



ESTATE AGENTS COUNCIL

**IMPEDIMENTS TO THE OPERATION
OF A NATIONAL LICENCE
CONTAINED IN CONDUCT
PROVISIONS -
RESEARCH PROJECT**

**REPORT ON CONTRACTS AND
AGENCY AGREEMENTS**

MAY 2010

1. EXECUTIVE SUMMARY	4
2. LIST OF RELEVANT LEGISLATION.....	5
3. BACKGROUND.....	6
4. RESEARCH PROJECT	7
5. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS IN VICTORIA	8
(a) Form of contracts.....	8
(b) Conflict of interest.....	8
(c) Price requirements	9
(d) Payments	9
(e) Cooling off periods.....	10
(f) Termination.....	11
(g) Void contracts or unfair terms.....	11
(h) Disclosure requirements or vendor’s statements.....	12
(i) Service of documents	12
(j) False and misleading statements or representation	12
(k) Remedies	13
(l) Statutory warranties	13
(m) Defences.....	14
6. A COMPARATIVE ANALYSIS OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS	17
(a) Form of contracts.....	17
(b) Conflicts of interest	19
(c) Price requirements	20
(d) Payments	21
(e) Cooling off periods.....	21
(f) Termination.....	22
(g) Void contracts and unfair terms	23
(h) Disclosure requirements or vendor’s statement	23
(i) Service of documents	25
(j) False and misleading statements or representation	25
(k) Remedies	26
(l) Statutory warranties	26
(m) Defences.....	26
7. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING AGENCY AGREEMENTS REGULATING PROPERTY AGENTS IN VICTORIA	29
(a) Requirements for agency agreements.....	29
(b) Conflict of interest.....	29
(c) Disclosure requirements for agreements	30
(d) False and misleading statements or representations.....	30
8. A COMPARATIVE ANALYSIS OF AGENCY AGREEMENT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS.....	31
(a) Requirements for agency agreements.....	31

(b) Conflicts of interest	32
(c) Disclosure requirements for agreements	32
(d) False and misleading statements or representations.....	33
(e) Cooling off periods.....	33
9. THE FEASIBILITY OF HARMONISING CONDUCT PROVISIONS	35
9.1 CONTRACTS.....	35
(a) Form of contracts.....	35
(b) Conflict of interest.....	38
(c) Price requirements	38
(d) Payments	41
(e) Cooling off periods.....	43
(f) Termination.....	45
(g) Void contracts or unfair terms.....	46
(h) Disclosure requirements or vendor statement	46
(i) Service of documents	47
(j) False and misleading statements or representation	48
(k) Remedies	48
(l) Statutory warranties	49
(m) Defences.....	50
9.2 AGENCY AGREEMENTS.....	52
(a) Requirement for agency agreements	52
(b) Conflicts of interest	54
(c) Disclosure requirements	54
(d) False and misleading statements or representations.....	55
(e) Cooling off periods.....	55
10. Consultation.....	56
11. Contract and Agency Agreement Conduct Provisions –An Impediment to the Operation of a National Licence?	58
11.1 Contracts.....	58
11.2 Agency Agreements.....	58
11.3 Conclusion.....	59

1. EXECUTIVE SUMMARY

The fundamental question posed by this report is whether any jurisdictional differences in conduct provisions concerning contracts or agency agreements could potentially impede agents operating under a national licence across borders.

While the Council has highlighted differences between models, considered the potential for national harmonisation and assessed conduct provisions it views as representing best practice, it has found overall that there are no significant impediments posed to the operation of national licensing by contract and agency agreements conduct provisions.

It is not possible for the Council to consider all aspects of estate agency practice across Australia and in particular this report does not to consider estate agency practice in regards to:

1. Sale of land by the Crown.
2. Terms contracts of sale.
3. Any codes of conduct¹
4. Rules for public auctions².

¹ Codes of conduct generally address standards and behavioural conduct that will be dealt with in subsequent review papers. While codes of conduct are useful technically speaking they are not part of the legislative framework.

² This area has not been explored in this paper as it is Council's understanding that work is already being done around this area by other jurisdictions.

2. LIST OF RELEVANT LEGISLATION

Australian Capital Territory

Agents Act 2003 (ACT) (“ACT Act”)

Agents Regulations 2008 (ACT) (“ACT Regulations”)

New South Wales

Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”)

Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”)

Northern Territory

Agents Licensing Act (NT) (“NT Act”)

Agents Licensing Regulations 1979 (NT) (“NT Regulations”)

Queensland

Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”)

Property Agents and Motor Dealers Regulations 2001 (QLD) (“QLD Regulations”)

Property Law Act 1974 (QLD) (“PLA QLD”)

Land Sales Act 1984 (QLD) (“LSA QLD”).

South Australia

Land and Business (Sale and Conveyancing) Act 1994 (SA) (“SA Act”)

Land and Business (Sale and Conveyancing) Regulations 1995 (SA) (“SA Regulations”)

Land Agents Act 1994 (SA)

Law of Property Act 1936 (SA)

Tasmania

Property Agents and Land Transactions Act 2005 (TAS) (“TAS Act”)

Property Agents and Land Transactions Regulations 2006 (TAS) (“Tas Regulations”)

Conveyancing and Law of Property Act 1884 (“CLPA TAS”)

Victoria

Estate Agents Act 1980 (VIC) (“EAA”)

Sale of Land Act 1962 (VIC) (“SOLA”)

Sale of Land Regulations 2005 (VIC) (“SOLA Regulations”)

Estate Agents (Contracts) Regulations 2008 (VIC) (“contract regulations”)

Estate Agents (Professional Conducts) Regulations 2008 (VIC) (“professional conduct regulations”)

Fair Trading Act 1999 (VIC) (“FTA”)

Western Australia

Real Estate and Business Agents Act 1978 (WA) (“WA Act”)

Property Law Act 1969 (WA) (“PLA WA”)

Strata Titles Act 1985 (WA) (“STA WA”)

3. BACKGROUND

In July 2008, the Council of Australian Governments (COAG) agreed to introduce national licensing for a number of occupational groups, including property agents. A national licensing body will be established by 2011 with the commencement of the national licensing scheme for the first wave of occupations including property agents scheduled to begin in 2012 with all current market participants transferred over to the new system.

The wide ranging regulatory reform agenda seeks to remove legislative duplication and inter-jurisdictional inconsistencies and in doing so create a seamless national economy in which practitioners can conduct business across borders free of impediments such as complying with the various licensing regimes of the states and territories. The introduction of national licensing offers the opportunity to consider the harmonisation of estate agency legislation with the view to adopting a best practice model based on the current provisions in the various states and territories. It also allows for the consideration of emerging issues such as if the licensing model is equipped to deal with the virtual office.

