



ESTATE AGENTS COUNCIL

POSITION PAPER –

MODERNISING THE ESTATE AGENTS ACT 1980

JULY 2009

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 a new generic consumer law and trade licensing for property agents at the national level.

2. The Council's Review

The Council is to undertake its Modernisation Review in two stages. The first stage involves the preparation of a position paper reflecting the Council's preliminary views and initial stakeholder consultation. The second stage will involve consultation on the position paper and the formulation of a final report and recommendations to the Minister.

The purpose of this position paper is to two fold. First, it will provide a focus for seeking further input from industry, consumers and stakeholders. Second, it will serve to advise the Minister of the Council's preliminary views regarding its modernisation review.

The focus of this position paper is primarily on the Estate Agents Act, although consideration has also been given to the associated regulations, in particular the Estate Agents (Professional Conduct) Regulations 2008 and Estate Agents (General, Accounts and Audit) Regulations 2008.

The Council's review will focus primarily on conduct sections and procedures relating to the establishment and conduct of the business, accountability mechanisms and the role of agents' representatives¹. The Council considers that this focus fits well into the project brief in terms of considering measures which will reduce the regulatory burden on industry, while not impeding consumer protection. The Council will also review sections which are already covered by other legislation, such as the Fair Trading Act 1999 (FTA), as well as the drafting and level of regulation contained in the Act.

In view of the proposed introduction of national licensing the Council will not be addressing licensing aside from observations about the overall structure of the Act. Furthermore the Council will not be examining those sections of the Act dealing with administration and enforcement.

3. Sections to modernise or not modernise –that is the question?

This Modernisation Review is still in its early stages and thus the Council has not determined the sections that it will ultimately recommend to the Minister as candidates for modernisation in its final report.

However based on its initial consideration of the issues and consultation with stakeholders and interested practitioners the following sections of the Act have been identified as being in need of modernisation and/or unnecessarily burdensome for industry when weighed against the benefits for consumers.²

¹ While the Council will not be looking at licensing within the context of this project, it will be looking at the role of agents' representatives in terms of who is responsible for their conduct as it deems this to be more focussed on conduct and accountability mechanisms rather than licensing per se, given that this group are in fact unlicensed.

² Refer to Appendix 1 for details of the content of the sections of the Estate Agents Act identified and the objective of the provision.

3.1 Role of 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).

It is the initial view of the Council that the role of agents' representative in the market place is problematic. The Council is particularly concerned about ensuring that estate agents are responsible for the conduct of their agents' representatives. It has also considered what further additional accountability mechanisms could be put in place to support this objective and whether in fact there is a need for the legislated role of agents' representative as pseudo estate agent.

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*³. 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*⁴. The Council shares the concerns raised by the Tenants Union of Victoria (TUV) in their submission to this review as to the need to ensure that agents are aware of their responsibility for the conduct of their representatives and are also held accountable for any *unlawful or unprofessional conduct* by agents' representatives⁵.

The Council informally discussed with the Real Estate Institute of Victoria (REIV) whether there is a perception amongst consumers that there is no difference between licensed estate agents and agents' representatives. This perception was regarded as common and is consistent with the Council's understanding of the position. It is not surprising given that under the legislation agents' representatives are able to perform all of the functions of an estate agent other than the day to day management of a branch office. However a fundamental difference lies in the licensing requirements. Agents are required to have a certain level of experience and qualifications, and are accountable for their actions as well as of those under their supervision.

³ 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).

⁴ 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).

⁵ Mark O'Brien, CEO Tenants Union of Victoria, Modernising the Estate Agents Act 1980 Submission, 24 March 2009.

The Council has given some consideration to whether there is a need to have a legislated agents' representative role or a more transparent system might be gained from having an alternative model. For example if rather than having an agents' representative the licensed estate agent was to have simply a salesperson, who's conduct both the agent and officer in effective control were responsible for in the same way they are answerable for the actions of any other staff member employed in the estate agency office. It could be asked what's in a name, what is to be gained from simply changing the agent's representative to a salesperson? The point of distinction would be differentiating between the role of licensed estate agent and all that entails and the unlicensed salesperson working for an estate agency business and making this clear to the consumers using their services.

The Council has also reviewed the arrangements in place under the Corporations Act in terms of financial services licensees authorising representatives as per sections 916A and 917B. As noted by the Australian Securities and Investments Commission (ASIC):

The Corporations Law regime specifically provides that a licensee is liable for the acts of its representatives, whereas the real estate regime relies primarily on common law agency principles to ensure the licensee's accountability for their salespersons' activities⁶.

Section 916A (1) of the Corporations Act states that a licensee gives the authorised representative written notice authorising the provision of a specified service upon the licensee, while subsection (2) suggests that this may be for all or some of the financial services covered by the licensee's licence. Furthermore under section 917B it is established that the licensee is responsible for the conduct of the representative whether or not the representative's conduct in question is within authority.

