must provide the person with a comparable market analysis or if this cannot be prepared a written explanation of how the market value of the property was devised (section 574C). The underlying principle is the same as in Victoria and New South Wales in terms of the agent being required to base the estimate on their knowledge and skills or prove the reasonableness of the price quoted. However there is less emphasis on the methods of advertising this price than in Victoria and a set process is in place as to how the agent is expected to substantiate the price provided to the vendor.

It should be noted that in terms of price representations made to prospective purchasers generic provisions prohibiting misleading conduct and false representation apply. The QLD Act does specify that an agent must not disclose the vendor's reserve price to a buyer. However the agent is permitted to provide the prospective purchaser with the documentation surrounding how the agent arrived at their estimate of the market value of the property if given written consent by the vendor.

### **South Australia<sup>29</sup>**

As in the case in Victoria and most other jurisdictions the South Australian Land Agents Act 1994 requires agents not to publish any advertisement regarding the sale of land unless their name, contact details and registration number are featured as per section 48A. The Land Agents Act also conforms in terms of having a general provision prohibiting making a statement that provides false or misleading information (section 54).

The Land and Business (Sale and Conveyancing) Act 1994 (SA Act) has some similar characteristics to the Victoria Act in terms of requiring agents to establish a genuine estimated selling price that is either a single figure or price range (with an upper limit that does not exceed 110% of the lower limit) that is stated on the sale agency agreement when the services of the agent are engaged by the vendor. No reference is given to how the agent should arrive at this figure. Alternatively the selling price sought by the vendor expressed as a single figure can be lodged on the agreement. It should be noted that a fundamental difference between the respective South Australian and Victorian statutes is that the SA Act only applies to residential sales. The SA Act is also more prescriptive in having a prescribed minimum advertising price which is either the agent's estimated selling price or vendor's selling price as stated in the agency agreement depending which figure is greater. Agents or representatives are not permitted to market a property below the prescribed minimum advertised selling price. It could be argued that this system closely resembles the Victorian arrangement with the addition of a specific mechanism addressing price representations in advertising by having a prescribed minimum advertised selling price so that there is no room for conjecture if an agent is found to have marketed a property below this amount.

### **Tasmania<sup>30</sup>**

The Property Agent and Land Transactions Act 2005 in Tasmania does not present any particularly unique characteristics regarding price representation and advertising. It establishes under section 27 and 28 that real estate agents and property managers must publish their name and business address on all published advertisements. Sections 29 and 30

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<sup>29</sup> Refer to Appendix 4 for further information regarding the respective provisions in Victoria and South Australia.

<sup>30</sup> Refer to appendix 5 for further information regarding comparative provisions in Victoria and Tasmania.

also require real estate agents or property managers not to publish information that the agent knows contains a false or misleading statement or representation in respect of property that is or is stated to be available for purchase or lease.

### **Western Australia<sup>31</sup>**

Western Australian presents a different scenario to other jurisdictions in terms of relying more heavily on fair trading legislation at the state level and the Commonwealth Trade Practices Act in terms of outlawing false representations and misleading and deceptive conduct. There is provision in section 24 of the Auction Sales Act 1973 in regard to false or misleading representations that are made or published pertaining to land to be sold at auction. In addition there are basic good estate agency principles established by the Code of Conduct prescribed by the Real Estate and Business Agents Supervisory Board regarding agents generally acting fairly and honestly, not knowingly misleading or deceiving parties or engaging in unconscionable conduct. Section 41 of the Real Estate and Business Agents Act 1978 also requires all office documents and correspondence to include the details of the business. However specific provisions to advertising and price representation are not given as much attention in specific industry legislation as is the case in the other states.

### **Stakeholder views<sup>32</sup>**

#### **Real Estate Institute of Victoria<sup>33</sup>**

The Real Estate Institute of Victoria (REIV) consider the extent of underquoting in the Victorian real estate market at present to be overstated and restricted to the metropolitan residential market with little evidence of the practice in regional areas or the commercial sphere.<sup>34</sup> This perhaps demonstrates the complexity of having the various segments of a multi-faceted industry all being bound by a single Act, a point which was examined in the Council's Segmentation Study<sup>35</sup>.

The REIV contend that sections 47A and 47B of the Act, regarding establishing an estimated selling price or representations made to the vendor, seem to be functioning reasonably well in the market place. Rather they suggest that the operation of section 47C in terms of false representations made to prospective purchasers is more problematic with there being a *potential lack of knowledge regarding the prohibition on advertising and marketing property below an agents' estimated selling price, when a price range, a price "plus", or a buyer enquiry range is used*<sup>36</sup>. Furthermore they suggest that section 47D in regard to requiring information to be submitted in order to support the reasonableness of the price quoted in the

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<sup>31</sup> Refer to appendix 6 for further information regarding comparative provisions in Victoria and Western Australia.

<sup>32</sup> It should be noted that the view point of the Tenants Union of Victoria has been incorporated into this review through the participation of its Chief Executive Officer, who is also a Consumer Representative on the Council, on the Modernisation Working Group. The REIV have also participated to the review by having their nominee on the working group and ALPA has had their representative contributing to the process as part of his duties serving on the Council.

<sup>33</sup> Submission from Enzo Raimondo, Chief Executive Officer, Real Estate Institute of Victoria, Modernising the Estate Agents Act Review, 12 August 2009. The Council Modernisation Working Group also met with a delegation from the REIV on 19 August 2009 consisting of Peter Lowenstern, Ian McDonald, Brett Philipp and John Pratt.

<sup>34</sup> It is claimed that virtually all participants in the commercial segment know what a property is worth, leaving little room for false representations in a more sophisticated market dealing with large complex transactions.

<sup>35</sup> The Allen Consulting Group Report to the Estate Agents Council, Real Estate Agency Market Segmentation Study, April 2008, available at [www.eac.vic.gov.au](http://www.eac.vic.gov.au).

<sup>36</sup> Raimondo, *ibid*.

marketing of a property to potential purchasers is not being used to full effect in addressing potential breaches of section 47C.

The REIV suggested that the practice of underquoting could be tackled by a more rigorous compliance and enforcement regime. They also believed that there was a need to ban the use of price plus in advertising, in line with the CAV guidelines which deem the price phrase as misleading. The REIV also concurred with the contention put forward in the Council's Position Paper in which a greater utilisation of fair trading principles prohibiting misleading and deceptive conduct and false representation was advocated as a means of addressing the underquoting problem, in line with developments at the national level contained in the Trade Practices Amendment (Australian Consumer Law) Bill 2009. It was also put forward that the South Australian model of tackling underquoting by having a mechanism for setting a minimum prescribed advertising price and restricting such provisions only to the residential sphere was perhaps a more effective model than comparable Victorian provisions.

### **Australian Livestock and Property Agents Association<sup>37</sup>**

The Australian Livestock and Property Agents Association (ALPA) concurred with the REIV in stating that underquoting is not a problem in provincial or regional Victoria. Furthermore they were also in favour of outlawing the use of price plus in property advertising<sup>38</sup>. ALPA saw merit in the Council's Position Paper stance that the price provisions should be recast in order to prohibit misleading and deceptive conduct and false representation rather than being as prescriptive and focussed specifically on underquoting as is currently the case.

### **Consumer Action Law Centre<sup>39</sup>**

The Consumer Action Law Centre (CALC) concurred with the REIV and ALPA in terms of seeing the rationale behind a great reliance on fair trading principles to tackle such practices as underquoting in the Victorian real estate market. However CALC still thought there was a need to have the industry specific Act setting a base level of conduct to address such practices as underquoting and dummy bidding which posed consumer detriment.

### **Australian Property Institute<sup>40</sup>**

The submission received from the Australian Property Institute (API) calls for a new approach to be adopted in reference to underquoting as it believes that sections 47A-C have failed to stamp out the practice. The API are in favour of general fair trading principles outlawing misleading and deceptive conduct being enhanced and appropriate penalties being attached.

The fundamental conflict of interest contained in the price representation provisions whereby an estate agent is advising of a selling price when at the same time providing independent advice on a sale from which they stand to gain a commission was raised by the API. They contend that removing this conflict of interest *would remove the subjectivity of value*

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<sup>37</sup> Kate Mannion, Southern Regional Manager, ALPA, Modernising the Estate Agents Act Review, 14 August 2009. Shane McIntyre, Chairman, Real Estate Committee, ALPA and Kate Mannion, Southern Regional Manager, ALPA, Estate Agents Act 1980, 12 August 2009. The Council Modernisation Working Group also met with a delegation from ALPA on 19 August 2009 consisting of Kate Mannion, Brian Rodwell and Brian Wood.

<sup>38</sup> Fergus Nutt also suggested that the use of price should be outlawed in his submission to the review. Fergus Nutt, Director, Warlimont and Nutt, Submission to Modernising the Estate Agents Act Review, 5 August 2009.

<sup>39</sup> Telephone conversation with Nicole Rich, Policy and Campaigns Director, Consumer Action Law Centre, 13 August 2009.

<sup>40</sup> Chris Plant, President, Australian Property Institute, Victorian Division, 21 August 2009.

*determination where an agent may be influenced to act in their client's best interests by providing a compromised appraisal often under the guise of an imprecise or rampant market*<sup>41</sup>.

It is suggested that section 47A whereby an agent is expected to determine an estimated selling price based on their experience, skills and knowledge is a fundamentally flawed provision which results in *affected advice from a commission-based agent not from an independent qualified professional valuer*<sup>42</sup>. The API contends that estate agents or agents' representatives are not sufficiently independent or qualified to carry out this valuation role. They cite the tertiary qualifications, two years of practical experience and twenty hours per year of continuing professional development required to be a certified practicing valuer compared to the certificate III and IV required to become an agents' representative and agent. The API propose removing the requirement that estate agents must conduct an appraisal as per section 47A and the introduction of a requirement that any valuation be based on a independent professional valuation undertaken by a qualified property valuer.

### **Peter Mericka**<sup>43</sup>

Peter Mericka contends that section 47A whereby an estate agent or agents' representative must provide the vendor with an estimated selling price has been *a complete failure*<sup>44</sup>. Mr Mericka considers a number of factors in his submission related to underquoting including whether the practice is overstated, the consumer detriment posed, whether the real estate sector is over-regulated, the competency of estate agents and their representatives to provide property valuations and the responsibility of the vendors and purchasers respectively when participating in a real estate transactions.

Mr Mericka raises similar issues to the API in terms of the qualifications of estate agents and agents' representatives to provide property appraisals and the fundamental conflict of interest presented by the agent representing the vendor yet also being expected to be impartial in their role as valuer.

The rationale behind the Practices Amendment (Australian Consumer Law) Bill 2009 whereby vendors can face large fines when found to have engaged in underquoting and thus breached misleading and deceptive conduct provisions is endorsed by Mr Merricka. He suggests that vendors should be held accountable for the conduct of estate agents as *the vendor, in whose name the improper behaviour is carried out, is every bit as guilty of misconduct as the person who has been instructed to carry it out his or her behalf*<sup>45</sup>. Similarly it is contended that a prospective purchaser should be expected to take some responsibility in doing their research regarding the market price of a property before bidding at an auction rather than simply naively relying on the price representations made by the agent and then bemoaning underquoting after the fact.

Mr Mericka's recommendations include valuations only being able to be performed by qualified valuers, repealing sections 47A-C, vendors being responsible for the conduct of the agent engaged to sell their property (including price representations made and advertising) and regarding both the agent and vendor as responsible for underquoting offences against purchasers.

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<sup>41</sup> Plant, *ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Peter Mericka, Lawyers Real Estate, Modernising the Estate Agents Act 1980 Submission to the Estate Agents Council, 14 August 2009. Mr Mericka is lawyer who has been involved in real estate transactions on behalf of his clients.

<sup>44</sup> *Ibid*

<sup>45</sup> *Ibid*

## **John Keating<sup>46</sup>**

John Keating suggests that underquoting is *a systemic and entrenched industry practice* which significantly impacts both consumers and the reputation of the estate agency industry. Mr Keating claims that the current laws and price guidelines seeking to address the practice of underquoting have been ineffective and that initiatives such as the possible banning of the use of price plus advertising phrases are just fiddling around the edges<sup>47</sup>.

Mr Keating has been a prominent advocate of the publication of auction reserve prices, a method he has utilised in his own estate agency since October 2003 which he claims has been well received by vendors, purchasers and the community. It is argued that a vendor's auction reserve being published in advertising material as stated on the authority and known by all prospective purchasers would inject transparency to the auction process and restore integrity to the system. Mr Keating suggests that benefits would include purchasers not wasting their time at inspections or funds on building inspections on a property which is out of their price range. Furthermore that the price expectations of vendors would be managed and that they would not be required to waste their money on costly advertising campaigns. Mr Keating contends that the role of agents would be restored to marketing the property and utilising their product knowledge in attracting prospective purchasers to ensure that genuine competition at the auction serves to maximise the sales price obtained by the vendor, without resorting to dishonest means.<sup>48</sup>

## **James Kaufman<sup>49</sup>**

James Kaufman brought a commercial perspective to the underquoting debate, concurring with others that the issue was overstated and was not applicable to the commercial market. Mr Kaufman said that it was important to remember that not all properties go to auction and that the residential and commercial segments were very different despite being bound by the same legislation.

It was put forward that any amendments to the Act aimed at addressing underquoting would need to be conscious that such provisions would also need to be applied to the commercial sector. For example the use of a ten per cent range in advertising would not work in the scenario where a commercial property has different potential uses (industrial site, shopping centre, residential development) and thus the value can vary accordingly.

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<sup>46</sup> John Keating, Licensed Estate Agent and Managing Director, Keatings Real Estate, Modernising the Estate Agents Act 1980 (July 2009) Estate Agents Council Position Paper Submission, 14 August 2009. The Council Modernisation Working Group also met with John Keating on 27 August 2009.

<sup>47</sup> Although Mr Keating agrees that the use of price plus is a "nonsense". Estate Agents Council Modernisation Working Group Meeting with Agents, 27 August 2009.

<sup>48</sup> Alan Camfield also advocated the model touted by John Keating in his submission to this review and that the underquoting problem was essentially restricted to the residential segment of the market. Alan Camfield, Camfield and Associates, Submission to the Estate Agents Council Position Paper – Modernising the Estate Agents Act 1980 July 2009, 11 August 2009.

<sup>49</sup> James Kaufman, Jones Lang LaSalle, participated in the Estate Agents Council Modernisation Working Group Meeting with Agents, 27 August 2009.

## **Policy options**

The Council has considered the following policy options during its deliberations about how to modernise price representation and advertising provisions to address the practice of underquoting:

### **(a) Increased education and compliance and enforcement activity<sup>50</sup>**

While there seems to be anecdotal evidence that the current price representation provisions are problematic when applied in the market place there are measures that could be implemented to enhance their effectiveness. These would include increasing consumer and industry education surrounding the issue and renewed compliance and enforcement action surrounding price advertising. This is in line with the recommendations made to the Minister for Consumer Affairs as part of the Council's Underquoting Review in 2007<sup>51</sup>.

It could be suggested that such initiatives are already underway with CAV having a section of its website devoted to the issue of underquoting designed to highlight both the obligations of estate agents and their representatives and seeking to empower consumers<sup>52</sup>. CAV also already runs an industry engagement program, which covers such issues as underquoting.

In terms of compliance and enforcement, the regulator conducted a price advertising blitz across eighty estate agencies involving inspection of a thousand sales files in August 2009<sup>53</sup>. This is on top of the four hundred estate agents who are visited by the inspectors as part of CAV's annual compliance program<sup>54</sup>. In addition a powerful message was sent to those engaging in underquoting practices under the impression that they will not be caught with two agents being prosecuted in 2008 and being fined \$7500 and \$20,000 respectively for breaches of the Estate Agents Act<sup>55</sup>.

While the Council welcomes education and enforcement initiatives in the underquoting space, it is not inclined to recommend such an approach in isolation. It is the view of the Council that the price representation and advertising provisions would benefit from modernisation in order to take decisive action addressing this cyclical problem which to date has not been resolved. Short term solutions such as setting an example through enforcement blitzes or education campaigns periodically does not necessarily address the motivation of the agent who knowingly engages in underquoting and is prepared to take the risk of getting caught for the sake of monetary gain.

### **(b) Disclosure of Reserve Prices**

The Council has considered the proposition that a vendor's auction reserve price should be published in advertising materials and updated if necessary if this figure changes due to an offer being made or strong interest during the marketing campaign. The Council is sympathetic to the desire of advocates of such a model, such as John Keating, to inject greater

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<sup>50</sup> As previously stated the Council will not be directly addressing compliance and enforcement matters except in the broadest terms as this is outside the scope of this review.

<sup>51</sup> Estate Agents Council, Annual Report, 2007, page 11.

<sup>52</sup> Understanding Real Estate, Buying and Selling Real Estate section of the CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 25 August 2009.

<sup>53</sup> Consumer Affairs Victoria, Understanding Real Estate, Buying and Selling Real Estate section of the CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 25 August 2009.

<sup>54</sup> Real estate inspections show majority of agents comply with law, Media Centre section of the CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), 7 August 2009, accessed 25 August 2009.

<sup>55</sup> Consumer Affairs Victoria, Estate agent fined \$20,000 for underquoting, CAV Media Centre, CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), 3 October 2008, accessed 25 August 2009.

transparency into the residential auction system. However we remain unconvinced of the merits of such a proposal in practice, including the enforceability of reserve price disclosure. Although we note the testimonials of experienced practitioners such as Mr Keating and Barry Plant who have trialled revealing the asking price prior to auction<sup>56</sup>.

It strikes the Council that disclosing reserve prices erodes the auction system and essentially advocates private sales as the sole method of sale; *This will destroy the auction system, as it effectively becomes a private sale with an asking price*<sup>57</sup>. The Council is not prepared to endorse such action based on the current evidence of underquoting in the market place.

In Queensland agents are specifically prohibited from disclosing the vendor's reserve price to potential purchasers. However under the Queensland model an agent is permitted to provide a potential purchaser with comparable sales data or evidence to support the advertised price if given the written permission of the vendor to provide such information. The Council is more comfortable with such an approach which seeks to add transparency and integrity to price representations while not compromising the privacy of the vendor.

It has been argued that disclosing vendor auction reserve prices is *an absolute nonsense (a vendor) should have the right to adjust their reserve and not share it with anyone other than their agent*<sup>58</sup>. Indeed the Council's objection to the publication of the vendor's reserve price is that it skews the sale process in favour of the purchaser at the expense of the vendor. While it is by no means contended that a vendor should allow their estate agent or representative to engage in improper practices on their behalf, the vendor is entitled to the opportunity to market their property in order to secure the maximum sale price possible. The Council would prefer to recommend a more proven model which is equitable to all parties participating in real estate transactions.

### **(c) Restrict advertising methods**

There has been debate about the use of terms such as price plus, in excess of, opening bid, buyer enquiry range, nearest offer in advertisements. Such advertising sales methods have been deemed misleading by the CAV Guidelines, as they suggest that a property is available at the lower end of the range quoted when the vendor and agent are not prepared to sell at this price, and such practices are therefore discouraged<sup>59</sup>. Research conducted prior to the introduction of the guidelines showed 64% of the sample used terms such as price plus and that these advertising techniques saw prices on average 11.3% above the advertised sales price being achieved<sup>60</sup>. The REIV and ALPA have also called for such practices to be banned.

In 2008 South Australia introduced new real estate laws which prohibited the use of such phrases in advertising. In South Australia agents are only permitted to represent prices in advertising as a set price, price range not exceeding ten per cent<sup>61</sup> or may opt not to have a

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<sup>56</sup> Keating, *ibid* and Caroline James, Bid for change, The Sunday Herald Sun, 23 August 2009.

<sup>57</sup> Warwick Anderson, RT Edgar, in Caroline James, under the microscope, Sunday Herald Sun, 2 August 2009.

<sup>58</sup> Tim Fletcher, Fletchers, in Caroline James, under the microscope, Sunday Herald Sun, 2 August 2009.

<sup>59</sup> Consumer Affairs Victoria, Real Estate Guidelines for real estate salespeople –price advertising and underquoting, November 2007 ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 26 August 2009.

<sup>60</sup> While this research is useful strictly speaking the sale of a property above the advertised price does not constitute underquoting as per the legal definition. Source - Monash University prepared for Consumer Affairs Victoria, Department of Justice, Residential Property Advertising in Victoria, June 2008 and Consumer Affairs Victoria, Understanding Real Estate, Buying and Selling Real Estate section of the CAV website ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 26 August 2009, pages 3 and 20.