Potential benefits are presented for various segments of the market, for example for those working on complex transactions across jurisdictions in the commercial sector or estate agency practitioners operating in border towns such as Albury Wodonga. Furthermore, it is anticipated that business efficiency will improve through greater competition and productivity, less red tape and that consumers will ultimately benefit through increased market transparency.

4. RESEARCH PROJECT

The Estate Agents Council (the Council) has been asked by Hon Tony Robinson MP, Minister for Consumer Affairs, to consider conduct provisions within the current legislative framework-governing estate agents and the operation of their business in Victoria. While conduct provisions are still expected to be administered by state and territory regulatory authorities, the introduction of a national licence will require conduct provisions to be harmonised to ensure that the operation of a national licence for estate agents is not impeded by inconsistencies in the respective statutes of the various jurisdictions.

The Council has been asked to focus on the Estate Agents Act 1980 (EAA) and associated regulations in addressing the following:

1. Identify the major areas in Victoria where legislation regulates the work of estate agents and operation of estate agency businesses, that is conduct requirements;
2. Determine whether these areas are regulated in other states and territories and compare the legislative provisions across all jurisdictions;
3. Assess whether the differences in the legislative provisions across jurisdictions have the potential to impose an unnecessary burden and/or to impede agents wishing to operate across jurisdictional borders using a national licence.

It is not possible for the Council to examine every aspect of the vast statutes concerning estate agency practice across Australia in the timeline of this research project. Therefore, the Council has decided to feed into areas, which might be the most useful in contributing to the national discourse regarding the enormous task of harmonising conduct provisions.

The Council will be initially focussing in this paper on conduct provisions concerning contracts and agency agreements, which represent a complex area for industry as well as a significant area in terms of consumer protection.

The Council will revisit the areas of standards and behaviour and management and supervision which were explored in its Modernisation Review in the final stage of this research project.

These reports will be submitted to the Minister for his consideration following consultation with key consumer and industry stakeholders and input from individual practitioners and other interested parties.

The Council welcomes the opportunity to contribute to this important area of work, which hopefully will benefit consumers, industry and good governance.

5. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS IN VICTORIA³

(a) Form of contracts

The EAA allows for the making of regulations prescribing standard forms of contracts (s.99 (1) (ge), EAA), a measure presumably designed to establish clear standards regarding contracts which serves as both a consumer protection mechanism and as a useful guide to industry. Similarly, the Estate Agents (Contracts) Regulations 2008 (contract regulations) also prescribe the forms and terms for the contract of sale for real estate (forms 1 and 2, contract regulations) and sale of businesses (reg. 5, contract regulations).

The EAA establishes that an estate agent or agent's representative is not guilty of an offence under the Legal Profession Act 2004 just because they fill in a standard form of contract or contract prepared by a legal practitioner (s.53A, EAA). This is arguably a sensible measure to ensure that estate agency practitioners are not penalised for simply carrying out an administrative rather than legal function in filling in a standard form contract, which poses no consumer detriment but represents increased business efficiency by not requiring a lawyer every time a standard form contract needs to be completed.

The Fair Trading Act 1999 (FTA) features a number of fundamental consumer protection mechanisms related to contracts. For example, the FTA enables the Director to apply to the courts or tribunal for an order or an advisory opinion with a contract able to be declared a consumer⁴ or standard form contract. Standard-form contracts are generally offered on a 'take it or leave it' basis without alterations to the terms and conditions (in some industries these standard contracts are used by many if not all traders and are almost identical)⁵. A term of a standard form contract can be classified as a prescribed unfair term (s.32ZC and s.32ZD, FTA). An unfair term occurs where there is an imbalance in the rights and obligations of the parties to a contract to the detriment of the consumer. Unfair contract terms were a Victorian initiative that sought to protect consumers who had already entered into a contractual arrangement and is now a consumer protection mechanism being replicated at the national level via the Australian Consumer Law (ACL). On a more basic level, the FTA also states that material featured in consumer documents must be clearly expressed, legible and in accordance with fair trading principles not contain false or misleading statements (s.163, FTA).

(b) Conflict of interest

The EAA contains a number of important consumer protection measures regarding any possible conflict of interest by the estate agent, their staff, relatives or any third parties who have a beneficial interest in the sale of land transaction proceeding. This extends to contracts with the ability of the client to withdraw from the contract within seventy-two hours of signing the contract by way of giving written notice to the other party to the contract. This is one measure of providing consumers with a form of redress in the context of conflict of

³The Council thanks Consumer Affairs Victoria for their assistance in terms of the sharing of data concerning conduct provisions in Victoria and other Australian jurisdictions.

⁴ Consumer contracts are defined as agreements into which consumers enter for the supply of goods and services for the purposes of ordinary personal, domestic or household use, this paper is not primarily concerned with the supply of goods. Definition found on the Consumer Affairs Victoria website (www.consumer.vic.gov.au) –following the pathway -shopping, trading and pricing-unfair contracts – unfair contract terms –accessed 9 February 2010.

⁵ Ibid.

interest issues being detected after entering into a contractual arrangement. If this right of withdrawal is exercised, the client is not liable to the other party to the contract in any way with the person holding any deposit paid by the other party being required to return it immediately. The client is also not required to pay the estate agent any commission or outgoings in respect of the failed sale (s.55, EAA).

On the other hand, the EAA does allow for some instances whereby the disclosure of any conflict of interests is permitted. A person may make a purchase that would otherwise be prohibited by conflict of interest provisions in the EAA, if the person applies in writing to the Director before the contract of sale is signed for permission to make the purchase and the conditions required by the Director are complied with. The objective of such a provision is to allow for exceptions to conflict of interest provisions providing that there is full disclosure to the regulator, transparency and no consumer detriment posed by such a transaction proceeding (s.55, EAA).

(c) Price requirements

The EAA requires 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 (s.47A, EAA). The Director may subsequently write to the agent to request substantiation regarding the estimated selling price cited (s.47D, EAA). The estate agent or agent's representative who holds a written engagement or appointment to sell real estate must not falsely represent the estimated selling price during the marketing of the property to seller (or prospective sellers) or prospective buyers (s.47B-C, EAA). Such price requirement provisions relate to not only conduct but rather they also establish the estimated selling price as part of a contractual arrangement between the agent and vendor and as such, a process that can be audited by the Director when irregularities occur. These provisions seek to establish transparency and apply fair trading principles in the interest of protecting consumers from potentially detrimental pricing practices, namely false and misleading representations (such as under or over quoting) or deceptive conduct.