The scheme under the Corporations Act for the responsibility of licensees for the conduct of their representatives involves:

- Express liability of the licensees to the client in respect of any loss or damage caused as a result of the representative's conduct (section 917E);
- The client has the same remedies against the licensee as they have against the representative (section 917F); and
- Joint and severed liability of the licensee and representatives to the client (section 917F).

It could be argued that this builds upon the principles found in sections 13, 13A and 47 of the Act and builds a clear accountability structure, clearly identifying what functions the authorised representative is permitted to undertake and who is responsible for their conduct with written authority (as well as notice of cessation of this arrangement) required. The Council proposes examining how such provisions could apply to the agents' representative role.

The comparative legislation of other jurisdictions feature similarities to the Victorian Act in terms of requiring the agents' representative role to be supervised, their employment registered and the basic sentiment that agents are answerable for the conduct of those acting on their behalf⁷. Queensland goes a little further than the Estate Agents Act in that whereas

⁶ ASIC, ASIC review of financial advising activities of real estate agents: February 2000, <http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC+review+of+financial+advising...>, accessed 18 May 2009.

⁷ Different terminology is used in the legislation of other jurisdictions to describe what equates to an agents' representative under the Estate Agents Act. For example they are referred to as employees under the Property, Stock and Business Agents Act 2002 in New South Wales, salespersons in the Property Agents and Motor Dealers Act 2000 in Queensland, sales representative in the Land Agents Act 1994 in South Australia and Real Estate and Business Agents Act 1978.

section 47 (1) deems that an agents' representative shall not perform any of the functions of an estate agent unless the agent has authorised this arrangement in writing, under section 130 of the Queensland Property Agents and Motor Dealers Act 2000 an employment authority clearly specifies the activities that the estate agent authorises the salesperson to perform on their behalf and must be in place upon the commencement of employment. This builds upon the intention of section 47 and ensures that proper accountability structures are in place from the outset so that there is no doubt regarding what functions agents' representatives are permitted to undertake and who is ultimately responsible for their possible misconduct.

While the Council's consideration of the role of agents' representatives in the context of this review is still in its infancy, its key concern is about the accountability question and how this translates in terms of authorisation. Ultimately accountability is important in terms of consumer protection and the Council is keen for such processes to be streamlined also for the benefit of business in terms of easing the regulatory burden.

- 3.1.1 What problems (if any) are occurring in the market place regarding agents' representatives?**
- 3.1.2 Is there a need to have the role of agents' representative?**
- 3.1.3 Do consumers differentiate between the roles of estate agent and agents' representative or are they regarded as the same by virtue of carrying out the same functions? Does it matter?**
- 3.1.4 Is it widely understood that estate agents are liable for the conduct of their agents' representatives?**

3.2 Supervision and Accountability

Section 29B Duties of agents officers in effective control 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.

Section 30 Management of an estate agency office 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.

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's interest in ensuring the Act enshrines sufficient accountability structures extends beyond the position of agents' representative to management, namely the respective roles of the officer in effective control and branch manager. The Council is in favour of reinforcing the importance of the licensed agent or the officer in effective control being ultimately responsible for the estate agency business while contending that regulation is not needed to deal with administrative matters such as the role of the branch manager in the office and short-term absences.

The underlying governance principles guiding the responsible licensed agent and officers in effective control, aside from those found in the Act and associated regulations particularly the Estate Agents (Professional Conduct) Regulations (professional conduct regulations), should resemble that required of any board director as per chapter 2D of the Corporations Act. The key point of the section dealing with the duties of agents and officers in effective control is that they are ultimately accountable for everything that happens in the business, whether that be supervising employees, setting up best practice procedures or making sure that operations comply with all relevant laws in both the principal and branch offices. The Council is less interested in section 29B in terms of the requirement of substantial attendance contending that it would be more appropriate to have the emphasis on accountability, responsibility, proper supervision and being in charge of the principal office not merely being present⁸.

A question arises that if the officer in effective control is meeting their obligations as per section 29B in regard to both the principal and branch office, is there a need to have the role of branch manager featured in the legislation as per section 30? Sections 29B, 30 and 13A 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 and then licensed estate agents within the office who are responsible for the conduct of agents' representatives. It could be contended that while the intentions of the respective provisions are admirable, that there are too many tiers of accountability at play which ultimately causes 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

⁸ This is the emphasis of section 7 (7) of the Tasmanian Property Agents and Land Transactions Act 2005 which states that the agent managing the estate agency is *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 out there.*

officer in effective control who is ultimately answerable for the actions of all employees and aspects of the business or all of the above?