<sup>61</sup> Such an approach was also put forward by David McMillan, Domain Property Advocates at the Council Modernisation Working Group Meeting with Agents held on 27 August 2009.

stated price<sup>62</sup>. When prices are not advertised the onus is on prospective purchasers to conduct their own research regarding the property's value through information available free of charge or at a cost through various property sales data websites. It should be noted that prices are not currently being quoted in a proportion of advertising as the Victorian residential sales real estate sector is particularly sensitive to the perception of underquoting. Not having prices quoted does not strike the Council as a solution to the problem or particularly useful for consumers.

The Council does not discount the value of banning the use of advertising sales methods such as price plus, but we tend to agree with John Keating in suggesting that such measures are simply small steps and a broader approach is warranted. The use of potentially misleading sales methods is symptomatic of improper conduct but simply banning the use of terms like price plus in advertising does nothing to address the behaviour of an agent and thus in our view does nothing to stamp out the practice of underquoting.

**(d) Vendor authorisation**

The Council has also considered an option whereby a vendor is required to authorise the use of any price quoted in the marketing of their property in the engagement authority. Furthermore they would be required to confirm that the price cited in advertising is within the range that they are prepared to sell the property, thus ensuring that it is not a false representation or inherently misleading.

The price may need to be further adjusted throughout the course of the campaign due to interest but we believe that having this initial transparency would assist consumers to have confidence in the prices quoted by agents and in advertisements. Vendors may not have set their reserve price prior to the auction day, waiting to assess the interest in the property before deciding. It strikes us that they would have a clear idea of their asking price at which point they are prepared to sell. It should be noted that this builds upon guideline 5 in the CAV Guidelines whereby an agent may require the vendor to authorise in writing the advertised price of the property and that they are prepared to consider offers made within the advertised price range<sup>63</sup>.

This proposal was endorsed by John Keating, David McMillan and James Kaufman, representing the rural residential, eastern suburban buyer's advocate and commercial segments of the market<sup>64</sup>.

Such a focus on the responsibilities of vendors would also tie into the sentiments found in the Trade Practices Amendment (Australian Consumer Law) Bill 2009, where individuals can incur significant fines for authorising misleading or deceptive conduct to be undertaken on their behalf in the sale of their property.

As with the Council's rationale regarding further education and enforcement and banning the use of price plus terminology, we would view this as a positive step but not the panacea to underquoting.

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<sup>62</sup> Real Estate Institute of South Australia, Price Quoting and New Real Estate Law Open for Inspection this Weekend, [www.reisa.com.au](http://www.reisa.com.au), accessed 26 August 2009.

<sup>63</sup> Consumer Affairs Victoria, Real Estate Guidelines for real estate salespeople –price advertising and underquoting, November 2007 ([www.consumer.vic.gov.au](http://www.consumer.vic.gov.au)), accessed 26 August 2009.

<sup>64</sup> Estate Agents Council Modernisation Working Group Meeting with John Keating, Keatings Real Estate, David McMillan, Domain Property Advocates and James Kaufman, Jones Lang LaSalle on 27 August 2009.

**(e) Use of evidence to support price representations**

The Council sees merit in the Queensland model where an agent must provide material to the vendor to support their estimated selling price such as comparable sales data, evidence of capital site improvement or an independent valuation<sup>65</sup>. The agents the Council met with during their consultation meetings also see value in such a proposal suggesting that this already happens to a certain extent in the commercial, buyer's advocacy and some sections of the residential sales market<sup>66</sup>. In Queensland this information can be made available to potential purchasers provided that the vendor has given their written consent, thus ensuring that while there is greater transparency and integrity in the agent's quoted price the system is not skewed in favour of purchasers at the expense of vendors.

On the other hand such a model could be open to manipulation as is the case with the current system with agents able to be creative with their use of comparable sales data. Another disadvantage would be if the costs of conducting independent valuations and collating such data were passed on to vendors, in addition to commission and advertising costs they already incur when selling their property, this could be felt by purchasers who would be forced to pay higher prices in order for vendors to recoup their costs. In addition while such an initiative would have a positive impact for the valuation industry, it could have detrimental consequences for companies selling property sales data.

The Council is interested in the exploration of this option further as it sees some value in having a model which allows consumers to have greater confidence in the accuracy of prices quoted in the market place by agents having to substantiate their price representations and making underquoting a little more difficult to execute. As is the case with options previously outlined above, with the exception of the disclosure of reserve prices, the Council does not think this option alone will have a significant impact in addressing underquoting. The Council advocates a broader approach to the issue, by the examination of the pricing provisions in the context of modernisation and developments with the national consumer law.

**(f) Minimum prescribed sales price**

Another alternative building upon the existing price representation provisions would be to prescribe that a minimum advertising price be set as is the case in South Australia. The minimum prescribed advertising price is either the agent's estimated selling price or the vendor's asking price/ auction reserve price as stated in the agency agreement, depending on which amount is greater. This establishes a very clear system that agents or their representatives are not permitted to represent a price below this set figure. This perhaps affirms the principles already found in section 47C and reinforced in the CAV Guidelines.

The Council views such a proposal as tidying up the current system but probably unlikely to have a significant impact on false representations being made to the prospective buyer.

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<sup>65</sup> A valuation conducted by an independent qualified professional valuer as opposed to simply an estate agent or agent's representative conducting an appraisal. This builds upon the issues raised in the submissions made by the API and Peter Mericka. The greater use of independent valuations was also suggested by the Estate Agents Council in 2008 as part of its underquoting review.

<sup>66</sup> Estate Agents Council Modernisation Working Group Meeting with Keating, Kaufman and McMillan, *opcit.*

**(g) Property sales data**

Another proposal would be for the state regulator to establish a website with up to date property sales data, thus assisting the consumer to do their research and be sufficiently well informed so that they do not find themselves the victims of misleading or deceptive price representations made by agents. Such a service would be provided free of charge, as opposed to a number of private companies who provide this material at a cost. In addition such a site would convey current information as opposed to the property sales data presently available via the Valuer-General, which can be out of date and thus not a useful guide of a volatile market.

The Council views such a proposal as appealing in terms of empowering consumers and allowing the market to self-regulate. However we do not think that this would fundamentally address the misleading and deceptive conduct of agents, build significantly on the material currently available in the market place and are unsure of the practical implications of how it would work.

**(h) Adding a substantiation clause to the Estate Agents Act**

The view put forward in the Council's Position Paper was that in light of the introduction of the Australian consumer law and problems identified with the operation of these underquoting provisions, that sections 47A-D should be recast with the focus placed on the obligations found in the Fair Trading Act, in particular sections 9 and 12 regarding misleading and deceptive conduct and false representation. It was argued that the use of a broader catch-all conduct requirement, rather than specifically focussing on underquoting, to establish whether an agent has engaged in misleading or deceptive conduct might be more effective. The possibility of an industry relevant adaptation was also suggested.

The Council still advocates the greater use of fair trading principles rather than maintaining the current price representation arrangements or focussing on such aspects of the underquoting problems as sales methods. However given the current climate focussing on underquoting, the Council acknowledges that a clear message needs to be sent at an industry specific level regarding price representation and advertising beyond simply deferring to the Fair Trading Act or provisions within the Trade Practices Amendment (Australian Consumer Law) Bill 2009. That being said the Council welcomes the use of fair trading principles to establish the norm of conduct in relation to misleading and deceptive conduct and significant penalties as a deterrent as found in the Trade Practices Amendment (Australian Consumer Law) Bill 2009, whereby individuals and businesses can be fined up to \$220,000 and \$1.1 million respectively, if convicted of misleading and deceptive conduct such as underquoting<sup>67</sup>.

The Council is in favour of sections 47A and 47B being stripped back as the concept of estimated selling price as the focus of regulatory arrangements for advertising is in the Council's view inappropriate and the cause of ongoing confusion. The estimated selling price is itself a flawed concept open to abuse. Broader fair trading principles prohibiting misleading or deceptive conduct or false representations made to vendors or purchasers should replace section 47C. This would apply to representations made orally or in writing including via advertisements. In place of the current section 47D regarding the Director requiring further information about estimates, the Council would recommend enhancing the provision by the addition of a substantiation clause.

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<sup>67</sup> Caroline James, Home cheat fines, Sunday Herald Sun, 19 July 2009 and Mark Russell, Agents to face \$1m fines for fake bids, The Age, 19 July 2009.

The substantiation of claims in section 106A of the Fair Trading Act establishes that the Director may require a person who publishes a statement regarding the promotion or supply of goods or services to provide proof of any claim or representation made within the timeframe set out in the written notice issued. A person who fails to provide sufficient proof to support the claim or representation made within the set period or provides evidence which is false or misleading is guilty of an offence. Individuals and businesses face penalties up to \$60,000 and \$120,000 respectively. However this only applies to representations made regarding goods and services, the Council is suggesting that a similar requirement be replicated regarding property in the Estate Agents Act.

The substantiation notices requirements featured in the Trade Practices Amendment (Australian Consumer Law) Bill 2009 builds upon the provisions related to representations about goods and services found in state fair trading statutes of Victoria, New South Wales, Queensland and South Australia. The objective is to address the gap in the ability of the regulator to quickly and easily access information to substantiate the representations made by businesses or an individual. It is proposed that substantiation notices will be used as a preliminary investigative instrument in conjunction with other tools such as infringement and public warning notices. The difference between the proposed Australian consumer law and substantiation notices in state fair trading legislation is that it also applies to the sale or grant, or possible sale or grant, of an interest in land by a corporation and is not simply limited to representations made about goods and services. The substantiation notice requires the person to provide the ACCC or Australian Securities and Investment Commission (ASIC) with the required information to substantiate representations made within twenty one days of being issued with the written notice.

The Council recommends the addition of a substantiation clause related to property transactions to the Estate Agents Act. It is our view that this sends a clear message that misleading and deceptive conduct such as underquoting will not be tolerated and that there will be repercussions for those found in breach of such provisions with the onus being on the agent or representative to establish that a breach has not occurred in a relatively short time period. Such a proposal also incorporates more generic fair trading principles and feeds into developments with the Australian consumer law and national harmonisation. It also poses no additional regulatory burden on the market as a whole, focussing only on those suspected of doing the wrong thing and has no adverse impact on other sectors such as the commercial or rural sphere that have not been affected by underquoting. However the Council's recommendation of a substantiation clause being added to the Act in place of the current section 47D would be subject to a vigorous compliance and enforcement regime underpinning such a proposal, without which this model is likely to be unsuccessful.

## **Conclusion**

In summary the Council contends that the price representation and advertising provisions found in sections 42 and 47A-D of the Estate Agents Act have not met their objectives in prohibiting misleading and deceptive conduct or false representations being made through such practices as underquoting. It is argued that while the problem may have been overstated, that the provisions are not functioning effectively in the market place as stakeholders and contributors agreed. Detriment is being experienced by some consumers in the metropolitan residential segment and the reputation of the industry has been impacted by the attention on the underquoting issue by the media.

In addition to considering arrangements in other states, the Council has considered a number of policy options. These include the use of increased education and enforcement to compliment current provisions, the disclosure of reserve prices, restricting advertising methods, vendor's authorising price representations, using evidence to support price representations, setting a prescribed minimum advertising price and the establishment of a

property sales data website. The Council sees some merit in most of these suggestions but does not see any of them as the answer to misleading and deceptive conduct related to price representation in isolation.

Rather the Council suggests that sections 47A and B be repealed and that section 47C should be recast to broadly prohibit misleading and deceptive conduct and false representation as per the Fair Trading Act. In addition that a substantiation clause should be added to the Act in place of section 47D, assuming a robust compliance and enforcement program would be incorporated into such a model. The Council is in favour of such an approach as it establishes a more useful broader fair trading catch-all provision, targets the improper conduct rather than focussing on the sales techniques as such and feeds into developments in consumer law at the national level.

**SUMMARY OF PRICE AND ADVERTISING REPRESENTATIONS RECOMMENDATIONS**

<b>Estate Agents Act Section</b>	<b>Rationale for Modernisation</b>	<b>EAC Modernisation Review Recommendation</b>
42 Advertising	No longer effective in meeting its intended objective	Recast in terms of broad fair trading principles of prohibiting misleading and deceptive conduct and false representation
47A Seller must be given estimated selling price	No longer effective in meeting its intended objective	Repeal
47B False representation to seller or prospective seller	No longer effective in meeting its intended objective	Repeal
47C False representation to the prospective buyer	No longer effective in meeting its intended objective	Recast in terms of broad fair trading principles prohibiting misleading and deceptive conduct and false representation
47D Director may require information concerning estimates	No longer effective in meeting its intended objective	Repeal in favour of the addition of a substantiation clause to the Estate Agents Act which applies to property similar to section 106A of the Fair Trading Act regarding goods and services

#### 4. Management

**Section 29B Duties of agents and officers in effective control** requires that a licensed estate agent or officer in effective control must be in charge of the principal office entailing substantial attendance at that office and proper control and supervision of the estate agency business. Procedures are expected to be put in place to ensure that all staff are complying with the law and branch offices are also appropriately managed.

**Section 30 Management of an estate agency office** provides that the day to day operation of an estate agency office must be managed by a licensed estate agent, who is responsible for the management of solely that branch office.

**Section 30A Absence of estate agent or branch manager** mandates that licensed estate agents or branch managers must write to the Authority when they are absent from the office for between seven and thirty days appointing a licensed estate agent or agents' representative to manage the office in their absence.

The Council maintains the view put forward in the Position Paper that sections 30 and 30A of the Act regarding the management of an estate agency office and absence of estate agent or branch manager respectively are unnecessary. It is contended that such matters are able to be dealt with by the officer in effective control, who is responsible for all facets of the operation of the estate agency office. Standard business processes should also be able to address day to day management and short term absences of the estate agent without regulation being required. Furthermore in removing the branch manager tier from the accountability framework the Council believes that the importance of the responsibilities of the officer in effective control is highlighted. It is also contended that the emphasis of section 29B should be on the accountability of the officer in effective control rather than just attendance at the office. Such an approach is consistent with the Council's other proposals directed to strengthening accountability structures and reducing the regulatory burden within the estate agency office when there is no detriment posed to consumers.

#### **Objective of the provisions<sup>68</sup>**

The objective of section 29B regarding the duties of agents and officers in effective control is that a licensee, who runs their own estate agency business or is the officer in effective control of a company, is the principal estate agent of that business taking on a chief executive officer role whereby they are responsible for all operational matters. This role can only be carried out by a licensed estate agent. The officer in effective control is required to work from the principal estate agency office to ensure that adequate processes are in place, the law is being upheld, staff members are being appropriately supervised and in general there are sufficient accountability mechanisms in place. The officer in effective control is responsible not only for the management of the principal office but also any branch offices.

Section 30 regarding the management of an estate agency office was part of the 1994 amendments which stated that branch managers must be licensed estate agents in line with requirements in other jurisdictions. This was in response to a high proportion of branch offices previously being managed by sub-agents, particularly in rural areas. The provision requires that only a licensed estate agent shall manage an estate agency office and that they should only manage one office. This is presumably to avoid any potential conflicts of interest, reinforce the importance of the accountability of branch managers and differentiate between the respective roles of officer in effective control and branch manager. The 1994 Amendments also provided for current branch managers to be "grandfathered" for life

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<sup>68</sup> Refer to appendix 7 for further information about the content and objectives of the provisions.

regardless of whether they changed their place of employment. This concession was also designed to not disadvantage rural practitioners, which was also acknowledged in section 30AB.

The intention of section 30A regarding the absence of the estate agent or branch manager is to ensure that branch offices are managed by appropriate individuals even in the event of the short-term absence of the branch manager. This is another accountability mechanism designed to ensure that the requirements of the Act are met, proper processes are in place and adequate supervision occurs even when there is a brief change in personnel. Such a provision aims to avoid such practices as licence lending as well by having a transparent system of who is in charge of the estate agency office even when there is an absence due to recreational leave or illness.

### **Interstate comparison<sup>69</sup>**

#### **New South Wales**

New South Wales has similar provisions to Victoria with regard to the management of the estate agency office with licensees being required to nominate a licensed individual to manage the day to day functions of a branch office (section 31). The licensee in the Property Stock and Business Agents Act takes on the officer in effective control role in terms of being responsible for such things as establishing appropriate procedures to ensure that the law is complied with and the supervision of staff (section 32). Under section 32 of the NSW Act the Director General can also issue guidelines regarding what constitutes the proper supervision of the estate agency business<sup>70</sup>. The licensee is also liable for the conduct of all employees in contract and tort within the scope of their employment authority (section 41). There is no comparative provision to section 30A of the Estate Agents Act regarding the notification of the absence of the estate agent or branch manager beyond the requirement in section 31 that each office is expected to be managed by a licensed individual.

#### **Queensland**

Similarly the Property Agents and Motor Dealers Act 2000 require a licensee to be in charge of the estate agency office and in the case of multiple locations that a real estate agent is in charge at a branch office. Again proper supervision, procedures, compliance with the Act and liability for the conduct of employees are within the duties of the licensee. Section 30A is not replicated in the Queensland Act.

#### **South Australia**

South Australia has similar requirements to Victoria, New South Wales and Queensland in that each estate agency office is required to be properly supervised and managed (including having written procedures regarding trust money) and registered agents are liable for the actions of employees unless they are shown to have acted outside their employment authority. However it differs in not requiring a manager to be a real estate agent, provided that a

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<sup>69</sup> Refer to Appendix 7 for further information about similar provisions in other Australian jurisdictions.

<sup>70</sup> The Commission for Fair Trading issued guidelines on supervision in March 2005. Such things detailed were requiring licensees to have written procedures instructing employees regarding daily banking procedures, monthly cash flow processes and procedures for staff recruitment including those ineligible for employment in an estate agency office. Furthermore checklists regarding the property sales process and documented complaint handling processes. New South Wales Office of Fair Trading, Department of Commerce, Report –Statutory Review of Property, Stock and Business Agents Act 2002, May 2008, pages 43-46.

registered agent is charged with managing the trust accounts and inspects the office and previously unseen business documents on a monthly basis. Again there are no provisions regarding the notification of absences of the branch manager or estate agent as is the case in Victoria.

### **Tasmania**

The Property Agents and Land Transactions Act 2005 requires agents not to manage more than one office unless authorised to do so by the Board, after demonstrating that they are competent to adequately manage multiple branches. Section 7 regarding the management of the real estate agency business addresses attendance as does section 29B of the Estate Agents Act. The Tasmanian provision requires the place of business to be managed by an agent who is not necessarily in full time attendance but is responsible for the day to day activities of the office. This is similar to that required of the officer in effective control, with the difference that the emphasis is on accountability rather than attendance.

### **Western Australia**

The Real Estate and Business Agents Act 1978 is similar to the Estate Agents Act in requiring a branch manager in each office who is required to be licensed and answerable for the activities of a single office. The licensee and branch manager are to be responsible for unlicensed persons working within the estate agency office. The licensee is also required to give sufficient time and attention to ensure that branch offices are being managed appropriately. Again while there are similarities in terms of the role of the licensee and branch manager, there is no provision regarding notifying the authority of absences of branch managers or agents.

### **Branch manager and officer in effective control**

The Council does not have specific evidence suggesting that there are any particular problems with the function of the branch manager role in the marketplace. Rather it is suggested that there is a need for the role to be reviewed in the context of reducing the level of regulation where appropriate and refining the overall structure and accountability framework of the Act. It should be noted that during the review consultation process only the REIV claimed that removing the branch manager role from the Act was problematic.<sup>71</sup>

As outlined in the Position Paper if the officer in effective control is meeting their obligations under section 29B in regard to being responsible for the adequate supervision and overall function of both the principal and branch offices, the Council wonders whether there is a need to have the role of branch manager featured in the legislation as per section 30. Sections 29B, 30 and 30A of the Act create a structure whereby there is a licensed agent or an officer in effective control that is accountable for the overall operation of the estate agency business, a branch manager who oversees the everyday function of an individual branch office as well as the licensed estate agent within the office who is responsible for the conduct of their agents' representatives. While the intentions of these respective provisions are admirable there are too many tiers of accountability which ultimately cause confusion when a breach of the legislation occurs as to who is responsible for the misconduct –the agent or their representative involved, the branch manager who has a day to day supervisory role, the officer in effective control who is ultimately answerable for the actions of all employees and aspects of the business or all of the above.