There are also other processes in the EAA concerning contracts, which aim to ensure transparency by requiring all details relevant to the real estate transaction to be in writing with the failure to do so enabling the purchaser to withdraw from the contract at no cost. The statement must provide transaction information—the description of the real estate or business, name and address of the seller and the date. In addition, details of the promise of finance, the amount of the loan, rate of interest, whether the loan is to be paid in instalments, the date by which the loan is payable and the name of the person or institution providing the loan must be stated. The agent or auctioneer signs the statement and the person obtaining the finance must in turn provide a written acknowledgement of receipt of the written statement. Failure to provide a statement within a month of signing the contract and before the purchaser has paid the whole amount, taken possession or accepted the title of the property will deem the contract or agreement void. In such cases, the seller is liable to repay all money paid by the purchaser (s.51, EAA). Similar requirements apply in the EAA regarding a statement being given on the sale of a small business (s.52, EAA). The contract regulations provide further guidance regarding the particulars of the sale, statements, signatures required and general conditions of the contract stated in the prescribed forms (schedule, forms 1-3, contract regulations).

(d) Payments

The Sale of Land Act 1962 (SOLA) provides consumer protection safeguards regarding deposits. Such a safeguard would include that deposit money is only payable by the purchaser to a legal practitioner, conveyancer or licensed estate agent acting for the vendor,

who hold the money until the registration of the plan of sub-division. Alternatively this money can be kept in a special purpose account in an authorised deposit-taking institution in Victoria specified by the vendor in the contract and held in the joint names of the purchaser and the vendor, which can only be drawn on, with the signature of both parties. Such mechanisms prevent either party from inappropriately drawing on funds outside the terms of the contractual agreement. It is also prescribed that the deposit moneys payable under the contract should not exceed ten per cent of the purchase price of the lot (s.9AA, SOLA).

Provisions under the SOLA seek to ensure that there is sufficient transparency and disclosure embedded in the process, and that the property sale transaction is deemed void if false and misleading information is provided by the vendor making sure that the rights of purchaser are protected. Accordingly, a vendor under a contract for the sale of land must give the purchaser before he/she signs the contract a statement signed by the vendor. The statement should include the particulars of any mortgage, a description of any restrictions applying to the land, the name of the planning instrument, details of any rates, taxes/ charges, utility services, insurance when the land does not remain the risk of the vendor until possession and any terms contract set out in schedule 2. When there is a residence on the land, the vendor must give the purchaser a statement before they sign the contract of sale of land that outlines any building permits in relation to the land or any house contract guarantee regarding construction by an owner-builder both for the preceding seven years. The vendor should also provide the last conveyance, details of the sub-division or owners corporations. The contract can be rescinded if false information or the vendor fails to provide this material unless it can be established that the vendor has acted fairly and honestly (s.32, SOLA).

The SOLA also provides for terms contracts. A terms contract is when the contract regarding the sale of land involves the purchaser making two or more instalments (other than the deposit or final payment) to the vendor after the execution of the contract and before the purchaser is entitled to the title of the land. A person must not sell land unless at the day of the making of the contract the person is the owner of the property, mortgagee, and mortgagor or are empowered by legislation. A purchaser may request by written notice that the vendor transfer the land to the purchaser discharged from all mortgages upon the acceptance of the title or payment in full of the purchase money. Alternatively, when the land is sold under a terms contract and the terms are not more onerous than that of the mortgage the vendor may transfer the existing mortgage subject to the purchaser executing a mortgage to secure the amount payable to the vendor. This provision aims to ensure the consumer is protected under a perhaps messier terms contract arrangement involving multiple payments by way instalments prior to the transfer of the land. A legal practitioner must not act for both vendor and purchaser under a terms contract (part 1, div. 4, SOLA). Embedded in this section are basic principles that a legal practitioner should not represent both parties in prescribed contracts to avoid potential conflicts of interest.

(e) Cooling off periods

The SOLA features a cooling off period, which in Victoria also applies to such things as domestic building contracts and retirement village contracts. Cooling off periods are a consumer protection mechanism which cause a minor delay in the transaction and were designed to give consumers time to think and reconsider in cases where high pressure sales techniques may have been used to secure the sale or consumers have entered into a contract impulsively or lacking in information⁶.

The SOLA allows a purchaser under a contract for the sale of land to give the vendor notice that they wish to terminate the contract before the expiration of three clear business days after

⁶ Consumer Affairs Victoria, Cooling-off periods in Victoria –their use, nature, cost and implications, Research Paper No. 15 January 2009 (available via www.consumer.vic.gov.au).

the contract was signed. Under such circumstances the purchaser is entitled to the return of all money paid out under the contract except for the sum of \$100 or 0.2 per cent of the purchase price (whichever is the greater) which may be retained by the vendor. A contract is required to contain a conspicuous notice informing the purchaser that they may exercise these cooling off rights up to three days after signing the contract of sale. This power to terminate a contract for the sale of land does not apply if the land is used for industrial, commercial or farming purposes or has been sold by publicly advertised auction. The purchaser is also exempt if they sought independent advice from a solicitor before signing the contract or have previously entered into a similar contract (s.31, SOLA), but may seek advice from a conveyancer. The logic behind these exclusions seems to be that the objective of the cooling-off period is to protect the vulnerable consumer, which would seem to exclude business, those who have sought professional advice or have experience regarding such a contractual arrangement. Further details about cooling off provisions within the sale of land contract are set out in the contract regulations (schedule, forms 1-3, contract regulations).

(f) Termination

As previously noted the SOLA allows for the termination of a contract if false information or insufficient material has been provided regarding a statement of matters affecting land being sold, which upholds a fundamental fair trading principle (s.32, SOLA). The EAA also requires a person or estate agent selling land or a small business to obtain the signature of the purchaser on a contract as well as providing them with a statement containing details of the transaction, which is another transparency mechanism. A purchaser may avoid the contract if the aforementioned statement is not in the prescribed form or does not contain the information required. Upon the termination of the contract, the vendor shall be liable for the repayment of any money paid by the purchaser (s.51-52, EAA). Forms and contract terms regarding termination are also included in the contract regulations (schedule, forms 1-3, contract regulations). Again, the ability to terminate a contract aims to ensure a level playing ground between both parties to a transaction and provides a means of seeking redress. This is further demonstrated by the fact that the purchaser may not rescind a contract if the court is satisfied that the vendor has acted honestly and reasonably and ought to be excused of the contravention and the purchaser is in as good a position as if all the relevant provisions had been complied with (s.32, SOLA).

(g) Void contracts or unfair terms

In addition to touching on generic provisions, whereby material featured in consumer documents must be clearly expressed, legible and not contain false or misleading statements (s.163, FTA), the FTA deals with significant provisions such as dealing with unfair terms in consumer contracts. As previously mentioned provisions to address unfair contract terms aim to address terms in consumer contracts that are unfair because they cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Such factors considered when determining whether a consumer contract contains an unfair term include:

- Whether the term permits the supplier but not the consumer to terminate the contract, vary the terms of the contract, renew the contract or determine the price;
- Penalising the consumer but not the supplier for a breach or termination of the contract;
- Permitting the supplier to vary characteristics of the goods or services to be supplied under the contract;
- Limiting the consumer's right to sue the supplier or imposing the evidential burden on the consumer in proceedings on the contract.