The Council is interested in considering whether there is a need for the legislation to address the role of branch manager, if accountability ultimately rests with the licensed agent or officer in effective control. It could be argued that 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 the authority, qualifications and level of training of all employees relative to the work they are being asked to perform. It could be argued that 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.

It should be noted that such a proposed change would not affect the presence of a licensed estate agent in the branch office or their responsibility in the field for the conduct of their agents' representatives. 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 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.

The Council considers section 30A whereby an estate agent or branch manager must notify the authority in writing of absences of between seven and thirty days is a provision worthy of further consideration. It is a provision which is not replicated in the comparative legislation of other jurisdictions. The Council considers this section unnecessary given that it is only dealing with short-term absences and the internal processes of the estate agency office in question should be equipped to deal with such circumstances. Ultimately the relevant licensed agent or the officer in effective control is responsible for the operations of the business, including the short term absences of the branch manager or licensed estate agent. Permanent changes in personnel which would presumably be more significant are already addressed in section 33 where details including commencement and cessation of employment need to be lodged with the authority for the purpose of the register, whereby the location of agents or agents' representatives can be traced in the event that they need to be made accountable for their actions. The Council is in favour of removing such sections, as section 30A, as generally estate agencies should be bound by the same regulations governing all businesses with the Act concentrating on addressing characteristics unique to the estate agency industry and worthy of specific regulation.

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| <p>3.2.1 Is there a perception that officers in effective control are currently held accountable for the actions of their employees, namely estate agents and agents' representatives?</p> <p>3.2.2 Should the Act deal with the role of branch managers (is there a need for branch managers in addition to the roles of officer in effective control and licensed estate agents)?</p> <p>3.2.3 Is section 30A of the Estate Agents Act regarding the notification of short term absences of the branch manager or licensed estate agent, necessary?</p> |
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3.3 Reducing the Regulatory Burden – 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 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.

The Council is concerned that there are a number of sections in the Act which deal with standard business processes that should not be the concern of industry specific legislation. These would include the registration of the business name, display of office signage, letterhead requirements and the maintenance of employee statements. The Council does see merit in the requirement that a registered office location be lodged but this practice also needs to be reviewed to ensure it is in keeping with contemporary practices. The Council is inclined to the view that the focus of legislation/ regulations should be on the big picture items, such as licensing, conduct and trust accounting, not office minutiae which burdens business while not enhancing consumer protection.

The requirement of a registered office address being lodged is found in all of the comparative statutes of other jurisdictions (with the exception of South Australia and Tasmania) and in section 142 of the Corporations Act. However the establishment of the virtual office poses the question as to what constitutes an office, which is raised in section 35 of the Act. 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. The Council sees the value in this provision, but thinks that it is important that it is reassessed in the context of emerging technology and changes foreshadowed as part of the introduction of national licensing. The Council considers that the requirement that a registered office address (and any subsequent changes) and the details of the employment (or cessation of employment) of agents' representatives in that office could be incorporated into the arrangements currently found in section 33 of the Act regarding the register.

Furthermore in relation to 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 36 about the name of an estate agency business. It should be noted though that most of the similar acts found in the other states have such a provision (the exceptions are Queensland and South Australia). The Business Names Act 1962 already 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). In addition any misleading or deceptive representations associated with the use of a business name are covered by the FTA. The Council would suggest that section 36 is a candidate for modernisation as it is already addressed by overarching legislation and it is not necessary to have such provision in an industry specific act.

The same could apply to section 39 which deals with displaying notice on places of business and 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 FTA. Again all other jurisdictions except for Queensland and South Australia have such a comparable section in their legislation. The Council considers having a specific section of the Act dealing with office signage as unnecessary and not really worthy of regulation or enforcement. Such provisions simply add administrative red tape without producing any meaningful consumer protection.

Section 40 which mandates that agents should have their name and description as a licensed estate agent featured on their letterhead is a provision unique to the Estate Agents Act. It is the preliminary view of the Council that section 40 is unnecessary given that section 29 of the FTA requires a name and address to be featured on documents and advertisements. 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.

Some jurisdictions have a similar provision to section 46 in terms of obliging estate agents to keep employee statements regarding the names and contact details of staff or the duties they were authorised to perform⁹. 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. The intention of the provision seems to be identifying the employees and conduct for which the agent is liable, possibly a throwback to the sub-agents era, and establishing transparent processes in regard to 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.

The Council notes that the details of employees could easily be incorporated into that already required in terms of the register as per section 33. Putting aside the possible objectives of the section detailed above, it is not immediately clear as to why there needs to be a provision

⁹ The exceptions were South Australia and Western Australia, which did not have a provision which was similar to section 46 of the Act dealing with employee statements.

within the Act dealing with keeping a log of salaries and commissions. It might be said this should be part of the normal accounting procedures for business and record keeping processes which can be duly audited. Again it could be contended 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 Council view is that reducing the regulatory burden in reference to such matters as office signage, letterhead or where other legislation already deals with the activity such as business names, would benefit industry without having a detrimental impact on consumers.