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<sup>71</sup> ALPA did not oppose the Council's proposal that the branch manager role be abolished. James Kaufman, David McMillan and John Keating also concurred.

The Council is not convinced that there is a need for the Act to address the role of branch manager, if accountability ultimately rests with the licensed agent or officer in effective control. Removing the branch manager role would simplify the chain of accountability with it clearly understood that the officer in effective control must take responsibility for all operational matters including supervising staff, establishing procedures, recruitment of appropriate individuals to be employed in an estate agency office, transparent management of trust accounts, adequate complaint handling processes and compliance with the requirements of the Act. It has not been established that the branch manager role is enhancing accountability within the estate agency office and thus the role adds another level of regulation and an opportunity to avoid accountability without any identified benefit.

Furthermore the internal business arrangements of an estate agency office, such as having a branch manager, are not really worthy of regulation if there is already someone in a position of authority who is responsible and liable for the activities of the business. If estate agencies wish to have a branch manager because this is a structure which works for the officer in effective control who is based in the principal office this is fine, but it is not an area in which the Council believes the Act should intervene. The Act should be primarily concerned with the law being upheld and establishing the standard of conduct required, how individual businesses achieve this objective is their concern as long as there are sufficient accountability mechanisms in place and compliance is monitored. Similarly while the Council anticipates that a licensed estate agent would be located in each branch office, as one would expect to have a lawyer in each legal practice or doctor in a medical surgery, this is a matter for the officer in effective control to ensure that each branch office has appropriate staff and structures not necessarily the role of the Act to govern such arrangements. To a degree the marketplace will self-regulate with consumers not choosing to do business with estate agencies that cannot demonstrate the required degree of professionalism.

ALPA suggested that the branch office requirements were important in the past, but with improved communications and more estate agents operating throughout regional areas that there would be no detriment posed to their constituency by the Act not mandating a branch manager in each office<sup>72</sup>.

Based on its consideration of the issue the Council recommends that the branch manager role in section 30 of the Act be removed and all the requirements regarding the management of any estate agency office be incorporated into section 29B in the duties of the agent or officer in effective control. In light of the Council's recommendation regarding the abolition of the branch manager role it contends that a focus on the accountability of the officer in effective control or agent is critical. The review consultation process revealed that there was wide understanding of the role and responsibilities of the officer in effective control or agent within the market place.

The Council's only recommendation regarding the current section 29B regarding the duties of agents and officers in effective control would be that the emphasis in subsection (2) (b) should be removed from being *regular and substantial attendance at that office* to focussing more on being accountable and in charge of the business as per the subsection (2) (a). The Council considers section 7 of the Tasmanian Property Agents and Land Transactions Act 2005 whereby the agent is not necessarily in full time attendance but is responsible for the day to day activities of the office a more useful model with similar objectives. Section 51 of the Conveyancers Act 2006 also provides guidance in focussing more on supervision of the conduct of the business, including the proper supervision of employees, ensuring the Act is being complied with and proper procedures are in place to ensure good practice, rather than substantial office attendance. It strikes the Council that the important point for the Act to highlight is that the business is to be managed in an appropriate manner, not whether the

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<sup>72</sup> ALPA Consultation –Mannion, Rodwell and Wood, opcit.

officer in effective control is simply present. This is perhaps a minor point, but perhaps noteworthy in the broader consideration of such provisions.

### **Absence of estate agent or branch manager**

The Council proposes that section 30A whereby an estate agent or branch manager must notify the Business Licensing Authority when they are absent for a period of between seven to thirty days and nominate in writing an agent or agent's representative to manage the office in their place, should be repealed.

At present this information is stored on a database maintained by the licensing authority and background checks are conducted on those nominated to manage the office in the agent's absence to ascertain whether they are a suitable person to act in this role<sup>73</sup>. An agent or agents' representative who is not deemed fit to act in this temporary role should have no place working in the estate agency office under normal circumstances, especially given the detailed eligibility criteria and criminal record checks required of agents and agent's representatives as per section 14 and 16 of the Act. This is an issue of staff recruitment and officers in effective control ensuring that their representatives meet the eligibility criteria required to carry out such roles in accordance with their obligations under the Act, not a problem directly related to the short-term absence of an agent or branch manager.

The officer in effective control or agent is ultimately responsible for the estate agency business even in the event of their short-term absence due to ill health or recreational leave. This places the onus firmly on the principal agent for ensuring that suitably qualified staff and adequate processes are in place to allow good estate agency practice to continue even when they are temporarily away from the office. Improved communication channels in this modern era also mean one can virtually run an office off-site if necessary.

Short-term staff absences occur in every business and systems need to be put in place to accommodate such periods. It is not clear why an estate agency office requires industry specific regulation to address such a routine people management issue. The Council perhaps understands the need for the authority to be notified in the case of long term or permanent changes in management, but otherwise it views such a provision as an unnecessary administrative burden with no real benefits. It should be noted that the REIV and ALPA agree with the Council's recommendation regarding section 30A and no other objections have been raised regarding this proposal.

### **Conclusion**

The Council recommends that the branch manager role as per section 30 be removed from the Act with management being addressed solely in the duties of the officer in effective control or agent in section 29B. Furthermore it is suggested that the emphasis on attendance be changed in subsection 29B (2) (b) to the principal agent being responsible and in charge of the estate agency business. Finally the Council proposes that section 30A regarding the notification of the short term absence of the branch manager or agent be repealed. The Council views such changes as useful to the overall task of modernising the Act in terms of streamlining administrative processes and maintaining the focus on proper accountability, which actually does have benefits for both consumers and the industry.

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<sup>73</sup> Property licensing area of Consumer Affairs Victoria, 28 July 2009.

**SUMMARY OF MANAGEMENT RECOMMENDATIONS**

<b>Estate Agents Act Section</b>	<b>Rationale for Modernisation</b>	<b>EAC Modernisation Review Recommendation</b>
29B Duties of agents officers in effective control	Strengthen focus on accountability	<p>The provision should be strengthened to make it clear that the officer in effective control or principal licensed estate agent is responsible for the training, supervision and employment of eligible staff and ensuring that processes are in place to enable legal obligations under the Act to be met by all those conducting estate agency business in the principal and branch offices.</p> <p>There should be a focus on the accountability of the officer in effective control or principal licensed estate agent for day to day activities rather than simply regular and substantial attendance.</p>
30 Management of an estate agency office	Unnecessary regulation	Repeal
30A Absence of estate agent or branch manager	Unnecessary regulation	Repeal

## 5. Agents' representatives

**Section 13 Agents' representatives** states that a person must only act as an agents' representative for a licensed estate agent and that as the representative of the estate agent they are able to carry out all the functions of an agent (with the exception of the day to day management of the estate agency office) providing they are authorised to do so.

**Section 13A Estate agents to be responsible for the acts of their representatives** establishes that an estate agent is responsible in tort and contract for the activities of their representative.

**Section 47 Authorization of agents' representatives** provides that an agents' representative shall not carry out the duties of an estate agent unless authorised to do so in writing by the estate agent they are representing and cannot be employed by another agent while acting in the role of branch manager for an estate agent. It also details that an agents' representative must not make false representations (whether verbally or in writing).

The Council maintains its concerns about the agents' representative role in the Act. The current structure whereby an unlicensed agents' representative is able to carry out all the functions of an estate agent (with the exception of branch management) without the training or experience of an agent underpins the need for adequate supervision and accountability mechanisms to be embedded in the Act. The Council also contends that greater transparency would be gained from restructuring the role in the Act so that the public are able to distinguish with greater ease whether they are dealing with a licensed estate agent or a person in their employment working under the licensed agent's supervision.

The Council affirms the view put forward in its Position Paper calling for the agents' representative role to be abolished. It is suggested that those working in the estate agency office who are not licensed agents should be classified simply as employees, whether that be salespersons or property managers, and the officer in effective control or licensed estate agent should be responsible for their conduct. The Council recommends that rather than just having the authorisation of agents' representatives as per section 47 that a model based on the arrangements for authorised representatives of financial services licensees under the Corporations Act be incorporated into the Estate Agents Act.

### Objectives<sup>74</sup>

The original intention of section 13A which was part of the 1994 amendments to the Act was to clearly establish *that a real estate agent is responsible for the acts of his or her representative*<sup>75</sup>. However as was foreshadowed at the time *it would be easy for an agent to deny the authority that was purported to have been given to an agent's representative, which would have been there when the behaviour came under notice*.<sup>76</sup> As the name suggests agents' representatives' act on behalf of agents, carrying out the functions of an agent (with

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<sup>74</sup> Refer to appendix 9 for further information about provisions related to the agents' representative role and objectives of such sections.

<sup>75</sup> Louise Asher, Second Reading Speech of the Estate Agents (Amendment) Bill 1994, Parliament of Victoria Legislative Council, 30 November 1994, Source – VicHansard ([www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)).

<sup>76</sup> Bruce Mildenhall, Debate - Second Reading Speech of the Estate Agents (Amendment) Bill 1994, Parliament of Victoria Legislative Assembly, 8 November 1994, Source – VicHansard ([www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)).

the exception of the management of a branch office)<sup>77</sup>. Agents' representatives have taken on the role previously held by sub-agents, the fundamental difference being that agents' representatives are not licensed as sub-agents were prior to deregulation.

The aim of section 13A is to clearly articulate that an agents' representative is indeed a representative of the agent acting on their behalf and as such they are liable for their actions in tort and contract. This is a consumer protection mechanism and part of the broader accountability framework. Section 47 builds upon this chain of accountability requiring an agents' representative to not carry out any function of an estate agent unless authorised in writing to do so by the agent.

### **Effectiveness of the statutory scheme for the regulation of agents' representatives**

It should be noted that the Act not only deals with agents' representatives in sections 13 and 13A referred to above but also features sections providing for:

- eligibility for appointment (s.16);
- the offence of aiding an unqualified person to work as an agent's representative (s.16B);
- the Tribunal to hold an enquiry into an agent's representative's eligibility, fitness or conduct (s.28);
- the Tribunal to discipline an agent's representative (s.28A);
- the registration of agent's representatives (as well as a licensed estate agents) (s.33); and
- agents' representatives to be authorized in writing in order to perform any function of an estate agent (s.47).

The Council considers that the statutory scheme for the regulation of agents' representatives reduces the primary responsibilities of licensed agents for the conduct of their employees. It does so by permitting licensed agents to deflect responsibility for regulatory breaches and inappropriate conduct to the individual agents' representative. That conduct is said to be appropriately addressed under the scheme established by the Act for representatives rather than responsibility for the conduct squarely resting with the licensed estate agent.

### **Interstate comparison<sup>78</sup>**

Although the name of the role differs the provisions regarding the agents' representative equivalent role are reasonably uniform throughout other Australian states. New South Wales, Queensland, South Australia and Tasmania all have a system where unlicensed employees are registered and carry out the duties of an agent on behalf of and under the supervision of the licensed agent. In South Australia proper supervision must be provided by an agent or a sales representative with the required training and at least two years experience. New South Wales and Queensland have a similar arrangement to section 47 of the Act in establishing a written agents' representative authority. New South Wales also has a provision that is almost identical to section 13A in establishing the liability of the licensee for the conduct of the real estate salesperson in contract and tort, within the scope of their authority or for the benefit of the business. Tasmania and Western Australia impose restrictions on agents' representatives working in multiple estate agency offices, presumably to avoid issues of conflict of interest.

The most notable difference was in Tasmania where in addition to having the required qualifications and being in the employment of real estate agent, property consultants must

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<sup>77</sup> However agents' representatives are permitted to be nominated as acting branch manager in the event of the officer in effective control or licensed estate agent's short term absence.

<sup>78</sup> Refer to appendix 10 for further information about the arrangements in other Australian states regarding the agents' representative equivalent role.

publish in the newspaper their intention to carry out the duties of a real estate agent. This is presumably to establish that they are a fit person to carry out such a role, with concerns perhaps being raised about their eligibility if there is some reason that they are not suited to this profession. The objective may also be to inject transparency into the system in the same way that a consumer can refer to the public register of estate agents or agent's representatives.

### **Rationale for modernisation**

Agents' representatives being able to carry out all the functions of a licensed estate agent without the benefit of their skills, training or experience strikes the Council as a problematic structural feature of the Act. The low entry point requirements for agents' representatives, which can amount to no more than a seven day certificate III course<sup>79</sup>, when compared to the tasks they are asked to perform in selling, leasing and property management, were raised during the course of the consultation process of this review<sup>80</sup>. It was suggested that while the former sub-agent system also offered a low entry point for new entrants to the industry it also provided a career path, whereas it is contended that the agents' representative role does not offer similar value. It is the view of the Council that such factors illustrate the need for the Act to enshrine sufficient levels of supervision and accountability to ensure consumer protection from unlicensed and inexperienced practitioners.

In the REIV submission to this review it was stated that *a clear distinction needs to be made between staff who are legally entitled to conduct estate agency business and those who are not*<sup>81</sup>. The Council agrees that it is important for the consumer to be able to distinguish whether they are dealing with a licensed estate agent or an agents' representative under the supervision of an agent. This is currently not the case as noted by the REIV and John Keating<sup>82</sup>. The current system creates a somewhat confused structure whereby in addition to licensed estate agents there is a tier of pseudo agents who are unlicensed and dependent on the patronage of an agent. While they look like an agent and carry out all the functions of an agent, they do not have the credentials of a licensed practitioner.

The Council acknowledges that the agents' representative role which operates under the umbrella of the licensed estate agent is also likely to be considered in the context of the national licensing of property agents.

### **Policy proposal**

The Council is in favour of a more transparent system whereby there are licensed estate agents and staff employed in their office as salespersons or property managers, the training and conduct of whom the agent is responsible for. It should be noted that the Council does not advocate the abolition of agents' representatives as simply a symbolic name changing exercise. Rather the Council sees this as part of a broader modernisation agenda strengthening accountability mechanisms and the responsibility of the officer in effective control and licensed estate agent for the actions of their representatives.

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<sup>79</sup> Kate Robertson, The real deal isn't nearly as easy as it looks, The Age, 18 July 2009.

<sup>80</sup> Kaufman and McMillan, *opcit.*

<sup>81</sup> Raimondo, *opcit.*

<sup>82</sup> Raimondo, *ibid* and Keating, *opcit.*

The Council has considered the model for authorized financial services licensees under the Corporations Act. Accordingly the Council proposes that regulatory arrangements be established under the Estate Agents Act as follows:

- (a) an employee of a licensed estate agent may be authorized in writing by the estate agent to carry out any of the functions of an estate agent (subject to the Act) on behalf of the license holder. The functions concerned must be specified in the authorization. The authorization may be revoked by the license holder at any time. (See s.47 of the Act and s.916A of the Corporations Act.);
- (b) the authorization should be in writing signed by both the licensed estate agent and the employee;
- (c) an employee may not be authorized by more than one licensed estate agent in the absence of written consent of each licensed estate agent (see s.916C Corporations Act);
- (d) a licensed estate agent employed by a licensed estate agent may not grant an authorization on their own behalf (see s.916C and s.916D Corporations Act);
- (e) a person may not give an authorization to an employee to perform estate agent functions other than in accordance with these arrangements;
- (f) a copy of the authorization must be retained by the licensed estate agent for inspection by the Director for five years after it is no longer in effect;
- (g) the licensed estate agent is responsible for the conduct of their authorized representative as between the licensed estate agent and the client whether or not the authorized representative is acting within the scope of the authority and the client has remedies against both the estate agent and the authorized representative (see s.917B, s.917F Corporations Act and s.13A Estate Agent Act);
- (h) the licensed estate agent is responsible for the conduct of the authorized representative in respect of the agent's obligations the Estate Agents Act, the Fair Trading Act, the Residential Tenancies Act and the Sale of Land Act whether or not such conduct is within the scope of the authorized representative's authority;
- (i) a licensed estate agent is not to be entitled to any commission or payment in respect of any sale or other transaction conducted by an employee in the absence of an authorization in respect of the sale or transaction concerned;
- (j) a licensed estate agent may not grant or permit to continue an authorization to an employee unless the employee is eligible to be granted authorization by satisfying minimum requirements of probity and education and continues to satisfy those requirements. (See s.16B and in particular s.16(1)(b) of the Estate Agents Act and the ASIC Regulatory Guide 146: Licensing: Training Financial Product Advisors); and
- (k) the person should not perform any of the functions of an estate agent unless he or she is a licensed estate agent or holds a current authorization issued by a licensed estate agent under these arrangements.

## Conclusion

The Council recommends the proposal outlined above as a means of injecting greater transparency into the regulation of agents' representatives and strengthening the accountability of licensed estate agents and the officer in effective control for the conduct of their representatives in a modernised Estate Agents Act.

### SUMMARY OF AGENTS' REPRESENTATIVES RECOMMENDATIONS

Estate Agents Act Section	Rationale for Modernisation	EAC Modernisation Review Recommendation
13 Agents representatives	No longer effective in meeting its intended objective	The role of agents' representative to be abolished with all those working in the estate agency business who are not licensed estate agents to be classified as employees
13A Estate agents to be responsible for the acts of their representatives	No longer effective in meeting its intended objective	Repealed in favour of the model outlined in chapter 5 based on the authorised financial services licenses provisions in the Corporations Act
47 Authorisation of agents' representatives	No longer effective in meeting its intended objective	Repealed in favour of the model outlined in chapter 5 based on the authorised financial services licenses provisions in the Corporations Act

## 6. Office processes

**Section 35 Registered office and address** states that every licensed estate agent and agents' representative are required to have a registered office address within Victoria. The Registrar is to be notified of any changes to these details immediately and within fourteen days regarding the establishment of a branch office. Estate agents are also to notify the Registrar in writing within seven days of the commencement or cessation of employment of an agents' representative for the purpose of the register.

**Section 36 Name of estate agency business** outlines that the Authority may refuse to issue an estate agents licence or require a change in estate agency name if a person operates or plans to run an estate agency with a business name that incorporates the name of an unlicensed person, an agent's representative or could easily be confused with another agent. In addition estate agency business names are not permitted to mislead the public.

**Section 39 As to displaying notice on places of business** requires that every licensed estate agent have their name and description as a licensed estate agent and the name of the registered business name visible at their office. In addition estate agents as corporations must also name every director of the corporation engaged in estate agency work and their description as a licensed estate agent.

**Section 40 Letterhead** mandates that every licensed estate agent must have their name and description as a licensed estate agent printed on all correspondence from the estate agency business. In addition every licensed estate agent being a corporation must also display the name of every director of the corporation engaged in estate agency work, their description as a licensed estate agent and the name that the business is registered under if different to the corporation name.

**Section 46 Employee statements** are a monthly written log of the name, work and salary wages or commissions of employees that estate agents are required to keep. This material may be demanded for inspection by the Director and from time to time the Director should be notified of the location of the records in the estate agency office. False entries in employee statements are classified as an offence.

As outlined in the Position Paper the Council is concerned that there are a number of provisions within the Act which deal with standard business processes that do not require industry specific legislation and in some cases also duplicate the requirements found in other legislation. It is not clear what consumer protection is offered by sections 39, 40 and 46 which relate to the display of office signage, letterhead requirements and the maintenance of employee statements. The Council is inclined to view such provisions as simply an unnecessary regulatory burden on industry.

However the Council does see some merit in section 35 regarding the requirement of a registered office being lodged and section 36 concerning the name of the estate agency business as they relate to the consumer knowing who they are doing business with and where to find them which could be classified as consumer protection mechanisms.

It is the contention of this paper that the focus of the Act should be on big picture items, such as licensing, conduct and trust accounting, not generic office processes which burden estate agency businesses with unnecessary administrative requirements that provide no consumer protection.

## **Objectives<sup>83</sup>**

The rationale behind section 35 is that all estate agency branch offices operating in Victoria have an identifiable office location. Agents and agents' representatives are also attached to a particular office so that there is a means of the consumer and the regulator seeking redress in the event of any misconduct taking place.

The purpose of section 36 is to require each estate agency to have an identifiable business name that allows consumers to know who they are dealing with. The section also enables the Authority to have a means of attributing a pattern of behaviour to a particular estate agency and have standards regarding business naming conventions, for example not incorporating the name of an unlicensed person or an agent's representative.

The aim of section 39 is that the premises of a licensed estate agent should be readily identifiable, including the name of the corporation and name of directors involved in the corporation. This ensures transparency so that the consumer is equipped with the relevant information prior to engaging the services of an estate agent or agency.