An unfair term in a consumer contract or a prescribed unfair term in a standard contract is deemed void. However, the parties will continue to be bound by the contract if it is capable of existing without the unfair term or prescribed unfair term (part 2B, FTA).

(h) Disclosure requirements or vendor's statements

Disclosure requirements are important in terms of empowering consumers to make good decisions by having access to all the information available. Disclosure requirements are also a means of addressing areas such as conflict of interest and representations regarding the price or the condition of a property. As noted earlier in sections looking at price requirements, termination and payments, vendor statements regarding the sale of land (s.51, EAA) and sale of a small business (s.52, EAA) are featured in the EAA as well as in the SOLA (s.32, SOLA).

(i) Service of documents

The EAA requires that when an estate agent is signing any person to a contract agreement regarding the sale of a property or business they must at the time the signature is obtained deliver a copy of the contract to the person signing it and obtain from that person an acknowledgement in writing of the receipt of that copy. It is not necessary when there is more than one person signing the contract to deliver and receive written confirmation of receipt from more than one person (s53, EAA). Such a measure is a consumer protection mechanism ensuring that all parties have clearly understood and received contract material. However, it was suggested during the course of the consultation process of the Council's Modernisation Review that written confirmation of receipt of the contract is unusual and that this is something that perhaps should be explored in the context of the increased use of technology.

(j) False and misleading statements or representation

The FTA entrenches a number of provisions that protect the consumer through ensuring a level playing field in which fair trading principles are upheld. The FTA states that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services of a kind ordinarily used for personal, household or domestic purposes to a purchaser, engage in conduct that is, in all the circumstances, unconscionable (s.8, FTA). In determining unconscionable conduct, the Court or Tribunal may wish to consider:

- The relative strengths of the bargaining positions of the supplier and the purchaser, as a result of conduct engaged in by the supplier;
- Whether the purchaser was required to comply with conditions that were not necessary for the protection of the legitimate interests of the supplier;
- Whether the purchaser was able to understand documents relating to the supply or possible supply of the goods or services;
- Whether any undue influence or pressure was exerted on, or any unfair tactics were used against the purchaser or a person acting on behalf of the purchaser by the supplier regarding the supply of goods or services;
- The amount for which, and the circumstances under which, the purchaser could have been supplied with identical or equivalent goods or services from a person other than the supplier.

Furthermore, under the FTA a person in trade or commerce must not engage in conduct that misleads the public as to the nature, the characteristics, and the suitability for their purpose or the quantity of any services (s.11, FTA). This extends to the supply (or possible supply) of goods or services or in connection with the promotion or advertising of the aforementioned goods or services. False representations regarding goods and services could concern the quality, sponsorship arrangements, price, origin, attached conditions or any general misleading statement (s.12, FTA).

(k) Remedies

As previously mentioned a purchaser may avoid the contract agreement and the vendor is liable for the costs of the purchaser if the statement to be given on the sale of a property or small business is not in the prescribed form or does not contain the required details (s.51-52, EAA). This is a consumer protection mechanism and means of ensuring that adequate disclosure has taken place. The EAA also allows the Director to investigate disputes that arise between an estate agent and client. When a dispute concerns the commission charged the Director must receive notice of the dispute within twenty-eight days of the client receiving the account or from when the amount has been taken from the agent's trust account (s.56A, EAA). Providing adequate dispute resolution processes are also an important part of consumer protection, especially when issues concerning commissions and money in trust accounts are involved.

Under the FTA, the Director may apply for an injunction against any person who is using, or recommending the use of an unfair term in consumer contracts or a prescribed unfair term in standard form contracts. An injunction may relate not only to the use of a particular term in a consumer contract or standard form contract, but to any similar term used or recommended for use by any person (s.32ZA, FTA). As cited earlier, the Director can apply to the courts or tribunal for an order or advisory opinion regarding declaring a contract to be a consumer contract or standard form contract. In addition, a term of a consumer contract can be determined to be an unfair term or a prescribed unfair term can be classified in a standard form (s.32ZC and s.32ZD, FTA).

Finally as previously noted under the SOLA a contract can be rescinded if false information has been cited in the statement of matters affecting land or the vendor has failed to provide the required material (s.32, SOLA).

(l) Statutory warranties

When goods and services are purchased, the purchaser enters into a contract with the seller. All consumer contracts contain certain promises, which are often referred to as statutory rights or implied warranties and conditions. Statutory rights are rights consumers have in law and thus cannot be refused, changed or limited by the seller. Statutory warranties are not regarded as an essential term of a consumer contract, however breaking a statutory warranty allows other remedies to be sought⁷. Fittingly the FTA features provisions regarding statutory warranties, which seek to enshrine fundamental principles such as that goods should be free of faults, of merchantable quality (that is fit for their intended purpose) and meet the description of the item regarding the supply of goods or services. The aim is to give consumers a means of redress under statutory warranties if such fair trading principles are not met.

⁷ 'Your Statutory Rights' Australian Competition and Consumer Commission website (<http://www.accc.gov.au/content/index.phtml/itemId/815360>), accessed 16 February 2010.

A contract of supply of goods or services applies when the value of the goods or services is less than \$40,000 (or more than \$40,000 if not ordinarily acquired for personal, domestic or household use or consumption). Contracts regarding the re-supply of goods, supply of raw materials used for repairing or incorporating into other goods or where the goods or services are contracted out to a third person are excluded.

In a contract of supply of goods, there is an implied condition that the supplier has a right to supply and that the goods will be free from any fault that the purchaser is aware of at the time of supply. Goods should also correspond with the description, it is not sufficient that the goods correspond with the sample if they do not also correspond with the description. There is also an implied condition that the goods are of merchantable quality that is if they are fit for the purposes for which goods of that kind are commonly purchased.

In a contract of supply of services, there is an implied condition that the services will correspond with the nature and quality of the services shown in a demonstration. There is also an implied condition that the services will be free of any defect rendering them unfit for the purpose which services of that kind are commonly purchased and that would be apparent on examination of the services shown in a demonstration or which the purchaser was not aware of when the contract was made. Excluded are services involving the transportation or storage of goods or insurance matters?

A contract of supply of goods or services is void if the contract or provision excludes, restricts or modifies liabilities for damages in respect of a breach by a supplier of a condition or warranty implied in a contract.

A term of a contract of supply of goods or services is not void by reason only that the term limits the liability of the supplier for breach of a condition or warranty if the replacement or repair of the goods occurs. In the case of services if the services are supplied again or the payment of the cost of having the service supplied again is offered. This does not apply if the purchaser establishes that it is unconscionable for the supplier to rely on that term.