3.3.1 Is the traditional estate agency office changing and what factors should the Act take into account to accommodate a new model of the ‘virtual office’?

3.3.2 Would removing provisions from the Estate Agents Act dealing with such matters as the business name, displaying the name of the business and letterhead and leaving such matters to individual businesses, ease some of the administrative burden on industry and would this impact consumers?

3.3.3 Is it necessary or a common practice for estate agents to write to the Director providing information about the location within the office of employee statements as per section 46 (1) (c)?

3.4 Fair Trading Act – Misleading or Deceptive Conduct, False Representations

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 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.

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.

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.

The Council considers these sections which broadly deal with outlawing disingenuous pricing and advertising practices commonly associated with underquoting to be of critical importance. It has sometimes been remarked it is within the very nature of a profession which relies on commissions that sometimes untoward practices occur while trying to secure the listing or sale. The Council is interested in the notion that the Fair Trading Act could be used as a mechanism to address such practices, rather than the current arrangement whereby the estate agency industry is bound by multiple pieces of legislation including their industry specific Act and regulations as well as the FTA and Trade Practices Act 1974. The greater reliance on sections of the FTA and the Trade Practices Act dealing with misleading or deceptive conduct or false representations could impose a more stringent regime around pricing and advertising and would be consistent with activity at the national level to move towards a national generic consumer law based around fair trading principles.

The introduction of sections 47A, 47B and 47C was designed to address the practice of underquoting (or 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; as the old estate agent adage goes *quote them high watch them die, quote them low*

watch them go. The provisions were intended not to penalise agents who genuinely made a mistake in their price estimate or were unable to accurately value a property due to volatile market conditions, but rather those who consciously engaged in misleading and deceptive conduct¹⁰. Similar provisions exist in legislation in Queensland and in particular in New South Wales, where the sections 72-75 of the Property, Stock and Business Agents Act 2002 are very similar to their Victorian counterparts. South Australia also has provisions which deal with false and misleading conduct generally, as does Tasmania with reference to auctions.

The Council has long followed the debate around underquoting, from the introduction of the amendments in 2003 to its consideration of the issues in the context of the furore around the practice in 2007. It is clear that there have been problems associated with the application of sections 47A-C. These sections establish the requirements that an agent must provide an estimated selling price and they cannot engage in false representations regarding price to the seller, prospective seller or buyer.

There appears to be some confusion in the market place regarding the obligations imposed on estate agents and agents representatives in regard to pricing by the Act, FTA and even the professional conduct regulations¹¹. This was raised by the REIV in their submission to this review¹² and is demonstrated by the need for CAV to issue guidelines for real estate salespeople regarding price advertising and underquoting in November 2007. Also identified during the consultation process was the difficulty in establishing a precise estimate in an often volatile market: *The expectation is that agents can estimate a sale price within 10% and that people act in reasonable and rational ways. The reality is that estimating unusual properties or estimating in a very volatile market is extraordinarily difficult. Agents are not trained as valuers...*¹³. That said, the Council is inclined to the view that the confusion in the industry as to the effect of the provisions is at least in part to a self-interested reluctance to comply by some elements of the industry.

It can be difficult to establish underquoting, as the common view is that the practice equates to a difference between the advertised property price and final sale price. Rather the legal definition of underquoting based on the Act is more complex¹⁴. Before underquoting can be established the knowledge and skills of the agent in valuing the property, the use of information regarding how the estimate was derived at based on recent sales of comparative properties in the area or capital improvements and whether the figure was updated based on offers received need to be considered.

In acknowledgment of the introduction of the national consumer law and the problems identified above associated with the operation of these underquoting provisions, the Council believes that they should be recast with the focus placed on the obligations found in the Fair Trading Act. It could be argued that section 8A dealing with unconscionable conduct and sections 9 and 12 regarding misleading and deceptive conduct and false representation of the Fair Trading Act already addresses much of the undesirable practices which sections 47A-C seek to combat. 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

¹⁰ 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).

¹¹ Consumer Affairs Victoria, Guidelines for real estate salespeople – price advertising and underquoting, November 2007, page 9-10.

¹² Lowenstern, *opcit*.

¹³ David Dundas, Managing Director, Licensed Estate Agent, Modernisation Review Submission, 19 March 2009.

¹⁴ Monash University Report on Residential Property Advertising in Victoria commissioned for Consumer Affairs Victoria, www.consumer.vic.gov.au.

deceptive conduct may be more effective as well as removing much of the confusion in the market place. Requiring agents to meet fair trading principles, perhaps with industry relevant adaptations, would create greater clarity within industry whilst still protecting the consumer interest against unacceptable conduct.