Section 40 prescribes that all licensed estate agents should have their name and description as a licensed estate agent on all correspondence printed from the business. Similarly this applies to corporations engaged in estate agency work, who must also detail the names of all of the corporation directors. The section is designed to ensure that consumers are not misled about an estate agent claiming to be licensed and that estate agencies are accountable for the material they produce which bears their name.

Section 46 requires an agent who is in effective control to maintain a written log in their registered office detailing the names of staff, services undertaken, salaries and commissions. The intention of the provision seems to be identifying the employees and conduct for which the agent is liable and establishing transparent processes which can be readily inspected and requested by the Director regarding any possible breaches of the Act concerning salaries and commission. It could also be designed as a means of tracking commissions for example to ensure that no commission sharing arrangements are occurring without notification as per section 48 of the Act. It was suggested during the consultation process that section 46 is a throwback to the past when agents had to be in full time employment not just weekend traders and such statements were evidence of such requirements being met when inspections occurred.<sup>84</sup>

## **Interstate comparative snapshot<sup>85</sup>**

New South Wales, Queensland and Western Australia all have fairly similar provisions regarding section 35 the registered office and address which establish the principal place of business and the requirement of the registrar being notified of any change of details. South Australia does not have a comparable requirement. Tasmania does not have an equivalent section 35 per se, but does have such details as office address and the name of persons carrying out business in the location as part of its register which is more like section 33 of the Act.

New South Wales has almost identical provisions regarding section 36 the name of the estate agency business, which must not incorporate the name of unlicensed persons, be

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<sup>83</sup> Refer to appendix 11 for further information about the content and objectives of these provisions.

<sup>84</sup> REIV Consultation Meeting, opcit.

<sup>85</sup> Refer to appendix 12 for further information about comparable arrangements in other Australian states regarding offices processes within the estate agency office.

inappropriate or mislead the public. Western Australia does have a similar provision but there is less emphasis on business names that are deemed inappropriate or incorporate the name of an unlicensed person. Tasmania requires the name of the real estate agent/s to be incorporated into the business name unless a substitute name is authorised by the Board and adheres to the requirements set out in the Business Names Act 1962. Queensland and South Australia do not have an equivalent name of the estate agency business provision.

The states are fairly uniform concerning section 39 displaying the notice on places of business in requiring the name and description of the licensed estate agent and details of directors of the corporation being clearly displayed at the office location. South Australia is the exception with no comparable provision.

In contrast Western Australia is the only state to have a similar provision to section 40 regarding official details being displayed on all estate agency correspondence.

New South Wales has a similar provision to section 46 concerning employee statements where a licensee is required to keep a record at the place of business of the name and residential address of employees for three years after the person ceases to be an employee. Queensland and Tasmania have provisions which more closely resemble details recorded in the register as per section 33 of the Act than employee statements in section 46.

## **Rationale for modernisation**

### **Registered office address**

The Council has raised section 35 in the context of modernisation not because it is suggesting that the provision should be repealed but rather that it could be refined to enhance its effectiveness. It would be expected that this may also be considered in the context of national licensing for property agents.

As noted in the Position Paper the Council views section 35 requiring a registered office address to be an important provision in terms of consumer protection. The Council considers it to be significant in establishing a readily identifiable location where the consumer can contact the agent in the event that there is some sort of grievance. In addition a framework is created whereby agents and agents' representatives are attached to a particular office, which is useful for both consumers and the regulator in terms of tracing those engaged in the estate agency business in the event of misconduct.

At present the registered office lodged can simply be an address where mail is received, as long as it is a physical address and not a postal address (e.g. a po box<sup>86</sup>). The purpose of this is presumably to have an address where papers can be served and thus the address provided could be for example a solicitor's office. It does not necessarily need to be the estate agent's place of business. It was suggested during the course of the consultation stage of this review that regional practitioners sometimes advertise a city based address for the perceived prestige associated with for example being in Collins Street, but simply divert their phones and mail to their actual place of business located in the regions<sup>87</sup>. We have also heard of examples of estate agencies maintaining a postal address at a CBD address while conducting their business elsewhere. The Council would prefer a system where the registered address is required to be the agent's principal office where estate agency business is conducted. It is of lesser importance what form this office takes whether it is in the traditional shopfront or a home office. It is not viewed as problematic to have additional details such as a po box featured on

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<sup>86</sup> Although new smart forms being implemented by the property licensing area of CAV will allow for a po box address. CAV, 28 July 2009.

<sup>87</sup> ALPA, opcit.

file, but the key is for the authority and consumers to have the address details of the estate agency so that there is a means of seeking redress.

The establishment of the virtual office also poses the question as to what constitutes an office. The Council considers that a readily identifiable location, as opposed to simply a website address or telephone number, is an important consumer protection mechanism. Whether this office location takes the form of the traditional shopfront or the agent's living room from which they are performing transactions via their laptop is perhaps not significant as long as there is a capacity to physically locate the agent and their business and records. For example the current legislative requirements mean that an operation like Buy My Place while offering property services in a virtual way must still provide details of a physical address where consumers can contact them.<sup>88</sup> The Council sees value in this provision, but thinks that it is important that it is reassessed in the context of emerging technology. The REIV have also raised the increased use of electronic communications in its submissions to the Council review<sup>89</sup>. Considering the implications of the virtual office on the legislative framework it is a task worthy of greater consideration than possible within the scope of this review.

### **Name of estate agency business**

In the Position Paper the Council advocated section 36 regarding the name of the estate agency business should be abolished due to duplication with the requirements of the Business Names Act. The Business Names Act 1962 establishes many of the principles found in section 36 such as prohibiting business names which are deemed unacceptable (section 9 (1) of the Business Names Act and section 36 (2) (a) of the Act) or may cause confusion (section 10a of the Business Names Act and 36 (1) (a) of the Act).

The operation of the provision involves the property licensing section of CAV investigating new or updated business name applications that are received by searching a database to check that the estate agency business name does not incorporate the name of an agent's representative or disqualified person. When there are concerns with the name submitted, the licensing authorities go back to the applicant to suggest amendments to their applications to enable compliance. Most of the issues incurred are due to errors being made in the selection of a business name rather than due to any deliberate wrong doing attempting to mislead the public<sup>90</sup>.

The Council has modified its stance regarding section 36 acknowledging that there does not appear to be a huge problem in this area and that the provision would seem to be reasonably effective. There may also be some advantages in having additional requirements to that found in the Business Names Act, such as section 36 mandating that the estate agency business name must not incorporate the name of unlicensed persons. It does however strike the Council as a quirk that an agents' representative can own the business but it is not permitted to have their name incorporated into the estate agency business name.

### **Displaying notice on places of business**

In terms of streamlining basic office requirements within the Act in order to reduce the regulatory burden on industry it seems unnecessary to have a provision as per section 39 about displaying notice on the place of business. Section 39 which essentially deals with office signage is already dealt with in the Business Names Act, section 144 of the Corporations Act and in the case of misleading or deceptive conduct, the Fair Trading Act. The Council considers having a specific section of the Act dealing with office signage

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<sup>88</sup> <http://www.buymyplace.com.au/ContactUs.aspx>, accessed 17 September 2009.

<sup>89</sup> Raimondo, opcit and Peter Lowenstern, Modernising the Estate Agents Act 1980, 24 March 2009.

<sup>90</sup> Source –CAV Property Licensing, 28 July 2009.

redundant and not worthy of regulation or enforcement. Such provisions simply add administrative red tape without producing any meaningful consumer protection and as such the Council recommends abolishing section 39 of the Act.

### **Letterhead**

It is the view of the Council that section 40 which mandates that agents should have their name and description as a licensed estate agent featured on their letterhead is a redundant provision within the Act. The Council deems it unnecessary given that section 29 of the FTA already requires a name and address to be featured on documents and advertisements. In addition letterhead is just a standard business practice that an industry specific Act should have no real role in regulating as no consumer detriment is posed.

In addition subsection 40 (3) regarding a person conveying that they are a licensed estate agent when this is not in fact (in this case via their correspondence) is already dealt with both in section 38 of the Act as well as in the FTA. Again the Council views such provisions as superfluous and neither worthy of regulation or industry specific policing of non-compliant letterhead.

It is recommended that section 40 is repealed as part of the modernisation of the Estate Agents Act.

### **Employee statements**

As previously noted some jurisdictions have similar provisions to section 46 in terms of requiring estate agents to keep employee statements regarding the names and contact details of staff or the duties they were authorised to perform. Section 46 (1) (a) goes a little further though requiring an estate agent to keep a written log of the salary or commission also paid to employees per month, in addition to their name and work duties.

It is not immediately clear as to why there needs to be a provision within the Act dealing with keeping a log of salaries and commissions. It is contended that this should be part of the normal accounting procedures for business and record keeping processes which can be duly audited. Again it could be argued that standard business practices which are not particularly unique to an estate agency office should not be dealt with by the Act. The provision in part duplicates the record keeping obligations on employers under the Fair Work Act 2009.

Subsection 46 (1) (c) which requires that the estate agent regularly inform the Director in writing of the location within the office premises in which the employee statement records are kept is a good example of an unnecessary requirement. The REIV advise that it *is an uncommon occurrence for the Director to be advised of the location where employee statement records are kept in the office*<sup>91</sup>.

The Council recommends abolishing section 46 of the Act in order to reduce the regulatory burden on estate agency businesses given that there is no apparent consumer protection offered by such a provision.

### **Stakeholder views**

No objections were raised to the Council's proposals regarding office processes by stakeholders or review contributors. The REIV noted:

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<sup>91</sup> Raimondo, opcit.

*Provisions in the Estate Agents Act which duplicate provision in other Acts of a more general application –for example, the Fair Trading Act –should be repealed. Duplication adds to compliance cost. It is doubtful consumers will be disadvantaged by the repeal of unnecessary dual provisions in legislation<sup>92</sup>*

ALPA also agreed with the position advocated by the Council in the context of such requirements being replicated in other legislation. The only endorsement of the Act including such office process provisions contended that they provided a *convenient single source reference checklist for estate agents and officers in effective control.*<sup>93</sup>

## Conclusion

The Council recommends that sections 39, 40 and 46 regarding office signage, letterhead and employee statements are abolished in order to reduce the administrative burden on industry, given that no consumer protection is currently offered by the Act regulating such standard business practices and they duplicate existing legislative arrangements. It is the view of the Council that such prescriptive regulation regarding the most basic of business matters is not needed as if an estate agency is a fit and proper business, which is sufficiently competent to facilitate real estate transactions on behalf of consumers, than it is also capable of managing their own letterhead and signage without regulatory guidance.

The Council also suggests that section 35 should be redrafted to make clear that the registered address should be the place of business not just a physical address where mail is received. While such recommendations may appear to be inconsequential, the Council believes that they would cut red tape for industry, reduce the legislative duplication and allow estate agency practitioners to concern themselves with more important aspects of the Act such as their knowledge of the law, not engaging in misleading or deceptive conduct and maintaining the integrity of their trust accounts.

### SUMMARY OF OFFICE PROCESSES RECOMMENDATIONS

Estate Agents Act Section	Rationale for Modernisation	EAC Modernisation Review Recommendation
35 Registered office and address	Context of contemporary industry practice and consumer protection needs	Clarify that the registered address provided should be the principal place where estate agency business is conducted, not simply a postal address. Additional postal address details can be kept on file but the registered address should be the place of business.
36 Name of estate agency business	Duplicates the provisions of other Victorian or Commonwealth legislation that apply to the conduct and practices of the estate agency industry	No change recommended
39 As to displaying notice on places of business	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal
40 Letterhead	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal
46 Employee statements	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal

<sup>92</sup> Raimondo, opcit.

<sup>93</sup> Keating, opcit.

## 7. Other Issues<sup>94</sup>

**Section 38 Unlicensed person pretending to be licensed as an agent** provides that persons are not permitted to falsely represent themselves by displaying for example a sign near their place of business suggesting that they are a licensed estate agent when this is not the case.

**Section 45 Continuing Professional Development** provides that the Director may require estate agents or agent's representatives to undertake specified training or professional development activities.

While the Council has focussed on four key areas throughout this paper, namely provisions concerning price and advertising representations, management, agents' representatives and office processes, there are other issues worthy of consideration when addressing the question of modernising the Estate Agents Act. Stakeholders have raised some of these issues during the consultation process and the Council as part of its wider work agenda has examined others. These issues, which will be addressed in brief, include:

- The ability of the Act to simultaneously regulate the various segments of the industry; metropolitan residential (sales and property management), metropolitan commercial, retail and industrial, regional and rural estate agency services and business broking<sup>95</sup>.
- The merit of professional development related to the knowledge of law requirements as per regulation 6 of the Estate Agents (Professional Conduct) Regulations 2008.
- The emergence of the virtual office and implications for the legislative framework.
- How user-friendly the drafting style of the Act is and in particular, whether the use of notes referring to other pieces of legislation cited could be utilised.
- Whether section 38 regarding unlicensed persons pretending to be licensed as an agent is required given the provisions under the Fair Trading Act regarding false representations and deceptive or misleading conduct.

### **The ability of the Act to regulate the various segments of the industry**

*A significant modernisation of the Act would be one which gives proper recognition to the significant differences between residential and non-residential markets and their participant<sup>96</sup>s.*

The various segments of the market are legislated by the Act with an underlying assumption that given that they are all carrying out the same activities of selling, leasing and property management, that there are no fundamental differences between the respective sectors. However in operation there are considerable differences between the characteristics of the various segments. The issue of whether the Act is able to regulate the needs of the various segments of the estate agency industry was contemplated in the Council's Segmentation Study in 2008<sup>97</sup>. This was also raised by the TUV in regard to the Act's focus on residential

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<sup>94</sup> Refer to Appendices 13 and 14 regarding the objectives and comparative provisions in other states for sections 38 and 45 of the Estate Agents Act.

<sup>95</sup> The Allen Consulting Group, opcit.

<sup>96</sup> Simon Parsons, Managing Director, Parsons Hill Stenhouse, Estate Agents Act Review, 23 July 2009.

<sup>97</sup> The Allen Consulting Group, opcit.

sales to the perceived detriment of the property management sphere; *the lack of specific provisions relating to property management contribute to the poor practice and reinforce the lowly level of care attached to property management by the industry*<sup>98</sup>. Similarly, it was contended that the requirements of the Act were formed with the residential sales sector in mind not the commercial sector<sup>99</sup>; *Transactions in non-residential property are governed by the same act as residential property and this is a constraint on commerce*<sup>100</sup>. It was argued that there were provisions which did not translate in terms of the practices of commercial estate agents<sup>101</sup>.

The Shopping Centre Council of Australia (SCCOA) raised concerns about the cost and relevance of consumer protection safeguards within the legislative framework being applied to retail property agents and managers. It is claimed that the consumers involved in such property transactions are primarily large national and multinational institutions such as property trusts, superannuation funds and managed investment funds that neither require nor want consumer protection, as they are more than capable of looking after their own interests. *Our members have indicated that compliance with the Estate Agents Act requirements (and those in every other jurisdiction) costs them millions of dollars*<sup>102</sup>. SCCOA advocates an exemption from the Act for large retail property owners and their agents and managers in relation to their management and leasing of retail property claiming that the Act *should continue to regulated residential transactions and smaller commercial property transactions in order to protect consumers, but there is no similar rationale for the Act continuing to regulate leasing and management in the large non-residential property sector*<sup>103</sup>.

The Council considered a model reducing the regulatory burden on commercial agents where sophisticated market participants are involved and the need for consumer protection is reduced as part of the Segmentation Study. The Council sees merit in such a proposal but acknowledges that such arrangements will need to be considered in the context of national licensing. In this instance, the Council contends that in terms of modernising the Act it is important to acknowledge the various segments of the industry and their different requirements.

### **Professional Development**

Professional development in the estate agency industry is a contentious issue. On the one hand the Council agrees with the TUV regarding the need for measures such as professional development to be utilised to strengthen agents' ability to meet their knowledge of the law requirements as per section 6 of the Estate Agents (Professional Conduct) Regulations 2008<sup>104</sup>. On the other side the Council is sympathetic to claims that compulsory professional development can be *...a compliance burden [that is] time consuming, mind numbingly irrelevant [and only serves the purpose of] receiving a stamp in a CPD book to enable the retention of [one's] licence*<sup>105</sup>. Furthermore it is difficult to mandate universal training for such a segmented market. It has been suggested during the consultation process of this review that professional development focussed on the residential market has little value for commercial agents<sup>106</sup>.

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<sup>98</sup> Mark O'Brien, CEO, Tenants Union of Victoria, Modernising the Estate Agents Act 1980 Submission, 24 March 2009.

<sup>99</sup> In some other states similar Acts are more segmented in terms of dealing with the commercial sector with separate provisions, for example the Property Agents and Motor Dealers Act 2000 in Queensland.

<sup>100</sup> Parsons, *opcit*.

<sup>101</sup> Kaufman, *opcit* and Parsons, *opcit*.

<sup>102</sup> Milton Cockburn, Submission to the Estate Agents Council Modernisation Review, 11 August 2009.

<sup>103</sup> *ibid*

<sup>104</sup> O'Brien, *opcit*.

<sup>105</sup> Parsons, *opcit*.

<sup>106</sup> Kaufman, *opcit* and Parsons, *opcit*.

As noted in the submissions to this review lodged by both the REIV and ALPA such industry associations already run a professional development program where a certain number of points must be accumulated per year to maintain membership of such organisations<sup>107</sup>. The REIV and ALPA professional development courses are also available to non-members. The REIV and ALPA contend that such a framework is sufficient and that compulsory professional development requirements within the Act are not necessary and *would be unduly burdensome and offer little or no additional benefit to the industry or consumers*.<sup>108</sup> The Council concurs to a certain extent and is not recommending a model like that in operation in New South Wales where points linked to professional development training must be accrued per calendar year or the scheme in place in Tasmania where continuing education is also linked to licence renewal. The Council is also reluctant to add to the regulatory burden on the estate agency industry, which is against the objective of this review, especially when it is not equipped with any evidence regarding cost-benefit analysis or data demonstrating potential advantages for consumers. That being said the Council still maintains there are improvements which could be made to strengthen professional development undertaken by agents and their representatives.

The Council recommends consideration is given to the following proposals:

- (a) Increasing the emphasis within section 29B regarding the duties of the officer in effective control or principal licensed estate agent for the training of their representatives and staff. This sends a clear message, establishes who is accountable for ensuring practitioners are adequately trained regarding their obligations and the law without adding to the regulatory burden on industry by working within the existing legislative framework.
- (b) *If consumers of estate agency services, in particular residential tenants, landlords, home purchasers and vendors are to be given optimum protections, section 45 of the Estate Agents Act should be invigorated to ensure that all estate agents and agents' representatives are able to participate in appropriate and ongoing professional development*<sup>109</sup>.

As stated in the Position Paper the Council sees considerable value being gained from agents and representatives being required to undertake a legislative update course every few years to ensure that their knowledge of the law is satisfactory, while not burdening them with unreasonable or excessive demands on their time. This could be achieved without further regulation by making more use of the current section 45 which allows the Director to require training to be undertaken in a set manner or time period.

- (c) The Council also sees value in the Director issuing guidelines around what is expected of agents and representatives meeting their knowledge of the law as per regulation 6. Without adding to regulation as such, this may provide clear guidance on what is expected and produce some benefits.

The Council welcomes further consideration about professional development with regard to the knowledge of the law. It does not advocate a cumbersome compulsory professional development model as such and acknowledges the existing training offered by industry associations. However the Council contends that consumers would benefit from having a market place where all practitioners were aware of the relevant and up to date laws

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<sup>107</sup> Raimondo, opcit and Mannion, et al, opcit.

<sup>108</sup> Raimondo, ibid.

<sup>109</sup> Keating, opcit.

concerning estate agency business and recommends thought be given to the options identified in this paper. It should also be noted that professional development is another issue which will need to be contemplated as part of the national licensing harmonisation process.

### **Virtual office**

As previously noted the emergence of the virtual office poses numerous challenges for the current legislative framework. The Act will need to be modernised in order for estate agency legislation to keep up with the fast pace of technology and new business practices. By virtual office we mean conducting estate agency business in a non-traditional way through the use of technology. For example rather than an agent engaging in the trade of selling, leasing and property management from the traditional shopfront, the virtual office would allow such transactions to be carried out via the agent with a lap top in their living room or indeed in another state. Such a scenario poses questions in terms of supervision, the concept of the office, jurisdictional borders, maintenance of documentation for the purpose of inspection, trust accounting and fair trading consumer protection safeguards. In addition the use of websites for inspections and online auctions present another area of development which the Act will need to address.