If in a contract of supply of goods, the supplier is in breach of an implied condition or an express term, the purchaser may not discharge the contract on the ground of the breach unless the purchaser has given notice to the supplier that the purchaser will discharge the contract unless the supplier provides the title to the good within a reasonable time and the supplier has not provided the title required by the contract or removed the charge (part 2A, FTA).

(m) Defences

Notwithstanding the right of a purchaser to rescind a contract under section 32(5) of the SOLA, the purchaser will not be permitted to rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if all the relevant provisions of this section had been complied with (s.32, SOLA).

Contract Provisions in Victorian Legislation Summary

(a) Form of contracts

- It is not an offence for an estate agent or agent's representative to fill in a standard form of contract or contract prepared by a legal practitioner (s.53A, EAA).
- Unfair terms within a consumer contract or prescribed unfair terms in a standard form contract established via advisory opinion. (s.32ZC and s.32ZDm, FTA)
- Material in consumer documents must be clearly expressed, legible and not contain false or misleading statements (s.163, FTA).

(b) Conflict of interest

- Ability of a client to withdraw from a contract within seventy-two hours of signing the contract by way of giving written notice to the other party to the contract (s.55, EAA).

(c) Price requirements

- Establishment of the estimated selling price in the engagement or appointment to sell which does not contain false or misleading statements and can be substantiated (s.47A-D, EAA).
- A legally binding statement must be provided to a person when finance has been promised. Failure to provide this statement within a month of the contract being signed and the before the purchaser has paid the whole amount, taken possession or accepted the title of the property will deem the contract or agreement void (s.51, EAA). Similar requirements apply to statements regarding the sale of a small business (s.52, EAA).

(d) Payments

- For prescribed contracts under the SOLA the deposit should not exceed ten percent of the purchase price and deposit moneys payable by the purchaser should only be paid to a legal practitioner, conveyancer or licensed estate agent acting for the vendor. Alternatively deposit money can be kept in a special purpose account in an authorised deposit-taking institution in Victoria specified by the vendor in the contract and held in the joint names of the purchaser and the vendor, which can only be drawn on with the signature of both parties (s.9AA, SOLA).
- A statement signed by the vendor must be given to the purchaser before they sign the contract. The statement should detail particulars of any mortgage, a description of any restrictions applying to the land, name of the planning instrument, utility services, taxes and any insurance when the land does not remain the risk of the vendor until possession, details of any subdivision and any owners' corporation information as well providing the last conveyance (s.32, SOLA).
- A legal practitioner must not act for both the vendor and purchaser under a terms contract (part 1, division 4, SOLA).

(e) Cooling off periods

- A purchaser can give the vendor notice that they wish to terminate the contract before the expiration of three clear business days after the contract was signed with all money paid out minus \$100 or 0.2 per cent of the purchase price (whichever is the greater) to be returned to the purchaser. Cooling-off periods do not apply to if the land was sold by publicly advertised auction, if the land is used for industrial, commercial or farming purposes, if a similar contract had previously been entered into or independent advice was received from a solicitor before signing the contract (s.31, SOLA).

(f) Termination

- Ability to avoid contract due to deficiencies in prescribed statements (s.32, SOLA, s.51-52, EAA).

(g) Void contracts or unfair terms

- A contract can be declared void due to the feature of unfair contract terms or false and misleading statements (part 2B and s.163, FTA).

(h) Disclosure requirements or vendor statement

- Disclosure requirements via prescribed statements (s.32, SOLA, s.51-52, EAA).

(i) Service of documents

- An estate agent must deliver a copy of the contract to the person signing it and obtain from that person an acknowledgement in writing of the receipt of that copy (s.53, EAA).

Contract Provisions in Victorian Legislation Summary (continued)

(j) False and misleading statements or representations

- A person must not engage in unconscionable conduct or provide false or misleading information (s.8, s.11-12, FTA).

(k) Remedies

- Avoid contract (s.51-52, EAA, s.32, SOLA, s.32ZA, s.32ZC-D, FTA) or investigatory process (s.56A, EAA).

(l) Statutory warranties

- Statutory warranties regarding the contract to supply apply when the value of the goods or services is less than \$40,000 (except when not ordinarily used for personal, domestic or household use). Implied conditions includes that the goods will correspond with the description, are free of fault and of merchantable quality. A contract of supply of good or services is void if the contract or provision excludes, restricts or modifies liabilities for damages in respect of a breach by a supplier of a condition or warranty implied in the contract. A term of a contract of supply of goods or services is not void by reason only that the term limits the liability of the supplier for breach of a condition or warranty if the replacement or repair of the goods occurs. The purchaser may not discharge the contract on the grounds of the breach unless the purchaser has given notice to the supplier that the purchaser will discharge the contract unless the supplier provides the title to the good within a reasonable time (part 2A, FTA).

(m) Defences

- The purchaser will not be permitted to rescind the contract if the court is satisfied that the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention and that the purchaser is substantially in as good a position as if all the relevant provisions of this section had been complied with (s.32, SOLA).

6. A COMPARATIVE ANALYSIS OF CONDUCT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS⁸

(a) Form of contracts

New South Wales

The Property, Stock and Business Agents Act 2002 (NSW Act) features a number of general principles regarding contracts. Such as a real estate agent must not offer residential property for sale unless the required documents (including a copy of the proposed contract minus the particulars of the purchaser or purchase price) are available for inspection at the real estate agent's registered office by a prospective purchaser or agent.(s.63, NSW Act). This ensures that there is transparency regarding the documentation and that the purchaser is equipped with all of the relevant information before considering entering into such a transaction. In Victoria the vendor statement (s.32, SOLA and s.6 Sale of Land Regulations 2005) must be available prior to the auction and is commonly distributed by estate agents to prospective purchasers, the NSW Act goes further in stating that a property should not be offered for sale unless such documentation is available for inspection.

A real estate agent is considered to have offered residential property for sale or auction later when they have advertised the sale, placed a sign near the property indicating it is for sale, displays details of the property at their place of business or provides such information to prospective purchasers (s.63, NSW Act).

South Australia

South Australia shares with Victoria and New South Wales a requirement that contracts for the sale of land should be in writing (s.26, Law of Property Act 1936).

Under the Land and Business (Sale and Conveyancing) Act 1994 (SA Act) a contract for the sale of subdivided land or an interest in subdivided land (except where the sale of land is by public auction) can be rendered void at the option of the purchaser at any time within six months of the contract being made unless the contract is in writing with the required detail regarding the vendor and money. A purchaser is entitled to recover the money paid under the contract under such circumstances (s.18, SA Act). Such a provision bears some resemblance to provisions under the Victorian EAA regarding statements being provided regarding the sale of land or a small business otherwise the purchaser can withdraw from the contract within one month (s.51-52, EAA).