Section 42 of the Act which relates to advertising requires that estate agents specify the name and address of their office and must not make any false or misleading statements in their published material. Amendments made to the Act in 2004 clarified that the requirements imposed on advertisements also applied to those featured online as well as in the printed form. The objective of section 42 (1) regarding the publication of a business address is a consumer protection measure, allowing consumers to verify the credentials of the agency before they engage their services. Section 42 also holds agents accountable for the claims made in their advertising material by ensuring that they do not make any false representations and the source of all material is clear by their identifying details being featured. Similar arrangements exist in other jurisdictions (except Western Australia) regarding the requirement that an agents name and address must be displayed on advertisements, as well as prohibiting false and misleading claims being made.

Given that section 29 of the Fair Trading Act requires all advertising material to feature the business name and either the office address or licence details, the Council considers that there is probably no need to have duplication in the form of section 42 (1) of an industry specific act. Similarly sections 9 and 12 of the Fair Trading Act adequately address false, misleading and deceptive conduct which is applicable to advertising and thus this does not really need to be featured in the Act.

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 also apply to section 38 of the Act which addresses an unlicensed person pretending to be licensed as an agent, which could arguably be dealt with again by the provisions in the Fair Trading Act focussed on misleading and deceptive conduct.

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| <p>3.4.1 Are the legal obligations imposed on industry regarding pricing in accordance with the Estate Agents Act, Fair Trading Act and Estate Agents (Professional Conduct) Regulations adhered to in the market place?</p> <p>3.4.2 What are the practical problems with the operation of sections 47A, 47B and 47C of the Act?</p> <p>3.4.3 If pricing, advertising and underquoting were simply addressed by provisions in the Fair Trading Act focussed on misleading or deceptive conduct or false representations, or those provisions slightly adapted to the industry, would this be a more effective model than the status quo?</p> |
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3.5 Continuing Professional Development

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.

The Council regards section 45 of the Act related to continuing professional development to be a currently redundant provision given that it is not utilised. However we are of the view that this should not in fact be the case. The purpose and potential use of this section should be modernised to ensure that it does not continue to function as a superfluous provision, but rather the potential benefits to the industry are realised and subsequently flow on to consumers.

The value of continuing professional development was stressed by both industry and consumer stakeholders during the consultation process of this review. Both the REIV and TUV emphasised the importance of compulsory professional development to assist agents in meeting their knowledge of law requirement under regulation 6 of professional conduct regulations.

The Council is inclined to agree with the sentiments put forward by the REIV and TUV. There is considerable value to be gained from agents and their representatives being required to undertake a legislative update course every few years to ensure that their knowledge of the law is satisfactory. This could be achieved without further regulation by simply by making the most out of the current section 45 of the Act and thus rendering it as a more meaningful provision than its current incarnation. The Council does not consider that such a requirement would be adding to the administrative burden. While the Council admittedly does not have evidence as such to support the benefit of such a program to agent conduct and ultimately consumer protection, it feels sufficiently strongly about this issue to raise it in the broader context of a review of the Act. Underpinning the current licensing scheme and the employment of agents' representatives is the value and need for appropriate training. The opportunity provided by section 45 supplements that approach. The Council also expects that this issue will be examined in more depth as part of the introduction of the national licensing of property agents and looks forward to following these developments.

3.5.1 Are the training courses available to members and non-member of industry associations or via educational institutions currently adequate to assist agents and agent's representatives meet their knowledge of the law requirement on a continuing basis as per the professional conduct regulations?

3.5.2 Would compulsory professional development be worthwhile or an added regulatory burden?

4. Other Issues

4.1 Drafting and Structure of the Act

While the Council has identified particular provisions above that it considers worthy candidates for modernisation, in a general sense it believes there is also considerable room for improvement regarding such matters as the overall drafting style and structure of the Act.

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 referring to other pieces of legislation for clarification¹⁵. 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 enables consumers to be empowered, which allows for a high functioning market place where all participants are well informed and thus better protected.

There are also stylistic issues which the Council thinks could be addressed. For example while the same basic requirements of knowledge of the law, disclosure and business practices should be transferable whether an agent or agents' representative is operating in the sales or property management spheres, there is a perception that the Act is focussed too heavily on residential sales.

In the context of a discussion about drafting, the basic structure of the Act is also worth noting. For example, the role of agents' representative is dealt with in both Part III Licences and Part IV Agents and Agents' Representatives of the Act. In terms of structure the Council is unsure as to why the role is featured under the banner of licensing given that one of the distinguishing features of the agents' representative is that they are unlicensed. This may be a legacy item courtesy of the former sub-agents which were licensed prior to deregulation. While an agents' representative carries out many of the same functions (aside from the day to day management of an office) as an estate agent they are differentiated by being required to be under the supervision of a licensed estate agent, who is ultimately answerable for their conduct. The Council view is that the role would be more appropriately addressed in the conduct provisions rather than the licensing area.