On this occasion the Council has decided not to grapple with the many issues associated with the virtual office as such a topic is worthy of a separate review in itself. The Council at this time flags this area as being in need of further attention when considering the modernisation of the Act.

### **Drafting style**

As stated in the Position Paper it is the view of the Council that the Act is drafted in a style which is neither readily accessible for those engaged in the industry or consumers using estate agency services. Provisions should be written in a manner in which their meaning is immediately apparent without the reader having to rely on definitions, interpretation or cross-referencing. Suggesting drafting as a problem with the current Act may appear a minor point, but a clearer statute would enable industry to be in no doubt about their obligations encouraging compliance and allowing this process to be less cumbersome for business. More user-friendly legislation also enable consumers to be empowered, which allows for a high functioning market place where all participants are well informed and thus better protected<sup>110</sup>.

The Council has identified sections 13, 13B, 14, 29B, 29C, 30, 47A, 47B, 47C, 48A, 48B, 48C, 55<sup>111</sup> and 56 amongst those provisions which may be more effective if drafted in a more user-friendly manner. Addressing drafting as part of the broader modernisation process may enable a more cohesive picture of industry regulation to emerge rather than the current amalgam of numerous legislative changes to the Act since its inception in 1980 and subsequently various drafting styles.

Aside from the general observations noted above the Council recommends that the drafting technique increasingly employed in Commonwealth legislation, such as the Trade Practices Amendment (Australian Consumer Law) Bill 2009 and Fair Work Act 2009, whereby footnotes are used within the text to explain various concepts, definitions or cite relevant sections of other pieces of legislation be utilised within the Estate Agents Act. The ability of

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<sup>110</sup> Estate Agents Council, Modernising the Estate Agents Act 1980 Position Paper, July 2009.

<sup>111</sup> An issue raised by the REIV during the first consultation process was the need to tighten up section 55 in order to make it clear that conflict of interest/ disclosure requirements should apply to those involved in the estate agency business, corporation boards and their immediate family and associates not run of the mill shareholders with no inside corporate knowledge. While this is not an area explored in any depth in this paper, the Council would support such a proposal.

the reader not having to cross reference during their consideration of the Act may be a useful drafting change.

### **Unlicensed persons pretending to be licensed as an agent**

As noted in the Position Paper the Council is of the view that renewed emphasis should be placed on the obligations imposed under the Fair Trading Act, rather than necessarily dealing with specific misconduct through individual provisions in the Estate Agents Act. Such an approach would apply to section 38 of the Act which addresses an unlicensed person pretending to be licensed as an agent, which could be dealt with by the Fair Trading Act focussed on misleading and deceptive conduct and false representation. Abolishing section 38 would remove further unnecessary legislative duplication from the Act.

### **Conclusion**

The Council recommends that further thought be given to how one Act can cater to the needs of the various segments of the market and the virtual office during the wider modernisation of the Estate Agents Act process. It is suggested that section 38 be abolished regarding unlicensed persons representing themselves as licensed estate agents in favour of the provisions within the Fair Trading Act addressing such matters. It is also proposed that the drafting style and use of notes be considered when modernising the Act. Finally the Council recommends that measures such as reinforcing the responsibility of the officer in effective control or principal licensed estate agent for the training of staff be incorporated into section 29B, issuing guidelines around the obligations of practitioners regarding regulation 6 the knowledge of the law or requiring agents and representatives to undertake a legislative update course every few years as per recommended changes to section 45 be considered when addressing the question of the value of professional development. The Council acknowledges that some of these issues will be addressed as part of the implementation of national licensing for property agents.

## SUMMARY OF OTHER ISSUES RECOMMENDATIONS

Estate Agents Act Section	Rationale for Modernisation	EAC Modernisation Review Recommendation
Overall observation – ability of the Act to regulate the various segments of the industry	Context of contemporary industry practice, effectiveness	Further consideration be given as part of the national licensing process to the needs of the various segments of the market and their respective requirements in terms of consumer protection within the Act
45 Continuing professional development	No longer effective in meeting its intended objective	<p>The responsibility of the officer in effective control for the training of their representatives and staff is incorporated into their duties in section 29B.</p> <p>Section 45 be utilised to required agents and representatives to undertake a legislative update course every few years to ensure they are meeting their knowledge of law requirements as per regulation 6 of the professional conduct regulations.</p> <p>Guidelines being issues around what is expected of agents and representatives in meeting their knowledge of law requirements as per regulation 6 of the professional conduct regulations.</p>
Overall observation – Virtual office	Emerging issue, context of contemporary industry practice	It is recommended that further consideration is given to issues raised by the virtual office including the concept of the estate agency office, supervision, licensing, jurisdictional borders, maintenance of documentation for inspection, trust accounting and the needs for additional consumer protection safeguards.
13, 13B, 14, 29B, 29C, 30, 47A, 47B, 47C, 48A, 48B, 48C, 55 and 56	Unclear in relation to the drafting of the provisions including the terminology and language used, the complexity of the provision or the linkages between related but separate provisions	<p>It is recommended that further consideration is given to the drafting style of the Act in terms of being written in a clearer and more user-friendly style.</p> <p>The use of footnotes within the Act regarding definitions and references to other pieces of legislation, which is a drafting technique used in pieces of Commonwealth legislation.</p> <p>Section 55 should be redrafted to clarify that conflict of interest and disclosure requirements should apply to those in involved in the estate agency business, corporation boards and their immediate family and associates not average shareholders.</p>
38 Unlicensed persons pretending to be licensed as an agent	Duplicates the provisions of other Victorian legislation	Repeal as provisions in the Fair Trading Act address this issue

## **8. Summary of findings**

It is the view of the Council that the Estate Agents Act 1980 could be modernised by considering the effectiveness of price and advertising representation provisions, strengthening accountability mechanisms within provisions dealing with management and agents' representatives and reducing the regulatory burden on industry by removing unnecessary provisions concerning basic office processes. In addition other areas identified as being suitable for further consideration in the context of modernisation include the drafting style of the Act, segmentation of the market, the virtual office and professional development.

### **Price and advertising representations**

The Council acknowledges that underquoting is occurring in the metropolitan residential sales market, it is not to the extent often portrayed in the media. That being said the Council does not consider the current provisions to be functioning effectively given the consumer detriment posed and impact on market confidence by cyclical allegations of widespread underquoting.

The Council's Position Paper advocated the use of a broader catch-all conduct requirement based on fair trading principles which outlaw misleading and deceptive conduct and false representations, rather than the current provisions which were designed to prohibit the specific practice of underquoting.

This paper suggests that there is some merit in addressing this issue through the increased use of education and compliance and enforcement activity, restrictions on advertising sales methods such as price plus, vendors being required to authorise the use of any price quoted and the use of evidence to support price representations. However the Council does not view any of these proposals as the answer to the problem in isolation and argues that it is important that such provisions focus on the misconduct of the practitioner not simply the symptoms of the problem such as problematic sales techniques.

The Council recommends that price and advertising provisions, in particular section 47C, be recast with a focus on the obligations found in the Fair Trading Act and Trade Practices Act, namely misleading and deceptive conduct and false representation. It is suggested that section 47A and 47B are repealed and that section 47D be replaced with a substantiation clause. Currently section 106A of the Fair Trading Act only applies to goods and services not property. The Council views the addition of a similar substantiation clause to the Estate Agents Act a useful preliminary investigative tool, and believes it sends a clear message that underquoting will not be tolerated, and places the onus on the agent or representative to prove that a breach has not occurred and is in the spirit of fair trading principles and developments at the national level.

### **Management**

The Council contends that the role of the officer in effective control or principal licensed estate agent should be strengthened to affirm their accountability for all aspects of the estate agency business. This would include responsibility for the employment of appropriate staff, ensuring that staff are adequately trained and supervised and that sufficient processes are in place to ensure legal obligations under the Act to be met. The Council also favours an emphasis on the overall responsibility of the officer in effective control for the estate agency business rather than simply being required to be in regular and substantial attendance. The Council advocates removing the branch manager role in section 30 from the Act suggesting that it adds an unnecessary tier to the accountability framework, with ultimate responsibility lying with the officer in effective control, and it is an internal business process not something that needs to be featured in regulation. Finally the Council recommends that section 30A

regarding the notification of absences of the estate agent and branch manager be repealed as human resources issues related to short-term absences within the office are more of an issue for the individual estate agency business not worthy of industry specific regulation. The Council views such changes as important in strengthening accountability within the Act for the benefit of consumers and reducing the regulatory burden on industry.

### **Agents' representatives**

The Council has concerns with the agents' representative role as it stands in the Act. Currently an unlicensed agents' representative with a certificate III TAFE course qualification can carry out all the functions of a licensed estate agent without the benefit of their training or experience. The Council suggests that this emphasises the importance of supervision and accountability mechanisms within the Act regarding the officer in effective control and licensed estate agent being responsible for the conduct of their agents' representative. The Council's view is that greater transparency and accountability would be gained from abolishing the role of agents' representative and classifying all those who are not licensed estate agents to be employees of the corporation for whose training and conduct the officer in effective control is ultimately answerable. In addition the Council recommends that a model based on the arrangement for authorised financial services licensees under the Corporations Act be established in the Estate Agents Act to clearly assert the responsibility and authorisation of the licensed estate agent for the conduct of their employees. The Council does not view such changes as merely a symbolic name change; rather it considers that it entrenches the accountability of agents for their representatives as per the original intent of section 47 and in doing so provides further consumer protection. Furthermore classifying agents' representatives as employees of the estate agency business better reflects the status of their role to the community, rather than the current system where agents' representatives are pseudo agents, a throw back to the era of sub-agents with none of the safeguards or career development.

### **Office processes**

The Council considers section 35 regarding the provision of a registered office address to be an important consumer protection mechanism in terms of having a readily identifiable location where the agent or representative can be contacted if there is a grievance. Accordingly the Council is in favour of section 35 requiring the registered office to be the principal place of business rather than simply a postal address.

The Council is in favour of retaining section 36 regarding the name of estate agency business. It is a provision which seems to be reasonably effective and compliments the requirements in the Business Names Act while having additional provisions regarding the name of disqualified persons not being incorporated into the name of the estate agency business. However the Council is in favour of repealing sections 39, 40 and 46 as it sees no need to have industry specific regulation regarding such standard business practices as office signage, letterhead and the maintenance of employee details. Such matters are already dealt with in other legislation such as the Corporations Act, Fair Trading Act and employment law and represent an unnecessary regulatory burden on industry with no benefits for consumers. Repealing such office process provisions would not preclude any estate agency business from having a sign identifying their place of business, their details on their correspondence or maintaining appropriate personnel files on their staff, rather it just removes the Act from being involved in the regulation of such standard business practices.

## **Other issues**

It is suggested that further consideration needs to be given to whether a single Act is able to cater to the various segments of the industry and the emergence of the virtual office. In addition the Council recommends that the responsibility of officers in effective control for the professional development of their employees be incorporated into section 29B, that section 45 be reinvigorated to require agents to undertake a legislative update course every few years and that guidelines be issued around what is expected of agents and their representatives in meeting their knowledge of the law requirements. The Council also advocates further consideration is given to drafting provisions in the Act in a more user-friendly manner and the use of notes to assist regarding definitions and citing other pieces of legislation (negating the need to cross-reference). It is also recommended that section 38 regarding unlicensed persons pretending to be licensed as an agent be repealed on the grounds of duplication as this would constitute misleading or deceptive conduct or false representation which is already covered by the Fair Trading Act. These issues represent different aspects of the Act, worthy of review or improvement, during the modernisation of the Act process.

## **Conclusion**

The Council considers the issues identified throughout this report and accompanying recommendations have the potential to increase the effectiveness of the Estate Agents Act, strengthen consumer protection and reduce the regulatory burden on industry. The intention of this project has been to contribute to the broader modernisation project of CAV initiated by the Minister for Consumer Affairs which seeks to improve the Act for the benefit of both consumers using estate agency services and practitioners carrying out estate agency business. It is anticipated that the Council's report and the views of stakeholders and estate agents featured will contribute to this work<sup>112</sup>. National licensing and harmonisation as well as the modernisation of legislation represent an important new chapter for estate agency regulation. The Estate Agents Council looks forward to continuing to contribute to this important work.

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<sup>112</sup> Refer to appendix 15 for a full list of contributors to the Council's Modernisation Review.

**TABLE – ESTATE AGENTS COUNCIL MODERNISATION REVIEW FINAL RECOMMENDATIONS**

Estate Agents Act Section	Rationale for Modernisation	EAC Modernisation Review Recommendation
<b>Price and advertising representations</b>		
42 Advertising	No longer effective in meeting its intended objective	Recast in terms of broad fair trading principles of prohibiting misleading and deceptive conduct and false representation
47A Seller must be given estimated selling price	No longer effective in meeting its intended objective	Repeal
47B False representation to seller or prospective seller	No longer effective in meeting its intended objective	Repeal
47C False representation to the prospective buyer	No longer effective in meeting its intended objective	Recast in terms of broad fair trading principles prohibiting misleading and deceptive conduct and false representation
47D Director may require information concerning estimates	No longer effective in meeting its intended objective	Repeal in favour of the addition of a substantiation clause to the Estate Agents Act which applies to property similar to section 106A of the Fair Trading Act regarding goods and services
<b>Management</b>		
29B Duties of agents officers in effective control	Strengthen focus on accountability	<p>The provision should be strengthened to make it clear that the officer in effective control or principal licensed estate agent is responsible for the training, supervision and employment of eligible staff and ensuring that processes are in place to enable legal obligations under the Act to be met by all those conducting estate agency business in the principal and branch offices.</p> <p>There should be a focus on the accountability of the officer in effective control or principal licensed estate agent for day to day activities rather than simply regular and substantial attendance.</p>
30 Management of an estate agency office	Unnecessary regulation	Repeal
30A Absence of estate agent or branch manager	Unnecessary regulation	Repeal
<b>Agents' representatives</b>		
13 Agents representatives	No longer effective in meeting its intended objective	The role of agents' representative to be abolished with all those working in the estate agency business who are not licensed estate agents to be classified as employees
13A Estate agents to be responsible for the acts of their representatives	No longer effective in meeting its intended objective	Repealed in favour of the model outlined in chapter 5 based on the authorised financial services licenses provisions in the Corporations Act

**TABLE – ESTATE AGENTS COUNCIL MODERNISATION REVIEW FINAL RECOMMENDATIONS**

<b>Estate Agents Act Section</b>	<b>Rationale for Modernisation</b>	<b>EAC Modernisation Review Recommendation</b>
47 Authorisation of agents' representatives	No longer effective in meeting its intended objective	Repealed in favour of the model outlined in chapter 5 based on the authorised financial services licenses provisions in the Corporations Act
<b>Office processes</b>		
35 Registered office and address	Context of contemporary industry practice and consumer protection needs	Clarify that the registered address provided should be the principal place where estate agency business is conducted, not simply a postal address. Additional postal address details can be kept on file but the registered address should be the place of business.
36 Name of estate agency business	Duplicates the provisions of other Victorian or Commonwealth legislation that apply to the conduct and practices of the estate agency industry	No change recommended
39 As to displaying notice on places of business	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal
40 Letterhead	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal
46 Employee statements	Unnecessarily burdensome for industry when weighed against the benefits for consumers	Repeal
<b>Other issues</b>		
Overall observation – ability of the Act to regulate the various segments of the industry	Context of contemporary industry practice, effectiveness	Further consideration be given as part of the national licensing process to the needs of the various segments of the market and their respective requirements in terms of consumer protection within the Act
45 Continuing professional development	No longer effective in meeting its intended objective	<p>The responsibility of the officer in effective control for the training of their representatives and staff is incorporated into their duties in section 29B.</p> <p>Section 45 be utilised to required agents and representatives to undertake a legislative update course every few years to ensure they are meeting their knowledge of law requirements as per regulation 6 of the professional conduct regulations.</p> <p>Guidelines being issues around what is expected of agents and representatives in meeting their knowledge of law requirements as per regulation 6 of the professional conduct regulations.</p>

**TABLE – ESTATE AGENTS COUNCIL MODERNISATION REVIEW FINAL RECOMMENDATIONS**

<b>Estate Agents Act Section</b>	<b>Rationale for Modernisation</b>	<b>EAC Modernisation Review Recommendation</b>
Overall observation –Virtual office	Emerging issue, context of contemporary industry practice	It is recommended that further consideration is given to issues raised by the virtual office including the concept of the estate agency office, supervision, licensing, jurisdictional borders, maintenance of documentation for inspection, trust accounting and the needs for additional consumer protection safeguards.
13, 13B, 14, 29B, 29C, 30, 47A, 47B, 47C, 48A, 48B, 48C, 55 and 56	Unclear in relation to the drafting of the provisions including the terminology and language used, the complexity of the provision or the linkages between related but separate provisions	It is recommended that further consideration is given to the drafting style of the Act in terms of being written in a clearer and more user-friendly style.  The use of footnotes within the Act regarding definitions and references to other pieces of legislation, which is a drafting technique used in pieces of Commonwealth legislation.  Section 55 should be redrafted to clarify that conflict of interest and disclosure requirements should apply to those involved in the estate agency business, corporation boards and their immediate family and associates not average shareholders.
38 Unlicensed persons pretending to be licensed as an agent	Duplicates the provisions of other Victorian legislation	Repeal as provisions in the Fair Trading Act address this issue

**APPENDIX 1 - PRICE REPRESENTATION AND ADVERTISING PROVISIONS**

EAA Section	Provision Content	Provision Objective
42. Advertising	<p>(1) Any estate agent who publishes any advertisement relating to or in connexion with his business without specifying therein a name under which the agent carries on business and the address of his registered office his principal office or any one of his branch offices shall be guilty of an offence.</p> <p>(2) Any person who wilfully and falsely advertises or in any way wilfully and falsely represents that as an estate agent he has a particular property or business for sale shall be guilty of an offence.</p> <p>(3) Any person who in any way wilfully and falsely represents that as an estate agent he has sold a property or holds a deposit in respect of the sale of a property shall be guilty of an offence.</p> <p>(4) Any estate agent who publishes or permits or authorizes to be published as part of any advertisement any false or misleading statement or representation concerning any property or business which is or is stated or represented to be for sale shall be guilty of an offence.</p> <p>(5) For the purposes of this section an advertisement shall be deemed to be misleading—</p> <p>(a) if it refers to the "gross profit" or the "clear profit" of a business stated or represented to be for sale; or</p> <p>(b) if it mentions any amount as being the profit of a business stated or represented to be for sale which is not the average weekly net profit of the business for the period of</p>	<p>The section focuses on conduct related to advertising. Following on from the requirement under section 40 where agents must have their name and description as a licensed estate agent clearly displayed on their letterhead, an estate agent must also have their name, business and registered office address displayed on any advertisement. This is designed to ensure that agents are accountable for the material they are publishing and that consumers are able to verify the credentials of the agency before engaging their services.</p> <p>Furthermore the section ensures that estate agents are held accountable for false or misleading advertisements or representations about a property or business for sale. This extends to whether they have published or authorised the advertisement. The section is a key consumer protection mechanism in seeking to defend misleading advertising in line with the Fair Trading Act 1999.</p>

**APPENDIX 1 - PRICE REPRESENTATION AND ADVERTISING PROVISIONS**

EAA Section	Provision Content	Provision Objective
	<p>three years immediately before the publication of the advertisement or for the whole of any lesser period during which the business has been carried on by the vendor.</p> <p>(6) In any proceedings under this section—</p> <p>(a) production of a newspaper containing an advertisement having specified therein the name of an estate agent or of an advertisement published in any other form having specified therein the name of an estate agent shall be prima facie evidence that the estate agent published or authorized to be published the advertisement and all statements and representations made therein; and</p> <p>(b) evidence on oath that an advertisement was published and that any statement or representation was made in or as part of the advertisement and that the name of any estate agent was specified or mentioned in or as part of or as having authorized the publication of the advertisement shall be prima facie evidence that the agent published or authorized the publication of the advertisement and the statement or representation.</p>	
<p>47A. Seller must be given estimated selling price</p>	<p>(1) Before obtaining a person's signature to an engagement or appointment to sell any real estate on behalf of the person, an estate agent (or an agent's representative employed by the agent) must ensure that the engagement or appointment states the agent's (or representative's) estimate of the</p>	<p>Section 47A requires an agent or agents' representative to provide an estimated selling price on the engagement document. The purpose is to establish a clear estimate of the value of the property based on the experience and knowledge of the agent so that the vendor has a clear expectation of the property's worth and the agent can appropriately market the property to would-be purchasers.</p> <p>The agent or their representative is employed by the vendor to sell their property for the highest value but at the same time the onus is on the agent not to falsely represent or mislead consumers regarding the cost involved in purchasing the</p>

**APPENDIX 1 - PRICE REPRESENTATION AND ADVERTISING PROVISIONS**

EAA Section	Provision Content	Provision Objective
	<p>selling price of the real estate, and that the estimate complies with this section.</p> <p>(2) The estimate—                      (a) may be a single amount or a price range; and                      (b) must be the amount the agent or representative believes, on the basis of his or her experience, skills and knowledge, that a willing but not anxious buyer would pay for the real estate, or in the case of a price range, the range within which that amount is likely to fall; and                      (c) must be set out in a manner approved by the Director.</p> <p>(3) If an estimate is expressed as a price range, the difference between the upper and lower limits of the range must not exceed 10% of the amount of the lower limit of the range.</p> <p>(4) Nothing in this section requires the estimated selling price and the seller's reserve price to be the same amount.</p>	<p>property. The provisions derive from the Estate Agents and Sale of Land Acts (Amendment) Bill in 2002 which sought to stamp out the practice of underquoting<sup>113</sup>.</p>
47B. False representation to seller or prospective seller	<p>An estate agent or agent's representative must not make a false representation to a seller or prospective seller of real estate as to the agent's or representative's estimate of the selling price of the real estate.</p>	<p>Section 47B clearly establishes the requirement that in line with the Fair Trading Act it is an offence to make false representations regarding the estimate selling price of a property to the seller. The objective of the section is to ensure that the vendor is not given an inaccurate snapshot of what their property is worth by the agent and price valuations are transparent and open to scrutiny.</p>
47C. False representation to prospective buyer	<p>(1) This section applies to an estate agent who holds a written engagement or appointment to sell real estate, and to any agent's representative employed by the agent.</p> <p>(2) In making any statement while</p>	<p>Section 47C requires that an estate agent or agents representative who has a written engagement to sell real estate must adhere to the principles set out in the Fair Trading Act in not making false representations regarding the estimated selling price when marketing real estate or communicating with potential purchasers of the property. The section aims not to place prospective purchasers at a disadvantage by the misleading conduct of the agent who is seeking to inflate the price of the property they are selling on behalf of their vendor.</p>

<sup>113</sup> Christine Campbell, Minister for Consumer Affairs, Second Reading Speech, Estate Agents and Sale of Land Acts (Amendment) Bill, Parliament of Victoria Legislative Assembly, 10 October 2002. Source –VicHansard ([www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)).