Under the SA Act, an agent is also obliged to take all reasonable steps to ensure that offers made in relation to residential land they are authorised to sell are recorded in writing and a copy of the signed offer is given to the vendor within forty-eight hours (s.21, SA Act). This conforms to the principal that all documentation should be in writing and that good estate agency practice is that the vendor should be informed of all offers immediately. Such themes are touched on in Victoria in the Estate Agents (Professional Conduct) Regulations 2008

⁸ Please note that if a state or territory is not referred to it means that there is not a comparable provision, not that the arrangements of a jurisdiction have not been considered. It should also be noted that each jurisdiction has comparable fair trading legislation to the Fair Trading Act 1999 in Victoria – namely - Fair Trading Act 1987 (NSW), Fair Trading Act 1989 (QLD), Fair Trading Act 1992 (ACT), Fair Trading Act 1990 (TAS), Consumer and Fair Trading Act 2008 (NT), Fair Trading Act 1987 (WA) and Fair Trading Act 1987 (SA).

(professional conduct regulations) in terms of agents and representatives being required to communicate all offers made whether verbally or in writing to the principal as soon as possible (reg. 16, reg.24, professional conduct regulations).

The Land and Business (Sale and Conveyancing) Regulations 1995 (SA Regulations) prescribe that a statement must be incorporated into the start of the contract of sale alerting the purchaser to the fact that both the vendor and purchaser will be bound by the terms of the contract. In addition, if they are in doubt regarding the terms of the contract they should seek legal advice, be aware that a two-day cooling off period applies to the purchaser, any conditions and the proposed date of settlement (reg.16B, SA Regulations). This bears some similarity to the requirement in Victoria that a conspicuous statement must be featured in the contract pointing out the cooling off period (s.31, SOLA) as well as requirements under the schedules of the Estate Agents (Contracts) Regulations.

Northern Territory

Under the Agents Licensing Act 1979 (NT Act) a real estate agent is not permitted to arrange the preparation and execution of a contract of sale of land unless the contract is in a form approved by the Registrar or Law Society Northern Territory for use by persons who are not legal practitioners (s.121A, NT Act). A similar provision is featured in Victoria legislation (s.53A, EAA).

Australian Capital Territory

The Agents Act 2003 (the ACT Act) is similar to section 63 of the NSW Act in terms of it being an offence to offer residential property for sale if documents are not available at the agent's place of business for inspection by prospective purchasers. It also establishes that a property is deemed to be for sale if the agent or salesperson advertises that the property is for sale or will be auctioned at a later date, invites offers or indicates that someone may be willing to grant an option to buy the property (s.89A, ACT Act). There is also a comparable provision in the ACT Act to section 53A of the EAA enabling an agent or salesperson to fill in basic details on a contract unless there is a legal practitioner acting for the other party then an agent must not be involved in the making or exchanging of contracts. An agent cannot charge for filling in a contract and a contract is not rendered void by non-compliance of this provision (s.89B, ACT Act). As outlined previously the objective behind s.89A is to ensure transparency and s.89B aims at easing the burden on estate agency businesses by not requiring them to seek the services of a lawyer for the completion of administrative as opposed to legal tasks regarding contracts.

It should also be noted that section 201 of the Civil Law (Property) Act 2006 provides that instruments are required to be in writing.

Queensland

The Property Law Act 1974 (PLA QLD) establishes that contracts must be in writing (s.59, s.11, PLA QLD).

There is also provision for circumstances where specific performance of a contract would not be enforced against the purchaser by the court because of defect or doubt as to the vendor's title but does not entitle the purchaser to rescind the contract. In such an event, the purchaser is still able to recover their deposit, any instalments paid on the contract and is relieved of liability under the contract (s.69, PLA QLD).

Western Australia

In Western Australia, a contract must be in writing (s.34, PLA TAS).

The contract is made up of provisions, which are incorporated into the contract of sale such as those, which are prescribed pursuant to s.45 of the PLA WA and s.69 STA WA.

In Western Australia, lawyers are not required to prepare or settle contracts for sale of land. Real estate agents and sales representatives can prepare them (with the sales representative having it checked by their supervising agent). Standard form contracts are generally used⁹.

Tasmania

In Tasmania, a contract must be in writing (s.36, CLPA TAS).

The contract is made up of provisions, which are incorporated into the contract of sale such as those, which are prescribed pursuant to section 3 of the CLPA TAS (s.3, CLPA TAS).

In Tasmania the balance of the contract (particulars of sale and any special conditions) are prepared by a legal practitioner. However, an agent is able to fill in the details of a standard form contract prepared by a lawyer without being in breach of the Legal Profession Act 2007 (TAS) (s.13, Legal Profession Act 2007 (TAS)). This is a similar arrangement to section 53A of the Estate Agents Act in Victoria (s.53A, EAA)¹⁰.

(b) Conflicts of interest

New South Wales

The NSW Regulations state that an agent must not accept an appointment to act, or continue to act, as an agent if doing so would place the agent's interests in conflict with the client's interests (Schedule 1, clause 11, NSW Regulations).

Queensland

The QLD Regulations state that an agent must not accept an engagement if there is a conflict of interest (reg.17) and must disclose any conflict (perceived or actual) regarding any personal or commercial relationship before entering into an agency agreement (reg.26).

Tasmania

An agent is prohibited from entering into an agency agreement for the sale of a property in which they have previously had a direct or indirect interest (s.22, TAS Act).

Western Australia

Section 64 of the WA Act also states that an agent entering into an agency agreement must not have a conflict of interest and must not receive rewards for undertaking estate agency business as per the terms of the agreement (s.64, WA Act).

⁹ The Council thanks the Consumer Protection section of the Department of Commerce in Western Australia for their advice.

¹⁰ The Council thanks the Real Estate Institute of Tasmania for their advice.

(c) Price requirements

South Australia

Under the SA Act a contract for the sale of land or a business that provides for the payment of part of the purchase price of the land or business (excluding a deposit) before the date of settlement is void (s.6, SA Act). Money paid under a contract that is void may be recovered by action in any court of competent jurisdiction (s.6, SA Act). This entrenches the basic contractual arrangement whereby a deposit must be paid and the remainder upon settlement that seeks to protect the interests of the purchaser and their money prior to taking possession of the property as well as the vendor who through the deposit has some indication that the transaction will proceed. A contract under which a person has a right to purchase land but an obligation to pay rent in respect of a period of occupation of the land of more than six months before the purchase is completed is voidable at any time at the option of the person. Again upon the avoidance of the contract the person may recover any amount paid and in this instance in excess of what would have been fair market rent for any period the person occupied.

An agent must not act on behalf of a vendor in the sale of residential land unless the agent has been authorised to do so by written agreement, which is signed, by both the vendor and agent.