Furthermore the repetition within the Act which stems from it being written around the roles of agent and agents' representative could be seen as rather unnecessary given that the requirements are often the same for both roles it is just that the chain of accountability that differs.

Essentially the Act needs to be updated so that it presents a more cohesive picture of industry regulation rather than being an amalgam of numerous legislative changes to the Act since its inception in 1980 and subsequently various drafting styles and an ad hoc structural framework.

4.1.1 Do you find the drafting and structure of the Act user-friendly or an impediment to your understanding of your legislative obligations?
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¹⁵ The Commonwealth Fair Work Act 2009 provides a useful example of legislation using notes to explain references, definitions or refer to other pieces of legislation.

4.2 Level of Regulation

*Whilst I [acknowledge] that most of the regulations do protect consumers from unscrupulous estate agents, I believe we are over regulated and you get the feeling that there is an overall assumption that agents are all crooks...*¹⁶

The Council's preliminary view is that the industry is over-regulated and that significant sections of the Act need to be overhauled both in terms of style and more importantly content. Overall, the Act is too prescriptive, delving into areas in which in our view there is no need for regulation.

In general, the Act is structured in ways that make it difficult for practitioners to meet the requirements of the professional conduct regulations regarding their knowledge of the law. It is an entirely reasonable expectation and as noted by the TUV important that those in the industry are aware of their responsibilities¹⁷. It may be unrealistic to assume that all agents and agents' representatives are familiar with the level of detail contained in the Estate Agents Act, Sale of Land Act 1962, Residential Tenancies Act 1997, associated regulations, Fair Trading Act 1999, various guidelines in addition to keeping abreast of legislative changes as well as actually doing their job and meeting industry professional development requirements.

The Act might focus on the big picture in terms of licensing, enforcement, trust requirements, administration, conduct, and not bother with the material, which is confusing for industry, does not protect consumers or is dealt with by other legislation. In particular, the Council would advocate a focus on accountability processes, trust accounts, conflicts of interest and generally practices that present the likelihood of consumer detriment. The basic legislative requirements that apply to all businesses should not be the focus of an industry specific act such as the Estate Agents Act, which should address practices and characteristics unique to that occupation. A drafting model that makes reference by notes to the obligations arising elsewhere might be also considered.

4.2.1 Is the current level of regulation imposed cumbersome for industry?

4.2.2 In practice do estate agents and agents' representatives meet their knowledge of law obligation as per section 6 of the Estate Agents (Professional Conduct) Regulations and all this entails?

¹⁶ Felix Zeldin, Director, Prime Property Partners Australia Pty Ltd.

¹⁷ O'Brien, opcit.

5. Initial Consultation Process

The Council wrote to both industry and consumer stakeholders in early March 2009 inviting them to lodge written submissions to this review. Submissions were received from the Real Estate Institute of Victoria (REIV) and Tenants Union of Victoria (TUV), the content of which will be detailed below. Other stakeholder groups did not respond to the opportunity to provide feedback.

In addition the Council sought the input of individual estate agency practitioners and other interested parties via a special edition of the Estate Agents Council Bulletin being distributed in March 2009 and material being posted on the EAC website. The subsequent response was relatively modest, but still useful in providing the Council with a sense of the issues worthy of consideration. The Council is planning to do more extensive consultation following the release of this position paper, which raises a number of issues which will no doubt garner strong opinion. In particular the second stage of the consultation process will target the various segments of the industry in order to have the voice of a good cross-representation of the marketplace heard.

5.1 Real Estate Institute of Victoria

The REIV provided the Council with a written snapshot of their thoughts in regard to areas of the Act and regulations which they believe should be looked at in the context of modernisation. Issues identified included greater recognition within the legislation for the increased use of technology in estate agency transactions, in line with the Electronic Transactions (Victoria) Act 2000. Also raised were office management procedures, in particular the role of the officer in effective control, compulsory professional development and advertising obligations imposed on agents by multiple pieces of legislation.

Subsequently the Council Modernisation Working Party met with a delegation from the REIV to discuss various issues related to the task of modernising the Estate Agents Act. The REIV reiterated their desire for provision in the Act for the utilisation of electronic medium, for example the use of online sales authorities. The Council supports the REIV's position in terms of the increased use of technology to improve overall business efficiency and processes, especially in light of the gradual move towards the virtual office model. However it views this as more of an administrative rather than legislative matter as to our mind there is nothing in the Act which currently precludes this from happening.