**APPENDIX 1 - PRICE REPRESENTATION AND ADVERTISING PROVISIONS**

EAA Section	Provision Content	Provision Objective
	<p>marketing the real estate, the agent or representative must not state as his or her estimate of the selling price of the real estate a price that is less than the estimated selling price, or in the case of a price range, less than the lower limit of that range, stated in the engagement or appointment (200 penalty units).</p> <p>(3) For the purposes of this section, a statement is made while marketing real estate if—</p> <p>(a) it is made in an advertisement in respect of the property that is published, or caused to be published, by the agent; or</p> <p>(b) it is made (whether orally or in writing) to a person as a prospective purchaser of the real estate.</p>	
<p>47D. Director may require information concerning estimates</p>	<p>(1) The Director may require an estate agent who has accepted an engagement or appointment to sell real estate to provide the Director with evidence of the reasonableness of the estimated selling price or price range of the real estate set out in the engagement or appointment.</p> <p>(2) The Director must make the requirement in writing and must specify the date by which the agent must comply with the requirement.</p> <p>(3) The agent must comply with the requirement on or before the compliance date specified in the notice.</p>	<p>The section requires agents with an authority or engagement to sell real estate to substantiate their estimated selling price if required in writing by the Director. The objective is clearly as a compliance mechanism to ensure that reasonable estimated selling prices are being set in accordance with section 47A and thus no false representations are being made to the seller or buyer as per sections 47B-C.</p>

**Appendix 2 - Comparison of advertising and pricing provisions in Victoria and New South Wales**

**Victoria - Estate Agents Act 1980**

**New South Wales - Property Stock and Business Agents Act 2002**

**42 Advertising**

Requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.

**50 Advertisements to include information about licensee**

Requires that a licensee must not publish an advertisement unless the advertisement includes the name of the individual licensee, business name, the name of the partnership or corporation as applicable.

**51 Publishing false or misleading advertisements**

A licensee must not publish anything in the course of conducting their business that is intended to promote the sale or lease of any property that is materially false, misleading or deceptive (whether to the licensee’s knowledge or not). A statement is published if it appears in a newspaper or any other type of journal, is exhibited in public, delivered via direct mail, broadcast on radio or television or communicated via a website or electronic mail.

A person must prove in defending such a charge that the person took all reasonable precautions against committing the offence, and the person believed on reasonable grounds that the statement was true or that the state of affairs existed, and the person had no reason to suspect that the statement was false or misleading. The person remains liable to all civil proceedings as if the proceedings for an offence had not been taken. This section is to be read as being in addition to and not in derogation from any enactment or law relating to false or misleading advertisements or other statements.

**Section 47A Seller must be given estimated selling price**

Establishes that prior to obtaining a person’s signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor’s reserve must be the same amount.

**74 Requirement to substantiate selling price estimates –residential property**

A real estate agent may be required to provide evidence in writing of the reasonableness of any estimate of the selling price of residential property made by the agent in a statement either orally or in writing to a seller or prospective seller of the property, in an advertisement in respect of the property that is published or caused to be published by the agent or orally or in writing to a person as a prospective purchaser of the property.

**Section 47B False representation to seller or prospective seller**

States that neither an estate agents or agents’ representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.

**72 False representation to seller or prospective seller**

A real estate agent or employee of a real estate agent must not make a false representation to a seller or prospective seller of residential property as to the agent’s or employee’s true estimate of the selling price of the property.

**Section 47C False representation to prospective buyer**

Applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent’s representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.

**73 False representation to prospective buyer**

A real estate agent acting pursuant to an agency agreement for the sale of residential property or the employee of such an agent must not, by a statement made in the course of marketing the property, falsely understate the estimated selling price of the property. An agent or employee is considered to falsely understate the estimated selling price of residential property if the agent or employee states as his or her estimate of that selling price a price that is less than his or her true estimate of the selling price. A statement is considered to be made in the course of marketing residential property if the statement is made in an advertisement in respect of the property that is published or caused to be published by the agent or to a person (orally or in writing) as a prospective purchaser of the property. A statement in the agency agreement of the agent’s estimate of the selling price of residential property is evidence for the purposes of this section of the agent’s true estimate of that selling price.

**Appendix 3 - Comparison of advertising and pricing provisions in Victoria and Queensland**

**Victoria - Estate Agents Act 1980**

**Queensland - Property Agents and Motor Dealers Act 2000**

**42 Advertising**

Requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.

**158 Display and publication of licensee's name**

A real estate agent who is a principal licensee must not publish, or permit to be published, in a newspaper or elsewhere an advertisement for the agent's business without stating in the advertisement the particulars that may be prescribed under a regulation

Similar provisions exist regarding residential letting agents (s123), pastoral houses (s195), property developers (s273) and commercial agents (s352).

**Section 47A Seller must be given estimated selling price**

Establishes that prior to obtaining a person's signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor's reserve must be the same amount.

**573A Misleading conduct** A marketeer must not, in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of residential property in Queensland, engage in conduct that is misleading or is likely to mislead.

**573C False representations and other misleading conduct in relation to residential property**

A marketeer must not, in connection with the sale, or for promoting the sale, or for providing a service in connection with the sale, of residential property in Queensland, represent in any way to someone else anything that is false or misleading. A marketeer must not make a false or misleading representation about the price payable for the property.

**Section 47B False representation to seller or prospective seller**

States that neither an estate agents or agents' representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.

**574 False representations about property**

A licensee or registered employee must not represent in any way to someone else anything that is false or misleading in relation to the letting, exchange or sale of property. A licensee or registered employee must not, in connection with the sale, or the possible sale, of an interest in land or in connection with the promotion in any way of the sale of an interest in land, represent in any way to someone else anything that is false or misleading.

**Section 47C False representation to prospective buyer**

Applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent's representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.

**574C Representation of price of property--real estate agent**

This section applies if a person wanting to sell residential property asks a real estate agent for information about the price at which residential property that is to be, or may be, offered for sale, whether or not by auction, (offered property) is likely to be sold. If the real estate agent decides to give the person the information, the real estate agent must, when giving the person the information, give the person a copy of a comparative market analysis for the offered property or if a comparative market analysis can not be prepared for the offered property, a written explanation showing how the real estate agent decided the market value of the property.

**574D Real estate agent not to indicate reserve price to potential buyer**

This section applies if a person wanting to buy residential property (potential buyer) asks a real estate agent for information about the price at which residential property that is to

**Appendix 3 - Comparison of advertising and pricing provisions in Victoria and Queensland**

**Victoria - Estate Agents Act 1980**

**Queensland - Property Agents and Motor Dealers Act 2000**

be, or may be, offered for sale, whether or not by auction, (offered property) is likely to be sold or is, or is likely to be, offered for sale. If the offered property is to be offered for sale by auction, the real estate agent must not disclose to the potential buyer whether the seller has set a reserve price for the offered property or the reserve price set for the offered property or an amount the real estate agent considers is a price likely to result in a successful or acceptable bid for the offered property.

If the property is not to be offered for sale by auction and the seller has instructed the real estate agent not to disclose the price at which the seller is willing to sell the offered property, the real estate agent must not disclose to the potential buyer the price at which the seller is willing to sell the offered property. However, the real estate agent does not commit an offence if on the seller's written instructions, the real estate agent gives the potential buyer a copy of whichever of the following was given to the seller the comparative market analysis for the offered property or the written explanation showing how the real estate agent decided the market value of the property.

**Appendix 4- Comparison of advertising and pricing provisions in Victoria and South Australia**

Victoria - Estate Agents Act 1980	South Australia – Land Agents Act 1994 and Land and Business (Sale and Conveyancing) Act 1994
<p><b>42 Advertising</b> Requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.</p>	<p><b>Land Agents Act 48A Advertisements to include registration number of agent</b> An agent must not publish, or cause to be published, an advertisement relating to the sale of land or a business unless the advertisement specifies, alongside the agent's name or contact details, the agent's registration number preceded by the letters "RLA".</p> <p><b>Land Agents Act 54 False or misleading information</b> A person must not make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of any particular) in any information provided, or record kept, under this Act.</p>
<p><b>Section 47A Seller must be given estimated selling price</b> Establishes that prior to obtaining a person’s signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor’s reserve must be the same amount.</p> <p><b>Section 47B False representation to seller or prospective seller</b> States that neither an estate agents or agents’ representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.</p> <p><b>Section 47C False representation to prospective buyer</b> Applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent’s representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.</p>	<p><b>Land and Business (Sale and Conveyancing) Act 20 Authority to act as agent</b> An agent must specify a genuine estimated selling price in the sale agency agreement expressed without qualifying words as either a single figure or price range in figures with an upper limit that does exceed 110% of the lower limit. Alternatively the selling price sought by the vendor is to be specified as a single figure. This applies only to residential land sales.</p> <p><b>Land and Business (Sale and Conveyancing) Act 24A Representations as to likely selling price in marketing residential land</b> A representation is made regarding the marketing of land if it is featured in an advertisement published or conveyed whether orally or in writing to a purchaser. A prescribed minimum advertising price is established being either the agent’s estimated selling price expressed as a single price or range as in the agency agreement or the selling price sought by the vendor as expressed in the agency agreement as a single figure, whichever is the greater figure. An agent or representative must not make a representation while marketing residential land that is either less than the prescribed minimum advertising price.</p>

**Appendix 5- Comparison of advertising and pricing provisions in Victoria and Tasmania**

**Victoria - Estate Agents Act 1980**

**Tasmania – The Property Agent and Land Transactions Act 2005**

**42 Advertising**

Requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.

**27 Requirements of advertisements by real estate agents**

A real estate agent who publishes an advertisement in connection with his or her real estate agency business must ensure that the advertisement contains the real estate agent's name and the address of his or her authorised place of business.

Similar provisions exist regarding property managers (s28) and auctioneers (s37).

**Section 47A Seller must be given estimated selling price**

Establishes that prior to obtaining a person's signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor's reserve must be the same amount.

**29 False advertising, &c., by real estate agents**

A real estate agent must not publish information that the agent knows falsely states that particular property is to be sold or leased or that a particular business is to be sold or leased or contains a false or misleading statement or representation in respect of property that is or is stated to be available for purchase or lease, or a business that is or is stated to be available for purchase or lease.

Similar provisions exist regarding property managers (s30) and auctioneers (s38).

**Section 47B False representation to seller or prospective seller**

States that neither an estate agents or agents' representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.

**Section 47C False representation to prospective buyer**

Applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent's representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.

**Appendix 6- Comparison of advertising and pricing provisions in Victoria and Western Australia**

Victoria - Estate Agents Act 1980	Western Australia – Auction Sales Act 1973, REBA Code of Conduct and Real Estate and Business Agents Act 1978
<p><b>42 Advertising</b> Requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.</p>	<p><b>41 Official details to be displayed in offices, on correspondence etc.</b> A licensee shall exhibit in a prominent place at his registered office, and at every branch office of his business, a notice of his name, and of the fact that he is a licensed real estate and business agent, together with the name, style, title, or designation under which he carries on business as a real estate agent or a business agent, or both, if that business is, or those businesses are, not carried on in his own name. In the case of a branch office, a notice of the name of the manager and the address of the registered office of the licensee.</p>
<p><b>Section 47A Seller must be given estimated selling price</b> Establishes that prior to obtaining a person’s signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor’s reserve must be the same amount.</p> <p><b>Section 47B False representation to seller or prospective seller</b> States that neither an estate agents or agents’ representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.</p> <p><b>Section 47C False representation to prospective buyer</b> Applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent’s representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.</p>	<p><b>Real Estate and Business Agents Act 1978 Section 101 Code of Conduct for Agents and Sales Representatives</b> An agent must act fairly and honestly. An agent must not knowingly mislead or deceive any parties in negotiations or a transaction. An agent must not engage in harsh or unconscionable conduct.</p> <p><b>24 Misrepresentation</b> Any person, firm or corporation who knowingly makes or publishes or causes to be made or published in the course of business as an auctioneer any representation or statement which is false or misleading in any material particular, in relation to any lot put up for sale at an auction sale, whether as to the value, composition, structure, description, character or quality, date, manufacture, or origin of that lot or otherwise, commits an offence. It shall be a defence to a charge for an offence against this section of which the making or publication of a false or misleading representation or statement is an ingredient to prove that the accused believed on reasonable grounds that the representation or statement was not false or misleading.</p>

**APPENDIX 7 – MANAGEMENT PROVISIONS**

EAA Section	Provision Content	Provision Objective
<p>29B. Duties of agents and officers in effective control</p>	<p>1) This section applies to a natural person—                      (a) who is a licensed estate agent who carries on an estate agency business; or                      (b) who is an officer in effective control of the estate agency business of a corporation.</p> <p>(2) The person must—                      (a) be regularly and usually in charge at the principal office of the estate agent; and                      (b) give regular and substantial attendance at that office; and                      (c) properly control and supervise any estate agency business carried on by the agent or for which the person is responsible; and                      (d) take reasonable steps to ensure that any estate agents, agents' representatives or other employees of the business comply with the sections of this Act, the Sale of Land Act 1962 and any other laws relevant to the conduct of the business while they are engaged in that business; and                      (e) establish procedures designed to ensure that the business is conducted in accordance with the law and good estate agency practice; and                      (f) monitor the conduct of the business in a manner that will ensure, as far as is practicable, that those procedures are complied with; and                      (g) properly control and supervise the management of any branch office of the estate agency business.</p>	<p>Amendments to the Act in 1994 established that the Officer in Effective Control must be a licensed estate agent.</p> <p>The objective of section 29B is that a licensee, who runs their own estate agency business or is the officer in effective control of a company, is the principal estate agent of that business. As such the officer in effective control must work from the principal estate agency office to ensure that adequate processes are in place, the law is being upheld, staff members are being appropriately supervised and in general there are sufficient accountability mechanisms in place.</p> <p>The officer in effective control is responsible not only for the management of the principal office but also any branch offices.</p>
<p>30. Management of an estate agency office</p>	<p>(1) Subject to this Act, a person shall not manage the day to day operation of an estate agency office unless he is a licensed estate agent.</p> <p>(1A) A licensed estate agent shall not while he manages an estate agency office act as the manager of any other estate agency office.</p> <p>(2) Despite sub-section (1), a person who held an unexpired approval granted under this section immediately before section 18 of the Estate Agents (Amendment) Act 1994 came into operation may continue to manage the branch office specified in the approval unless he or she is disqualified from doing so under sub-section (7).</p> <p>(3) A person to whom sub-section (2) applies may apply to the Authority for permission to manage a branch office different to the one specified in the approval.</p> <p>(4) The Authority may give its permission if it is satisfied that it is not contrary to the public interest for it to do so.</p> <p>(5) Sections 23 to 24B apply to a person to whom sub-section (2) applies as if—                      (a) a reference to a licensed estate agent was a reference to the person; and                      (b) a reference to the date a licence was granted was a reference to the date the person first received approval under this section; and</p>	<p>The section is the result of the 1994 amendments which provided that branch managers must be licensed estate agents in line with requirements in other jurisdictions. This was in response to a high proportion of branch offices previously being managed by sub-agents, particularly in rural areas.</p> <p>The provision states that only a licensed estate agent shall manage an estate agency office and that they should only manage one office unless permitted to do otherwise by the tribunal. This is presumably to avoid any potential conflicts of interest, reinforce the importance of the accountability of branch managers and differentiate between the respective roles of officer in effective control and branch manager.</p> <p>The 1994 Amendments also provided for current branch managers to be “grandfathered” for life regardless of whether they changed their place of</p>

**APPENDIX 7 – MANAGEMENT PROVISIONS**

EAA Section	Provision Content	Provision Objective
	<p>(c) a reference to a prescribed fee was a reference to a fee prescribed for the purposes of this section; and</p> <p>(d) a reference to a form approved by the Authority was a reference to a form approved by the Authority for the purposes of this section; and</p> <p>(e) a reference to the cancellation of a licence was a reference to the effect of sub-section (6).</p> <p>(6) If a person to whom sub-section (2) applies fails to comply with section 23 within the time specified by the notice under section 24A(1), sub-section (2) ceases to apply to him or her and any permission granted to him or her under sub-section (4) is automatically revoked.</p> <p>(7) The Tribunal may, after giving the person the chance to be heard, disqualify any person to whom sub-section (2) applies from acting as a branch manager if the Tribunal is satisfied that he or she has contravened or failed to comply with this Act, or is not eligible to be an agent's representative.</p> <p>(8) A person who is authorised to act as the manager of a branch office by sub-section (2) must not, while he or she manages that branch office, act as a branch manager in any other branch office of his or her employer or for any other estate agent.</p> <p>(9) Any person who manages the day to day operation of an estate agency office in contravention of the sections of this section shall be guilty of an offence.</p>	<p>employment. This concession was also designed not to disadvantage rural practitioners, which was also acknowledged in section 30AB<sup>114</sup>.</p>
<p>30A. Absence of estate agent or branch manager</p>	<p>(1) Notwithstanding section 30(1) where a licensed estate agent or branch manager is to be absent from the estate agency office which he manages—</p> <p>(a) for a period which is greater than seven days but not more than 30 days, the licensed estate agent or the employer of the branch manager (as the case may be) shall in writing appoint a licensed estate agent or agent's representative to manage the office during that period of absence;</p> <p>(b) for a period greater than 30 days the licensed estate agent or the employer of the branch manager (as the case may be) shall advise the Authority in writing of the proposed absence and shall nominate a licensed estate agent or agent's representative to manage the office during that period of absence.</p> <p>(2) Where the Authority is satisfied that a person nominated pursuant to sub-section (1)(b) is capable of managing the estate agency office concerned it may approve and permit that person to manage that office for a period specified by the Authority.</p> <p>(3) Notwithstanding section 30(1) an appointment in writing made under sub-section (1)(a) and an approval given by the Authority under sub-section (2) shall authorize the person so appointed or approved to manage the estate agency office in respect of which the appointment was made or the approval was given during the period of the absence of the estate agent or branch manager or for the period specified by the Authority.</p>	<p>The intention of this section is to ensure that branch offices are managed by appropriate individuals even in the short-term absence of the branch manager. This is another accountability mechanism designed to ensure that the requirements of the Act are met, proper processes are in place and adequate supervision occurs even when there is a brief change in personnel. Such a provision aims to avoid such practices as licence lending as well by having a transparent system of who is in charge of the estate agency office.</p>

<sup>114</sup> The term “grandfathered” was used in the Second Reading Speech made by Attorney General Jan Wade in the Parliament of Victoria Legislative Assembly regarding the Estate Agents (Amendment) Bill 1994 on 6 October 1994. Explanation regarding the intention of the amendments in reference to rural branch managers was also provided by the Second Reading Speech made by Louise Asher in the Legislative Council on 30 November 1994. Source – VicHansard ([www.parliament.vic.gov.au](http://www.parliament.vic.gov.au)).