Changes to the sales agency agreement may not be varied unless detailed in writing and authorised by way of signature by the parties who should be provided with a copy of the agreement immediately after any changes have been made. Providing the parties with copies of the signed document is common to s.21 of the SA Act as well as s.53A of the Victorian EAA. The sales agreement must specify the agent's genuine estimate of the selling price expressed as a single figure or a price range in figures with an upper limit that does not exceed 110 per cent of the lower limit and specifies the selling price acceptable to the vendor. This is similar to provisions found in the Victorian EAA (s.47A, EAA). The agreement should feature all the relevant details including the rights of the vendor to terminate the agreement. An agent must not make a sales agency agreement unless the agent has first given the vendor a written guide that explains the vendor's rights and obligations under such an agreement and is in the form approved by the Commissioner for the purposes of this section. There is a similar provision featured section 66 of the Victorian Residential Tenancies Act 1997 (RTA) regarding landlords providing tenants with a guide regarding the respective obligations of the landlord and tenants as per the tenancy agreement. Such provisions aim to provide consumers entering into contractual arrangements with sufficient information to be empowered and have clarity regarding their rights (s.20, SA Act).

The SA Act also features a provision similar to sections 47A-C of the Victorian EAA in terms of addressing false and misleading price representations. South Australian legislation establishes a prescribed minimum advertising price, which is a single figure or a range where the lower limit is a price acceptable to the vendor as expressed in the sales agency agreement at the time of the representation. In accordance with provisions in fair trading legislation, an agent must not make representations that are less than the prescribed minimum advertising price or as the upper limit of the range an amount exceeding 110 per cent of the lower limit (s.24, SA Act).

(d) Payments

New South Wales

The NSW Act allows for expression of interest deposits, which are paid when an offer is made regarding a property for sale¹¹. When an agent issues a receipt for an expression of interest deposit made prior to exchange of contracts the agent must inform the person who paid the deposit that the principal has no obligation to sell the property or the purchaser to buy the property. This information must be in writing and can be contained on the receipt. The deposit is refundable if a contract for the sale does not proceed in the event that the offer is not accepted. The agent must promptly inform the principal when an expression of interest deposit has been paid and promptly inform the person who paid the deposit when the agent becomes aware of any subsequent offer to purchase the property received from any other person. The agent must also advise the person who paid the deposit that they have the right to make further offers up until exchange of contracts has taken place. Such a system is very different to the model in place in Victoria (s.5, NSW Act).

South Australia

The SA Act features a cooling off period whereby the purchaser can give the vendor written notice of their intention to rescind the contract before the prescribed time. The prescribed time in the case of the sale of land is the second clear business day after a vendor statement is served or settlement, whichever occurs first and for the sale of a small business is five clear business days after receiving the vendor statement or the date of settlement (s.5, SA Act). It is an offence for the payment by the purchaser prior to settlement of any other amount aside from the deposit stated in the contract (s.5-6, SA Act). Both the SA Act and SA Regulations require that the contract be signed by the vendor and purchaser immediately following the fall of the hammer with the purchaser to pay a deposit (s.24I, SA Act, Reg.16H, SA Regulations). This conforms to the model that the transaction is not binding until both parties have signed the written contract and specified deposit paid.

(e) Cooling off periods

New South Wales

Under the NSW Act, a client can rescind an agency agreement by serving notice on the agent during the cooling-off period which is one business day (including Saturdays) after the agreement was signed. In order to be effective the notice of rescission must be in writing, addressed to the agent, state that the client rescinds the agreement and be signed by the client/s and their legal representative/s. The notice of rescission can be personally delivered or left at the agent's place of business or transmitted via facsimile. The purchaser is entitled to the refund of any money paid and is not liable for any further payment (s.59-61, NSW Act). While the objective of the cooling off period is the same as in Victoria, the NSW equivalent is shorter in duration.

South Australia

The cooling off rights under the SA Act are very similar to section 31 of the SOLA, aside from Victoria having a three-day cooling off period as opposed to two days in South

¹¹ The Agents Regulation 2003 in the Australian Capital Territory also allows for expression of interest deposits (8.23).

Australia. In South Australia, the purchaser is required to give the vendor written notice of their intention to rescind the contract within two clear business days after signing the contract. The purchaser is entitled to have money paid under the contract refunded, although the vendor can retain an amount no greater than \$100 of the deposit. This cooling off period does not apply regarding the sale of a small business to a body corporate or if the purchaser has sought independent legal advice, previously entered into a similar contractual arrangement or bought the property at auction (s.5, SA Act).

Queensland

The Property Agents and Motor Dealers Act 2000 (QLD Act) is similar to Victoria and South Australia in terms of having a cooling off period that is exercised by way of written notice to the seller or seller's agent by the purchaser of their intention to terminate the contract and return of any money paid under the contract (s.368, QLD Act). It differs in that the standard cooling off period is five business days, which is substantially longer than in other jurisdictions and cooling off rights can be waived by way of lawyer's certificate (s.369, QLD Act) or shortened (s.370, QLD Act). The QLD Act features a warning statement where it is stated that the contract is subject to a cooling off period, a recommendation that the purchaser seek independent legal advice or property valuation prior to entering into the contract, what will happen if the cooling off period is exercised and what percentage of the purchase price will not be refunded if the contract is terminated. The warning statement must be in the approved form and be signed by the purchaser prior to entering into the contract (s.366D, QLD Act). If a warning statement is not provided a contract can be terminated at any time with the deposit to be refunded within fourteen days and the vendor and their representative liable for the legal and other reasonable expenses incurred by the purchaser (s.367, QLD Act). It could be suggested that the Queensland model is the most rigorous of the cooling off periods applying to the sale of property, which aims to make consumers acutely aware of their rights through the warning statement and penalises those who do not provide such documentation. Penalties include being fined two hundred penalty units for not repaying the deposit upon the termination of a contract or the seller and their representative being liable for the legal and all other reasonable expenses incurred by the buyer in the process of signing a contract that did not feature the required warning statement (s.367, QLD Act).

Tasmania

The TAS Act features a cooling off period in which the purchaser can rescind the contract on the second business day under a contract for sale of residential property or on the next day in the case of residential agency agreement.

The cooling off period does not apply if the property is purchased by public auction or the parties have previously entered into a similar agreement with the same terms (s.200, TAS Act).

(f) Termination

New South Wales

Under the NSW Act, neither the agent nor the client is liable to pay any sum for commission, damages, costs or expenses in connection with an agreement being rescinded. However, the agent must refund to the client any money paid to the agent under a rescinded agency agreement (s.61, NSW Act), which also exists under the Victorian EAA (s.51-52, EAA). Such arrangements ensure that a contract can be terminated without the consumer being disadvantaged.

South Australia

In addition to cooling off rights, which were detailed above, the SA Act has a provision like Victoria and New South Wales in prohibiting an agent from demanding, retaining or receiving a commission regarding a rescinded agency agreement (s.23, SA Act). This establishes clear direction regarding when an agent is not entitled to retain a commission.