The REIV suggested that the conflict of interest provisions in section 55 (8) (a) could be interpreted to mean that a shareholder of a company or their partner or relatives could be declared to have a conflict of interest where in reality they are not subject to any insider knowledge that would give them an advantage over any other potential buyer of a property. The Council would support the clarification of this provision in terms of specifically making mention of a company board director or employees of a publicly listed company rather than 'mum and dad shareholders' per se.

The REIV also advocates a code of conduct for good estate agency practice be established as part of the Act, in addition to the current regulations as per section 99 including the Estate Agents (Professional Conduct) Regulations. They cited the example of the code of conduct found in the Western Australian Real Estate and Business Agents Act 1978. While the Council is sympathetic to the sentiment of this proposal, it considers the addition of a code of conduct as well as professional conduct regulations as adding to the regulatory burden which is counter to the objective of this review. It could be put forward that the law sets the minimum standard required and it is up to industry (and their industry associations) to establish best practice.

5.2 Tenants Union of Victoria

The TUV submission was largely focussed on property management, which is an area which features prominently in the complaints they receive and their casework. It was noted in their submission that the Act makes no specific reference of property management per se; *the lack of specific provisions relating to property management contribute to poor practice and reinforce the lowly level of care attached to property management by the industry*¹⁸. This seems an oversight given that two thirds of properties in the private rental market are managed by an estate agent or property manager. Indeed over the years the Council has observed that generally over a third of all real estate related enquiries received by CAV tend to be in relation to property management issues. The Council shares the concerns held by TUV about this sphere and acknowledge that while the conduct provisions found in the Act and regulations should apply just as readily to those working in property management as to those in residential sales, the Act does tend to be geared towards the sales market as opposed to the leasing side of things¹⁹.

The TUV concurred with the REIV, in calling for a mandatory program of continuing professional development in order to assist estate agents meet their knowledge of law requirement under the Estate Agents (Professional Conduct) Regulations. At present they contend that irrespective of this requirement that *insufficient knowledge of responsibilities under the Residential Tenancies Act 1997 and anti-discrimination law are widespread. This has the unfortunate consequence of misleading both tenants and landlord*²⁰.

Accountability also featured prominently within the TUV submission in terms of estate agents being held responsible for the conduct of agents' representatives as well as calls for breaches of conduct requirements being linked to licence renewal. As previously stated the Council is extremely interested in ensuring the Act adequately establishes appropriate accountability mechanisms, including in terms of the role of agent and agents' representative. While it is outside the scope of this review to comment on licensing processes in light of the developments at the national level, the Council supports overall calls for a low tolerance approach to breaches of professional conduct. Neither the industry nor consumer is well served by the few rogue elements who do not meet basic conduct standards.

5.3 Other Submissions²¹

In their submission to this review, Run Property focussed on two issues, namely trust accounts and documentation, which they felt impeded the effective operation of the virtual office at present²². They suggested a state-wide trust accounting software system, which would enable estate agencies to outsource trust accounting functions, ensure universal processes and encourage compliance by making trust accounting less of an administrative burden. This may be something that it considered in the broader context of the implementation of national licensing. It is the view of the Council that the maintenance of a trust account is a key element of consumer protection in the wake of the virtual office, alongside a readily identifiable office location.

Run Property also called for the greater use of electronic communication in line with the Electronic Transactions (Victoria) Act 2000 to improve efficiency and in terms of the

¹⁸ O'Brien, opcit.

¹⁹ In part due to the Residential Tenancies Act 1997 primarily dealing with matters relating to renting.

²⁰ O'Brien, opcit.

²¹ The Council thanks Keith P. Lanyon,,Cecil Munaweera, John Saurini, Felix Zeldin, David Dundas and Alan Wilson for their respective submissions.

²² Carol Riley, National Manager, Trust Accounting and Administration Services, Run Property Managemen, 23 March 2009.

maintenance of documents within the office for the purpose of inspection. They called for the Act to be updated so that document could be filed solely electronically, authorities to be completed online and the acceptance of electronic signatures. Again the Council does not disagree with this viewpoint, but it is yet to identify anything in the Act which necessarily prohibits the further embrace of modern technology in the estate agency office. For example documents can be currently stored electronically according to the Act, the only conditions that are imposed are that the documents must be written in the English language and be able to be easily printed into hard copy form for the purpose of inspection.