**APPENDIX 8- SUMMARY OF ARRANGEMENTS IN OTHER AUSTRALIAN JURISDICTIONS TABLE – MANAGEMENT**

<p align="center"><b>VICTORIA</b> <b>Estate Agents Act 1980</b></p>	<p align="center"><b>NSW</b> <b>Property Stock and Business Agents Act 2002</b></p>	<p align="center"><b>QLD</b> <b>Property Agents and Motor Dealers Act 2000</b></p>	<p align="center"><b>SA</b> <b>Land Agents Act 1994</b></p>	<p align="center"><b>WA</b> <b>Real Estate and Business Agents Act 1978</b></p>	<p align="center"><b>TAS</b> <b>Property Agents and Land Transactions Act 2005</b></p>
<p><b>Section 29B Duties of agents officers in effective control</b> states that a licensed estate or officer in effective control must be in charge of the principal office entailing substantial attendance at that office and proper control and supervision of the estate agency business. Procedures are expected to be put in place to ensure that all staff are complying with the law and branch offices are also appropriately managed.</p> <p><b>Section 30 Management of an estate agency office</b> establishes that the day to day operation of an estate agency office must be managed by a licensed estate agent, who is responsible for the management of solely that branch office.</p>	<p><b>31 Each place of business to be in charge of licensee</b> An individual who carries on business under a licence at more than one place of business or a corporation that holds a corporation licence must employ at each of those places of business (except the place at which the licensee is personally in charge) a licensed person who will be in charge of business at that particular office location. This licensed person is not permitted to be in charge of any other office of the licensee or any other licensee.</p> <p><b>32 Duty of licensee and person in charge to properly supervise business</b> The principal or employed licensee must properly supervise the business carried on at that place of business.</p>	<p><b>132 Licensee to be in charge of a real estate agent's business at a place</b> A real estate agent who is an individual or corporation and principal licensee or corporate agent must be in charge of the agent's business at the registered office and in the case that they have more than one office location ensure that at each other place of business that there is a real estate agent in charge of the business. In the case of a resident letting agency it is acceptable to have a resident letting agent in charge. An individual must not be in charge at</p>	<p><b>11 Each of agent's places of business to be properly managed and supervised</b> A registered agent must ensure that each place of business of the agent is properly managed and supervised by a registered agent who is a natural person or, in accordance with the regulations, by some other natural person nominated in writing to the Commissioner.</p> <p><b>58 Liability for act or default of officer, employee or agent</b> For the purposes of this Act, an act or default of an officer, employee or agent of a person carrying on a business will be taken to be an act or default of that person unless it is proved that the officer, employee or agent acted outside the scope of his or her actual, usual and</p>	<p><b>37 Branch office of licensee</b> A licensee shall nominate, and have at all times in his service at a registered branch office, as manager of that office, another licensee who is the holder of a current triennial certificate. The manager shall not be a licensee nominated as manager by any other licensee or in respect of any other office, and shall not carry on business as an agent on his own account.</p> <p><b>132 Unlicensed assistants to be supervised etc.</b> The work of unlicensed persons engaged in assisting in the conduct of the business of a licensee shall be constantly supervised and controlled by a licensee. The licensee shall give substantial time and attention to the</p>	<p><b>7 Management of real estate agency business</b> An authorised place of business where real estate agency business is carried on is being managed by a real estate agent if the agent, although not necessarily in full-time attendance at the place of business, is aware of, and has responsibility for, the day-to-day activities carried on there.</p> <p>A real estate agent named in the register must not carry on real estate agency business except at an authorised place of business</p>

<p style="text-align: center;"><b>VICTORIA</b> Estate Agents Act 1980</p>	<p style="text-align: center;"><b>NSW</b> Property Stock and Business Agents Act 2002</p>	<p style="text-align: center;"><b>QLD</b> Property Agents and Motor Dealers Act 2000</p>	<p style="text-align: center;"><b>SA</b> Land Agents Act 1994</p>	<p style="text-align: center;"><b>WA</b> Real Estate and Business Agents Act 1978</p>	<p style="text-align: center;"><b>TAS</b> Property Agents and Land Transactions Act 2005</p>
	<p>Proper supervision regarding the conduct of the business includes properly supervising the employees of the business and establishing procedures to ensure that the requirements of the Act are upheld.</p> <p><b>41 Liability of licensee for acts of employees</b> A licensee who employs a person at any place of business of the licensee is responsible, in tort and in contract, for anything done or not done by the person within the scope of the employee's authority, or for the benefit, or the purported or intended benefit, of the licensee or the licensee's business.</p>	<p>more than one place of business.</p>	<p>ostensible authority.</p> <p><b>Land Agents Regulations 1995 - 9 Regulations relating to proper management and supervision</b> A registered agent will not be taken to properly manage and supervise a business or place of business referred to in that section unless the agent makes written procedures readily available to all employees who handle trust money instructing those employees in the proper handling of such money; and</p> <p>The agent, in respect of each place of business managed and supervised by a person other than a registered agent must ensure that a registered agent is responsible for managing the trust accounts and the person nominated to manage and supervise the place of business and all other persons employed at the place of business are</p>	<p>business and shall ensure that the managers of all branch offices of the business respectively give substantial time and attention to the business of the respective branch offices. Where the licensee of the business involved is a firm or a body corporate 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 time and attention to the business.</p>	<p>that is managed by the real estate agent or by a real estate agent named in the Register employed by the agent.</p> <p>A real estate agent, unless authorised by the Board, must not manage more than one authorised place of business where real estate agency business is carried on. The Board may authorise a real estate agent to manage not more than 3 authorised places of business. Before authorising a real estate agent the Board must be satisfied that the real estate agent is competent to manage those places of</p>

<b>VICTORIA</b> <b>Estate Agents Act 1980</b>	<b>NSW</b> <b>Property Stock and Business Agents Act 2002</b>	<b>QLD</b> <b>Property Agents and Motor Dealers Act 2000</b>	<b>SA</b> <b>Land Agents Act 1994</b>	<b>WA</b> <b>Real Estate and Business Agents Act 1978</b>	<b>TAS</b> <b>Property Agents and Land Transactions Act 2005</b>
			<p>instructed as to their obligations under the Act, these regulations and any other relevant laws and procedures are in place to enable the agent to ascertain whether the person nominated to manage and supervise the place of business is managing and supervising the place of business properly and with due care and diligence (including inspection by a registered agent who is a natural person, at least once per month, of the place of business and of previously uninspected prescribed business documents of the agent held at the place of business). Prescribed business documents include sales agency agreements, auction records and trust account records.</p>		<p>business and those places of business are all in the same region. Region means the northern region, the north-western region or the southern region.</p> <p>If the authorised place of business is unable to be managed by a real estate agent than an application can be made to the Board, provided that there are good reasons for doing so, to permit the premises to be managed, for such period as the Board is to specify, by a property consultant employed by the agent.</p> <p>Similar</p>

<b>VICTORIA</b> <b>Estate Agents Act 1980</b>	<b>NSW</b> <b>Property Stock and Business Agents Act 2002</b>	<b>QLD</b> <b>Property Agents and Motor Dealers Act 2000</b>	<b>SA</b> <b>Land Agents Act 1994</b>	<b>WA</b> <b>Real Estate and Business Agents Act 1978</b>	<b>TAS</b> <b>Property Agents and Land Transactions Act 2005</b>
					provisions apply to property managers (s8).
<p><b>Section 30A Absence of estate agent or branch manager</b> mandates that licensed estate agents or branch managers must write to the Authority when they are absent from the office for between seven and thirty days appointing a licensed estate agent or agents' representative to manage the office in their absence.</p>	-	-	-	-	<p><b>7 Management of real estate agency business</b>            An authorised place of business where real estate agency business is carried on is being managed by a real estate agent if the agent, although not necessarily in full-time attendance at the place of business, is aware of, and has responsibility for, the day-to-day activities carried on there.</p>

**APPENDIX 9 – OBJECTIVES OF PROVISIONS RELATED TO THE ROLE OF AGENTS’ REPRESENTATIVE**

<b>EAA SECTION</b>	<b>CONTENT</b>	<b>OBJECTIVE</b>
13. Agents’ representatives	<p>(1) Subject to this Act—                      (b) a person shall not be or act as an agent's representative for any person who should be but is not the holder of an estate agent's licence.</p> <p>(2) Nothing in this Act shall be construed as requiring any agent's representative, so far as he performs for any licensed estate agent any of the functions of an estate agent (other than managing the day to day operation of an estate agency office) and is duly authorized to do so by that agent, to hold an estate agent's licence under this Act.</p>	As the name suggests agents’ representatives’ act on behalf agents, carrying out the functions of an agent (with the exception of the management of a branch office). Agents’ representatives have taken on the role previously held by sub-agents, the fundamental difference being that agents’ representatives are not licensed as sub-agents were prior to the 1994 amendments to the Act or as is required of estate agents.
13A. Estate agents to be responsible for the acts of their representatives	<p>If an estate agent employs an agent's representative, the estate agent is responsible, in tort and in contract, for any thing done or not done by the agent's representative—                      (a) within the scope of the agent's representative's authority; or                      (b) for the benefit, or for the purported or intended benefit, of the estate agent or the estate agent's business.</p>	The aim of this section is to clearly articulate that an agents’ representative is indeed a representative of the agent acting on their behalf and as such they are liable for their actions in tort and contract. This is a consumer protection mechanism and part of the broader accountability framework that involves officers in effective control, branch managers and licensed estate agents bearing responsibility for the conduct of staff, including agents’ representatives.
47. Authorization of agents’ representatives	<p>(1) Notwithstanding anything in this Act or any law to the contrary, an agent's representative shall not perform for an estate agent any of the functions of an estate agent unless the agent's representative has been lawfully authorized in writing by the estate agent to do so.</p> <p>(2) An agent's representative who is employed by an estate agent must not undertake employment under section 30(3) with another estate agent as a branch manager for that other agent.                      Penalty: 25 penalty units.</p> <p>(2A) An agent's representative who is employed by an estate agent as a branch manager under section 30(2) or 30(3) must not undertake employment with another estate agent.</p> <p>(3) Any agent's representative who makes any false representation (whether verbally or in writing or by conduct) to any person to the effect that the agent's representative is employed by or authorized to act as an agent's representative for any specified estate agent shall be guilty of an offence.</p>	Section 47 reaffirms that an estate agent is responsible for the conduct of an agents’ representative who is carrying out the functions of an estate agent on their behalf and with the written authorisation of the agent that they are representing. The section establishes the chain of accountability with regard to the roles of estate agent and agents’ representative.

**APPENDIX 10 – COMPARISON OF ARRANGEMENTS IN OTHER STATES REGARDING THE AGENTS REPRESENTATIVE ROLE**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TAS</b> Property Agents and Land Transactions Act 2005
<p><b>13 Agents’ representatives</b> A person must only act as an agents’ representative for a licensed estate agent and that as the representative of the estate agent they are able to carry out all the functions of an agent (with the exception of the day to day management of the estate agency office) providing they are authorised to do so.</p> <p><b>13A Estate agents to be responsible for the acts of their representatives</b> establishes that an estate agent is responsible in tort and contact for the activities of their representative.</p> <p><b>Section 47 Authorization of agents’ representatives</b> provides that an agents’ representative shall not carry out the duties of an estate agent unless authorised to do so in writing by the estate agent they are representing and cannot be employed by another agent while acting in the role of branch manager for an estate agent. It also details that an agents’ representative must not make false representations (whether</p>	<p><b>10 Salespersons and managers require certificate of registration</b> A person must have a certificate of registration in order to perform the functions or represent themselves as a real estate salesperson, stock and station salesperson, business salesperson or registered manager in the employment of a licensed person. An employee who is licensed is not required to also have a certificate of registration.</p> <p><b>11 Registered Salespersons and managers required to be employed and supervised by licensee</b> Holders of the certificate of registration must not carry out any of the functions of a real estate salesperson, stock and station salesperson, business salesperson or registered manager unless an employee of a licensee and or under the direct supervision of the licensee in charge of the place of business or a holder of a license. Those with a certificate of registration must not conduct auctions unless they hold a certificate of registration as a stock and station salesperson and are auctioning</p>	<p><b>82 Categories of registered employees</b> Registered employees consist of real estate salesperson, pastoral house salesperson, trainee auctioneer, property developer salesperson and commercial subagent.</p> <p><b>93 What a registration certificate authorises</b> A registration certificate authorises the holder to perform any of the activities of the licence holder, unless the activity is not allowed due to a condition of the certificate being issued or is not under the holder’s employment authority.</p> <p><b>129 Responsibility for acts and omissions of salespersons</b> The principal or employed licensee must ensure that the salesperson must be properly supervised, complies with the requirements of the Act and within the employment authority.</p> <p>Similar provisions apply to pastoral house salespersons (s169), trainee auctioneers (s206), property developer salespersons (s264) and commercial sub agents (s340).</p>	<p><b>6A Sales representatives to be registered</b> A person can act as a sales representative for an agent if they are registered as a sales representative under the Act and are acting as an employee engaged by the agent under a contract of service (or they are registered as an agent under the Act). The sales representative performs any of the functions of a sales representative on behalf of the agent.</p> <p><b>Land Agents Regulations – 5 Entitlement to be registered as sales representative subject to conditions relating to training and supervision</b> A sales representative is not be considered to be properly supervised unless the supervision is provided by a person</p>	<p><b>44 Real estate sales representatives to be registered etc</b> Holders of a current certificate of registration can carry out the functions of a licensed real estate agent on their behalf. They must not represent themselves to be a sales representative without the aforementioned credentials or being in the employment of real estate agent.</p> <p>Similar provisions apply to business sales representatives (s45).</p> <p><b>55 Sales representative to be in service of one person</b> A registered sales representative is not permitted to accept employment with an agent or developer when in the employment of any other person who is an agent or developer.</p> <p><b>132 Unlicensed</b></p>	<p><b>10 Employment of property consultants by real estate agents</b> A real estate agent must not employ a person to carry out the functions of a property consultant on behalf of the agent unless the person has the qualifications required and the person has caused to be published in a newspaper published in the State and circulating generally in the State a notice, in a form approved by the Board, stating that the person intends to be employed as a property consultant. A person is also must be in the employment of a real estate agent to carry out this role.</p> <p>Similar provisions apply to property managers and assistant property managers (s9).</p> <p><b>11 Limitations on employees of real estate agents</b> A real estate agent,</p>

**APPENDIX 10 – COMPARISON OF ARRANGEMENTS IN OTHER STATES REGARDING THE AGENTS REPRESENTATIVE ROLE**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TAS</b> Property Agents and Land Transactions Act 2005
verbally or in writing).	<p>livestock as an employee under the director supervision of a holder of a the appropriate license.</p> <p><b>41 Liability of licensee for acts of employees</b> A licensee who employs a person at any place of business of the licensee is responsible, in tort and in contract, for anything done or not done by the person within the scope of the employee’s authority, or for the benefit, or the purported or intended benefit, of the licensee or the licensee’s business.</p>	<p><b>130 Real estate agent must give salespersons employment authority</b> Upon commencement of employment a real estate agent must provide a real estate salesperson with an employment authority, which clearly specifies the activities the agent authorises the salesperson to perform on their behalf during the period of their employment.</p> <p>Similar provisions apply to pastoral house salespersons (s170), trainee auctioneers (s207), property developer salespersons (s265) and commercial sub agents (s341).</p>	<p>who is a registered agent or registered sales representative (who has completed the required training and requirements as per section 8B) and has managed the business of an agent or been a sales representative for at least two years.</p>	<p><b>assistants to be supervised etc</b> The work of unlicensed person engaged in assisting in the conduct of the business of a licensee shall be constantly supervised and controlled by a licensee.</p>	<p>property manager, assistant property manager or real estate agent employed by another real estate agent must not accept employment from more than one real estate agent or property manager at a time.</p> <p>Similar provisions apply to employees of property managers (s12).</p>

**APPENDIX 11 – OFFICE PROCESSES OBJECTIVES**

EAA Section	Provision Content	Provision Objective
<p>35. Registered office and address</p>	<p>(1) Every licensed estate agent shall have a registered office within Victoria, and every agent's representative shall have a registered address within Victoria, to which all communications and notices may be addressed.</p> <p>(2) Any change in the situation of a registered office or registered address shall be promptly notified in writing to the Registrar by the agent or agent's representative concerned, and the Registrar shall alter the register accordingly.</p> <p>(3) An estate agent shall within fourteen days of the establishment of a branch office advise the Registrar in writing of the address of that branch office.</p> <p>(3A) Subject to sub-section (3B), every licensed estate agent must have a principal office in Victoria.</p> <p>(3B) A licensed estate agent who is also licensed or otherwise authorised under the laws of another State to carry on the business of an estate agent in that State who operates an estate agency business in that State and the main or only estate agency office of that business is located within that State may have his or her principal office outside Victoria if it is within 48 kilometres of Victoria.</p> <p>(4) Any change in the situation of the principal office or a branch office of an estate agent shall be promptly notified in writing to the Registrar by the estate agent concerned and the Registrar shall alter the register accordingly.</p> <p>(5) For the purposes of this Act where a licensed estate agent carries on business at only one place that place shall be recorded as his principal office.</p> <p>(6) Every estate agent shall, within seven days after he employs and within seven days after ceasing to employ any agent's representative, in writing notify the Registrar of such employment or cessation of employment and the Registrar shall enter the fact in the register.</p> <p>(7) Any agent or agent's representative who carries on business without complying with the requirements of this section shall be</p>	<p>The rationale behind this section is that all estate agency branch offices operating in Victoria have an identifiable office location, so that consumers or the authorities have a means of contacting the branch office and seeking redress in instances where wrongdoing may have occurred.</p> <p>It states that the Registrar should be notified of agents' representatives employed in the office, which provides a means of keeping track of agents and agents' representatives so that they and their officer in effective control and branch manager can be held responsible for any possible breaches of the Act committed by those working under their supervision.</p>

**APPENDIX 11 – OFFICE PROCESSES OBJECTIVES**

EAA Section	Provision Content	Provision Objective
36. Name of estate agency business	<p>guilty of an offence.</p> <p>(1) This section applies if, in the opinion of the Authority, the name under which a person operates, or proposes to operate, an estate agency business—</p> <p>(a) incorporates the name of an unlicensed person or the name of an agent's representative or any name which might be confused with the name already used by a licensed estate agent; and</p> <p>(b) may mislead the public.</p> <p>(2) The Authority—</p> <p>(a) may refuse to issue the person with an estate agent's licence until the person chooses a name that is acceptable to the Authority; or</p> <p>(b) if the person already holds an estate agent's licence, may require the person to change the name of the estate agency business.</p> <p>(3) A person must comply with any requirement made by the Authority under sub-section (2)(b) within the time specified by the Authority.</p> <p>Penalty applying to this sub-section: 25 penalty units.</p>	<p>The purpose of section 36 is to require each estate agency to have an identifiable business name that allows consumers to know who they are dealing with.</p> <p>The section also enables the Authority to have a means of attributing a pattern of behaviour to a particular estate agency and have standards regarding business naming conventions, for example not incorporating the name of an unlicensed person.</p>
39. As to displaying notice on places of business	<p>Every licensed estate agent carrying on the business of an estate agent shall paint or affix and keep painted or affixed on each place of business so as to be easily read from outside—</p> <p>(a) in the case of an estate agent other than a corporation—</p> <p>(i) his name and description as a licensed estate agent; and</p> <p>(ii) if the business is not carried on in his own name, the name under which he or the partnership in which he is a partner is registered under the Business Names Act 1962; and</p> <p>(b) in the case of an estate agent being a corporation—</p> <p>(i) its name and description as a licensed estate agent;</p> <p>(ii) the name of every director of the corporation engaged in the estate agency work of the corporation who is a licensed estate agent and his description as a licensed estate agent; and</p> <p>(iii) if the business is not carried on in its own name, the name under which it is registered under the Business Names Act 1962.</p>	<p>The aim of section 39 is that the premises of a licensed estate agent should be readily identifiable, including the name of the corporation and name of directors involved in the corporation. This ensures transparency so that the consumer is equipped with the relevant information prior to engaging the services of an estate agent or agency.</p>
40. Letterhead	<p>(1) Every licensed estate agent (other than a corporation) shall have his name and description as a licensed estate agent printed or shown on all correspondence from his estate agency business.</p> <p>(2) Every licensed estate agent being a corporation shall have its name and description as a licensed estate agent and the name of every</p>	<p>Section 40 prescribes that all licensed estate agents should have their name and description as a licensed estate agent on all correspondence printed from the business. Similarly this applies to corporations engaged in estate agency work, who must also detail the names of all of the corporation directors. The section is designed to ensure that consumers are not misled about an estate agent claiming to be licensed</p>

**APPENDIX 11 – OFFICE PROCESSES OBJECTIVES**

EAA Section	Provision Content	Provision Objective
	<p>director of the corporation engaged in the estate agency work of the corporation who is a licensed estate agent and his description as a licensed estate agent printed or shown on all correspondence from its estate agency business.</p> <p>(3) A person who is not a licensed estate agent or a director of a corporation which is a licensed estate agent shall not use or permit to have used on any correspondence from an estate agency business anything which implies or indicates that he is a licensed estate agent or a director of a corporation which is a licensed estate agent (as the case may be).</p>	<p>and that estate agencies are accountable for the material they produce which bears their name.</p>
<p>46. Employee statements</p>	<p>(1) Every estate agent shall—</p> <p>(a) make or cause to be made and keep at his registered office in Victoria a true statement in writing containing particulars as to the name and the work or services of and the salary wages or commission paid in each month to each person employed by him in connexion with his business as an agent;</p> <p>(b) produce that statement for inspection during office hours whenever demanded by the Director or by a member of the police force of or above the rank of sergeant or by any person authorized in writing by the Director or by any such member of the police force; and</p> <p>(c) from time to time advise the Director in writing of the premises at which are kept the records from which that statement was made and their location on those premises.</p> <p>(2) Any agent who makes any false entry in any statement made under sub-section (1) shall be guilty of an offence.</p>	<p>Section 46 requires agents who are in effective control to maintain a written log in their registered office detailing the names of staff, services undertaken, salaries and commissions. The section seeks to mandate transparent business processes and transactions which can readily be inspected or requested by the Director, which could assist in any investigation regarding possible breaches of the Act.</p>

**APPENDIX 12 – INTERSTATE COMPARISON OF OFFICE PROCESS PROVISIONS**

<b>VICTORIA</b> <b>Estate Agents Act 1980</b>	<b>NSW</b> <b>Property Stock and Business Agents Act 2002</b>	<b>QLD</b> <b>Property Agents and Motor Dealers Act 2000</b>	<b>SA</b> <b>Land Agents Act 1994</b>	<b>WA</b> <b>Real Estate and Business Agents Act 1978</b>	<b>TASMANIA</b> <b>Property Agents and Land Transactions Act 2005</b>
<p><b>Section 35 Registered office and address</b> states that every licensed estate agent and agents’ representative are required to have a registered office address within Victoria. The Registrar is to be notified of any changes to these details immediately and within fourteen days regarding the establishment of a branch office. Estate agents are also to notify the Registrar in writing within seven days of the commencement or cessation of employment of an agents’ representative for the purpose of the register.</p>	<p><b>28 Registered office and address</b>                      A licensee must have a registered office within New South Wales. The address specified in an application for a licence as the address at which the applicant proposes to carry on business (or, in the case of a licensee carrying on business at more than one place, the address specified in the application as the licensee’s principal place of business) is taken to be the registered office of the licensee. Notice of any change in the location of the registered office must be lodged by the licensee with the Director-General within the time prescribed by the regulations.</p>	<p><b>156 Registered office</b>                      A real estate agent’s registered office is the principal place of business cited in the application for a real estate agent’s licence or another place reported to the chief executive by the real estate agent in the approved form as the agent’s principal place of business.</p> <p><b>157 Real estate agent to notify chief executive of change in place of business etc.</b>                      The real estate agent must notify the chief executive in the approved form of any change in the real estate agent’s principal place of business within 14 days after the change. This includes notifying the chief executive in the approved form and within 14 days after the opening or closing of an office location where the agent carries out business.</p> <p>Similar provision exist regarding residential letting agents (s121-22), pastoral houses (193-94), auctioneers (250-51), property developers (271-272) and commercial agents (350-51).</p>	<p align="center">-</p>	<p><b>36 Registered office of licensee</b>                      A licensee shall, on and after the day on which he commences to carry on business as an agent, and for so long as he carries on that business, have a registered office in the State. Any summons, notice, order, or other document to be served on a licensee, may be served by leaving it at his registered office or by sending it by registered post addressed to the licensee at that office. An office may be registered by giving written notice of the situation of the office to the Registrar and a registration may be transferred from one office to the other by written notice given to the Registrar.</p>	<p><b>56 Board to maintain Register</b>                      The Board is to maintain a Register of Property Agents divided into three parts, real estate agents, property managers and general auctioneers. The name and address of each of these agents must be registered. The Register may be kept in any form that permits its contents to be readily inspected in a legible form by any member of the public.</p> <p><b>57 Part 1 of Register</b>                      Part 1 of the Register is to be divided into Division (1), which is to contain the name and address of each person who is carrying on real estate agency business and show, in addition, the address of each place where that person is carrying on that business and the name under which that person is doing so; and Division (2), which is to contain</p>

**APPENDIX 12 – INTERSTATE COMPARISON OF OFFICE PROCESS PROVISIONS**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TASMANIA</b> Property Agents and Land Transactions Act 2005
					the names and addresses of all other such persons and any other information approved by the Board. Where a real estate agent named in Part 1 of the Register is a company, the entry in respect of the agent is also to contain the name and address of each of the directors of the company who is a real estate agent <sup>115</sup> .
<b>Section 36 Name of estate agency business</b> outlines that the Authority may refuse to issue an estate agents licence or require a change in estate agency name if a person operates or plans to run an estate agency with a business name that incorporates the name of an unlicensed person, an agent’s representative or could easily be confused with another agent. In addition estate agency business names are not permitted to mislead the public.	<b>30 Business names</b> A licensee must not carry on business under a name or advertise or hold out that the licensee carries on business as a licensee under a name unless the name consists of the name of the licensee and the name of each other person, if any, with whom the licensee is carrying on, or advertising or holding out that the licensee is carrying on, business as a licensee, or the name is a business name registered under the Business Names Act 2002.  The name of a licensee (other than a corporation) consists of the licensee’s full name, or the licensee’s surname (or family name) together with the licensee’s other name/s or a	-	-	<b>40 Business names, use of by licensees</b> A licensee may carry on business as an agent under only one business name which shall be endorsed on his triennial certificate and all licensees carrying on the business of an agent under a business name shall have their surnames and initials on all correspondence from them in that business. A licensee who alters the name, style, title, or designation under which he carries on business as an agent shall within	<b>31 Name under which real estate agents may carry on business</b> Except as provided, a real estate agent must not carry on real estate agency business except under the name of the agent or, where agents are carrying on business in partnership, the names of the agents. The Board may authorise a real estate agent, or agents carrying on business in partnership, to carry on real estate agency business under a name in addition to, or in

<sup>115</sup> While this provision is closer to the Victorian section 33 regarding the register it does contain similarities to section 35 in reference to registering the place of business.

**APPENDIX 12 – INTERSTATE COMPARISON OF OFFICE PROCESS PROVISIONS**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TASMANIA</b> Property Agents and Land Transactions Act 2005
	<p>combination of one or more of those names and initials. The name of a licensee that is a corporation consists of the corporate name of the corporation.</p> <p>The Director-General may, by notice in writing to a licensee, direct that the licensee must not carry on business under a specified business name, being a name that is the same as, or is a name closely resembling, the name under which a person who is a disqualified person or in the circumstances of any particular case the Director-General deems undesirable as being contrary to the public interest.</p>			<p>14 days after the day on which he first uses that altered name, style, title, or designation in connection with that business give notice in writing to the Registrar of the altered name, style, title, or designation.</p>	<p>substitution for, the name of the agent or agent, which is subject to the requirements of the Business Names Act 1962.</p>
<p><b>Section 39 As to displaying notice on places of business</b> requires that every licensed estate agent have their name and description as a licensed estate agent and the name of the registered business name visible at their office. In addition estate agents as corporations must also name every director of the corporation engaged in estate agency work and their description as a licensed estate agent.</p>	<p><b>29 Display of name at registered office</b>                      A licensee must display legibly and conspicuously outside the licensee’s registered office and any other place at which the licensee’s business as a licensee is carried on: the licensee’s name and description as a licensee, and a description of the kind of licence or licences held by the licensee. In addition, a licensee that is a corporation must display legibly and conspicuously: outside the corporation’s registered office, the name of the person in charge of the corporation’s registered office, and outside any other place at which the business of the corporation is carried</p>	<p><b>158 Display and publication of licensee's name</b>                      A real estate agent who is a principal licensee must display at each place the agent carries on business, the agent's name and if the agent is not the person in charge of the agent's business at the place, the name of the real estate agent who is in charge at the place and the other particulars that may be prescribed under a regulation.</p> <p>Similar provisions exist regarding residential letting agents (s123), pastoral houses (s195), property developers (s273) and commercial agents (s352)</p>	<p align="center">-</p>	<p><b>41 Official details to be displayed in offices, on correspondence etc.</b>                      A licensee shall exhibit, and keep exhibited, in a prominent place at his registered office, and at every branch office of his business, so as to be easily read by persons entering therein a notice of his name, and of the fact that he is a licensed real estate and business agent, together with the name, style, title, or designation under which he carries on business as a real estate</p>	<p><b>25 Notice to be displayed by real estate agents</b>                      A real estate agent must display at each authorised place of business, in a conspicuous position where it may be easily read, a notice stating the agent's name and the fact that the agent is a real estate agent.                      If a real estate agent ceases to carry on real estate agency business at an authorised place of business, the agent must remove or obliterate the</p>

**APPENDIX 12 – INTERSTATE COMPARISON OF OFFICE PROCESS PROVISIONS**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TASMANIA</b> Property Agents and Land Transactions Act 2005
	on, the name of the person in charge at that place. A person must not display or exhibit outside or near the person’s office, house or place of business any sign or other matter that indicates or implies that the office, house or place of business is that of a person licensed as a kind of agent under this Act unless the person is licensed as an agent of that kind.			agent or a business agent, or both, if that business is, or those businesses are, not carried on in his own name. In the case of a branch office, a notice of the name of the manager and the address of the registered office of the licensee should be exhibited.	notice as soon as practicable.  Similar provisions exist for property managers (s26) and auctioneers (s36).
<b>Section 40 Letterhead</b> mandates that every licensed estate must have their name and description as a licensed estate agent printed on all correspondence from the estate agency business. In addition every licensed estate agent being a corporation must also display the name of every director of the corporation engaged in estate agency work, their description as a licensed estate agent and the name that the business is registered under if different to the corporation name.	-	-	-	<b>41 Official details to be displayed in offices, on correspondence etc.</b> On all correspondence, and on the outside of all documents prepared, in the course of business of a licensee at his registered office and every branch office the licensee shall be identified as a real estate agent or business agent, or both, and the registered office of his business shall be shown estate agent or business agent, or both, and the address of the branch office shall also be shown.	-

**APPENDIX 12 – INTERSTATE COMPARISON OF OFFICE PROCESS PROVISIONS**

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<p><b>Section 46 Employee statements</b> are a monthly written log of the name, work and salary wages or commissions of employees that estate agents are required to keep. This material may be demanded for inspection by the Director and from time to time the Director should be notified of the location of the records in the estate agency office. False entries in employee statements are classified as an offence.</p>	<p><b>42 Licensee to keep records of certain employees</b>                      A licensee must make and keep a record of the name and residential address of each employee that the licensee employs as a real estate salesperson, stock and station salesperson, business salesperson or registered manager. The licensee must keep the record for at least 3 years after the person ceases to be an employee. The licensee must keep the record in the form of a register of employees and that register must be kept at the place of business of the licensee at which the employee is employed or at such other place as the Director-General may approve.</p>	<p align="center">_116</p>	<p align="center">-</p>	<p align="center">-</p>	<p align="center">_117</p>

<sup>116</sup> Section 109 pertaining to the register of registration certificates is more like the Victorian section 33 regarding the register than section 46 with employee statements.

<sup>117</sup> Sections 57-59 relate more to a register as opposed to individual agencies maintaining a log of employee details.

**APPENDIX 13 OBJECTIVES OF SECTIONS 38 AND 45**

<b>EAA Section</b>	<b>Content</b>	<b>Objective</b>
38. Unlicensed person pretending to be licensed as an agent	Every person not being a licensed estate agent who keeps up or exhibits on or near his office house or place of business or anywhere else or allows to remain unobliterated any sign writing painting or other mark implying that the office house or place of business is that of a person licensed to carry on the business of an estate agent shall be guilty of an offence.	Section 38 establishes that it is an offence to create the impression that a person is a licensed estate agent carrying out such duties if this is not in fact the case. This section aims to outlaw misleading conduct so that consumers can have confidence when they are engaging the services of a licensed estate agent.
45. Continuing Professional Development	<p>(1) The Director may require estate agents or agent's representatives to undertake specified training or professional development activities.</p> <p>(2) The Director must publish notice of the making of a requirement in the Government Gazette.</p> <p>(3) A requirement takes effect on the date the notice is published, or on any later date specified in the notice.</p> <p>(4) A requirement—</p> <p>(a) may specify that it applies generally to all agents or agent's representatives, or only to specified classes or sub-classes of agents or agent's representatives;</p> <p>(b) may specify that every person to whom it applies must undertake a specified activity by a specified time;</p> <p>(c) may assign point (or other) values to specified activities and require that a person undertake within a specified time activities that have a specified total point (or other) value;</p> <p>(d) must identify the providers of any required activity;</p> <p>(e) may provide for the Director—</p> <p>(i) to extend a time limit that applies to a person with respect to the requirement;</p> <p>(ii) to exempt, or partially exempt, a class of person from having to comply with the requirement on specified grounds.</p> <p>(5) If the Director makes a requirement under this section, an agent or agent's representative to whom the requirement applies must not knowingly fail to comply with the requirement (25 penalty units).</p>	The objective of the provision is essentially to enable the Director to require a particular group, such as agents or agent's representatives, to undertake a training course or professional development activity in order to inform them of a new development, for example a legislative update, or as a means of addressing a problematic practice by such a group which is occurring in the market place.

**APPENDIX 14 – PROVISIONS IN OTHER STATES SIMILAR TO SECTIONS 38 AND 45 OF THE ESTATE AGENTS ACT**

<b>VICTORIA</b> <b>Estate Agents Act 1980</b>	<b>NSW</b> <b>Property Stock and Business Agents Act 2002</b>	<b>QLD</b> <b>Property Agents and Motor Dealers Act 2000</b>	<b>SA</b> <b>Land Agents Act 1994</b>	<b>WA</b> <b>Real Estate and Business Agents Act 1978</b>	<b>TAS</b> <b>Property Agents and Land Transactions Act 2005</b>
<p><b>38 Unlicensed person pretending to be licensed as an agent</b>                      Provides that persons are not permitted to falsely represent themselves by displaying for example a sign near their place of business suggesting that they are a licensed estate agent when this is not the case.</p>	<p><b>52 Misrepresentation by licensee or registered person</b>                      A person who, while exercising or performing any function as a licensee or registered person, by any statement, representation or promise that is false, misleading or deceptive (whether to the knowledge of the person or not) or by any concealment of a material fact (whether intended or not), induces any other person to enter into any contract or arrangement is guilty of an offence against this Act.</p>	<p><b>161 Pretending to be real estate salesperson</b>                      A person must not act as a real estate salesperson unless the person holds a registration certificate (real estate salesperson).</p>	<p align="center">-</p>	<p align="center">-</p>	<p align="center">-</p>
<p><b>45 Continuing Professional Development</b>                      Provides that the Director may require estate agents or agent’s representatives to undertake specified training or professional development activities.</p>	<p><b>The Fair Trading Commissioner’s Guidelines for Continuing Professional Development (CPD)</b>                      State that a licensee or certificate of registration holder are required to undertake continuing professional development. They must complete 12 points</p>	<p align="center">-</p>	<p align="center">-</p>	<p align="center">-</p>	<p><b>67 Continuing education</b>                      Despite any other provision of this Division to the contrary, a person ceases to be qualified to continue to be named in the Register unless, within a period specified by the Board, the person has undertaken any continuing education course specified by the Board. A person named in the Register must maintain</p>

**APPENDIX 14 – PROVISIONS IN OTHER STATES SIMILAR TO SECTIONS 38 AND 45 OF THE ESTATE AGENTS ACT**

<b>VICTORIA</b> Estate Agents Act 1980	<b>NSW</b> Property Stock and Business Agents Act 2002	<b>QLD</b> Property Agents and Motor Dealers Act 2000	<b>SA</b> Land Agents Act 1994	<b>WA</b> Real Estate and Business Agents Act 1978	<b>TAS</b> Property Agents and Land Transactions Act 2005
	of professional development in the 12 month period immediately prior to the renewal due date of the licence or certificate regardless of the number of licences held. Surplus points may be carried forward for 12 months. As you must complete some continuing professional development each year, a maximum of 11 points may be carried forward.				a register containing details of the continuing education undertaken by the person and by any relevant employee.

## **Appendix 15 – Contributors to the Estate Agents Council Modernisation Review**

The Estate Agents Council and Modernisation Working Group acknowledge and thank the following contributors to the Council's Modernisation of the Estate Agents Act 1980 Review.

### **Stage One**

David Dundas

Karen Gornalle, Karen Gornalle and Associates

Keith P. Lanyon, Helen Morrison, Lanyons Licensed Estate Agents

Peter Lowenstern, Real Estate Institute of Victoria

Denise Maresh

John McDonald, REIV Delegation, 5 May 2009

Cecil Munaweera

Mark O'Brien, Tenants Union of Victoria

Brett Philip, REIV Delegation, 5 May 2009

John Pratt, REIV Delegation, 5 May 2009

Carol Riley, Sam Herszberg, Rob Farmer, Jeff Stein, Run Property Management

John Saurini

Alan Wilson

Felix Zeldin, Prime Property Partners Australia Pty Ltd

### **Stage Two**

Alan Camfield

Milton Cockburn, Shopping Centre Council of Australia

Les Donaldson, Donaldson Martin, Pty Ltd

Philip Gardner

James Kaufman, Jones Lang LaSalle

John Keating, Keatings Real Estate

Peter Lowenstern, REIV Delegation, 19 August 2009

Kate Mannion, ALPA

Ian McDonald, REIV Delegation, 19 August 2009

Shane McIntyre, ALPA

David McMillan, Domain Property Advocates

Peter Mericka, Lawyers Real Estate

Fergus Nutt, Warlimont and Nutt

Simon Parsons, Parson Hill Stenhouse

Brett Philip, REIV Delegation, 19 August 2009

Chris Plant, Australian Property Institute Victorian Division

John Pratt, REIV Delegation, 19 August 2009

Enzo Raimondo, Chief Executive Officer, Real Estate Institute of Victoria

Nicole Rich, Consumer Action Law Centre

Brian Rodwell, ALPA Delegation, 19 August 2009

Robert Sherwell, Elders and ALPA

Brian Woods, ALPA Delegation, 19 August 2009