Other key themes identified in submissions were as follows:

- The requirements of the Act not always being readily understood due to the complex terminology and drafting style used;
- The excessive level of regulation;
- Office management processes;
- The effectiveness of professional conduct requirements;
- The difficulty in providing an accurate estimated selling price as per section 47A with any precision with so many variable factors, including a volatile market;

6. Summary of Preliminary Findings:

In summary the preliminary position of the Council is that the Estate Agents Act 1980 could be modernised by:

- Reviewing the role of agents' representatives and liability for their conduct;
- Revising the accountability structure of licensed agent/ officer in effective control-branch manager-licensed estate agent-agent's representative;
- Removing agent reporting obligations in relation to absences;
- Reducing the level of prescription in the Act in respect of some estate agency office processes and procedures;
- Recasting the Act's underquoting provisions to focus on the more generic obligations found in the Fair Trading Act and possibly adapted to the industry;
- Removing provision that duplicate obligations under the Fair Trading Act or Business Names Act;
- Reinvigorating section 45 regarding compulsory professional development to ensure that this provision is greater utilised;
- Evaluation of the overall drafting, structure and level of regulation currently contained in the Act.

It is the Council view that the aforementioned changes could reduce the burden on industry while not eroding consumer protection structures; in fact it could be argued that they would be strengthened by streamlining processes and affirming the overarching role of the Fair Trading Act 1999.

7. Consultation – Speak now or forever hold your peace...

While the Estate Agents Council has highlighted some relevant issues and posed some specific questions in this paper, it would welcome input on any of the matters raised or any other points relevant to the terms of reference.

The Council is seeking to consult with both industry and consumer stakeholders as well as individual practitioners who cover the various segments of the market (metropolitan residential, metropolitan commercial, business broking and the rural and regional sector) or any other interested party.

While initial submissions have already been received, it is not too late for feedback to be incorporated into the final report due in September 2009, which will inform the Minister and help shape the modernisation of the Act for the betterment of the industry and its consumers.

Submissions should be sent to:

Estate Agents Council Modernisation Review
C/O Giorgia Moar, Consumer Affairs Victoria
Level 20, 121 Exhibition Street
MELBOURNE VIC 3000
Email: Giorgia.Moar@justice.vic.gov.au

APPENDIX 1 - EAC MODERNISATION REVIEW –PRELIMINARY TABLE OF SECTIONS UNDER CONSIDERATION FOR MODERNISATION

EAA SECTION	CONTENT	OBJECTIVE
ROLE OF AGENTS' REPRESENTATIVES		
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>	<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.</p>
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>	<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.</p>
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. Penalty: 25 penalty units.</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>	<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.</p>

EAA SECTION	CONTENT	OBJECTIVE
SUPERVISION AND ACCOUNTABILITY		
<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>25 penalty units</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>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</p>

EAA SECTION	CONTENT	OBJECTIVE
	<p>(5) Sections 23 to 24B apply to a person to whom sub-section (2) applies as if—</p> <p>(a) a reference to a licensed estate agent was a reference to the person; and</p> <p>(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>(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>managers to be “grandfathered” for life regardless of whether they changed their place of employment. This concession was also designed not to disadvantage rural practitioners, which was also acknowledged in section 30AB²³.</p>
30A. Absence of estate agent or branch manager	<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</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.</p>

²³ 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).

EAA SECTION	CONTENT	OBJECTIVE
	<p>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 (as the case may be).</p>	
REDUCING THE REGULATORY BURDEN – OFFICE PROCESSES		
<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 guilty of an offence.</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>

EAA SECTION	CONTENT	OBJECTIVE
36. Name of estate agency business	<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 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>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.</p>
46. Employee	<p>(1) Every estate agent shall—</p>	<p>Section 46 requires agents who are in effective control</p>

EAA SECTION	CONTENT	OBJECTIVE
statements	<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>	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.
FAIR TRADING ACT – MISLEADING OR DECEPTIVE CONDUCT		
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.
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 three years immediately before the publication of the advertisement or for the whole of any lesser period during which the</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>

EAA SECTION	CONTENT	OBJECTIVE
	<p>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 selling price of the real estate, and that the estimate complies with this section.</p> <p>100 penalty units.</p> <p>(2) The estimate—</p> <p>(a) may be a single amount or a price range; and</p> <p>(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</p> <p>(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>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 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 underquoting²⁴.</p>
<p>47B. False representation to seller or prospective seller</p>	<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>200 penalty units.</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</p>

²⁴ 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).

EAA SECTION	CONTENT	OBJECTIVE
		snapshot of what their property is worth by the agent and price valuations are transparent and open to scrutiny.
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 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— (a) it is made in an advertisement in respect of the property that is published, or caused to be published, by the agent; or (b) it is made (whether orally or in writing) to a person as a prospective purchaser of the real estate.</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.
CONTINUING PROFESSIONAL DEVELOPMENT		
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— (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; (b) may specify that every person to whom it applies must undertake a specified activity by a specified time; (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; (d) must identify the providers of any required activity; (e) may provide for the Director— (i) to extend a time limit that applies to a person with respect to the requirement; (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.