Queensland

If a house is subject to a contract which has not been completed or possession taken place and the house is so destroyed or damaged that it is unfit for occupation the purchaser may rescind the contract by way of written notice to the vendor or their solicitor. Any money paid out on the contract is able to be recovered by the purchaser, while the vendor is entitled to recover any benefit from any insurance policy held (s.64, PLA QLD).

A vendor is not entitled to exercise any right to rescind the contract on the ground of any requisition or objection made by the purchaser unless the purchaser is given seven days notice of the vendor's intention to rescind the contract (s.67, PLA QLD).

A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser (s.68, PLA QLD).

Western Australia

A contract can be rescinded by way of written notice on the grounds of the failure to provide all the necessary disclosure material with the purchaser able to recover all money paid out on the contract (s.69D-69E, STA WA).

(g) Void contracts and unfair terms

Unfair contract terms, which are a key feature of the FTA, are unique to Victorian legislation.

New South Wales

The NSW Act touches upon agency agreements being void to the extent that it would have the effect of excluding, modifying or restricting the operation of the division concerning cooling off rights (s.62, NSW Act).

South Australia

The SA Act also features provisions concerning void contracts. As previously outlined these concern the payment of money prior to settlement aside from the deposit or when a person has the right to purchase land but obligation to pay rent for a period of occupation (s.6, SA Act). A contract can be made void within six months of the making of the contract if a person has been induced into purchasing subdivided land (s.18, SA Act) or undue influence has been applied with commission able to be recovered (s.23).

(h) Disclosure requirements or vendor's statement

South Australia

Under the SA Act ten days before settlement a vendor must provide the purchaser with a statement in the prescribed form, signed by the vendor that sets out such things as all

mortgages, charges, and prescribed encumbrances affecting the land subject to the sale¹². The statement need not include reference to charges arising from the imposition of rates or taxes less than twelve months before the date of service of the statement. The statement only applies to land where the interest being sold is an estate in fee simple or leasehold interest granted by the Crown under an Act and not where land is sold under a contract for the sale of a business (s.7, SA Act). A vendor of a small business must serve a statement on the purchaser within five days and attach a certificate signed by a qualified accountant certifying that the accounts of the business have been examined and that all financial particulars have been disclosed (s.8, SA Act). An agent may be required to confirm the completeness and accuracy of the information contained in the vendor statement. An agent is required to serve the certificate on the purchaser within ten days (s.9, SA Act). The vendor's statement must be accurate at the date of service on the purchaser. If changes occur after the service of the vendor statement but before the purchaser signs the contract, a fresh document must be prepared and served as a notice of amendment (s.10, SA Act). Such arrangements regarding a statement are similar to those in place in Victoria (s.51-52, EAA). An auctioneer is required to provide the vendor's statement for the perusal of members of the public at least three days before an auction and at the location at which the auction will be conducted thirty minutes prior to the auction-taking place (s.11, SA Act and reg.14, SA Regulations). This conforms to provisions in the Victorian Sale of Land Regulations 2005 (SOL Regulations). The SA Act also requires that a vendor of residential land must take all reasonable steps to deliver the prescribed notice to a purchaser when the purchaser is present on the land at the invitation of the vendor in order to inspect the land prior to its sale. The prescribed notice should be attached to the vendor's statement when the vendor's statement is made available for examination by members of the public before the auction (s.13A-14, SA Act) and be printed or typewritten in at least a 12 point font (Reg. 15A, SA Regulations)¹³.

Tasmania

While in Tasmania there is no vendor statement as such there are disclosure requirements in place regarding viewing the contract of sale and advertising. For example when advertising residential land for sale an agent or vendor must ensure that relevant disclosure documents are available to a purchaser during business hours at the vendor's residential address or the place of business of the agent in various forms (s.186, TAS Act). Disclosure documents consist of a copy of the proposed contract including warning statement and a copy of the relevant folio of the register of title (s.190-192, TAS Act). The vendor must inform the purchaser of any variation of disclosure information within five days or before the completion of the contract (s.194, TAS Act) and it is an offence to provide false or misleading information in disclosure documents (s.195, TAS Act). It should be noted that this division applies to all sales of residential land unless during the preceding six months, the residential land has been advertised for sale or a residential agency agreement has been made in respect to the residential land (s.185, TAS Act). Making documents available for inspection is common to Victorian and South Australian legislation, but this exclusion in s.185 is somewhat unusual. In contrast, disclosure documents having to be displayed at least thirty minutes prior to the commencement of an auction (s.188, TAS Act) and the ability to rescind the contract if disclosure documents are not provided (s.189, TAS Act) conform to standards in Victoria and South Australia. An interesting element of the TAS Act is also the liability of the vendor and agent to disclose information that would reasonably affect the purchaser's decision to purchase the residential land (s.196, TAS Act). It is also implied that if before the completion of the contract the purchaser becomes aware of a breach of any condition to which the contract is subject (and the loss arising from the breach is more than 5% of the value of the residential land) the purchaser may rescind the contract or complete the contract and claim

¹² Which is also addressed in reg. 12 of the SA Regulations.

¹³ Sections 12-13 and 24B of the SA Act and regulations 4, 7-11, 13, 15-16 and schedule 1 and 2 also address vendor statements.

damages from the vendor. In addition, a land valuer can be appointed to determine the loss arising from the breach of a condition of the contract the cost of which is to be shared by the vendor and purchaser (s.197, TAS Act).

Queensland

Before a person enters into the purchase of a proposed lot, they shall be given a statement in writing:

- Clearly identifying the lot to be purchased;
- State the names and addresses of the prospective vendors and purchasers;
- Details any promise or term offered in respect to the provision of a certificate of title that relates to the lot in question; and
- States the date on which it is signed (s.21, Land Sales Act 1984 –LSA QLD).

Under a contract for the sale of registered land the purchaser is entitled at the cost of the vendor to receive:

- To received from the vendor sufficient particulars of title to enable the purchaser to prepare the appropriate instrument to give effect to the contract;
- To receive from the vendor an abstract of any instrument, forming part of the vendor's title, in respect of which a caveat is entered upon the register;
- To have the relevant certificate of title or other document of title lodged by the vendor in the land registry to enable the instrument to be registered; and
- To have any objection to the registration of the instrument removed by the vendor (s.61, PLA QLD).

(i) Service of documents

South Australia

A vendor's statement, amended vendor's statement, certificate or agency agreement may be served by delivering it in person, by registered post or via electronic communication to the last person's known address (s.17, s.41, SA Act). The service of documents is also touched upon is provision of the Act regarding cooling off rights and vendor statements (s.5, s.7, s.9-10, SA Act). The SA Act is not as prescriptive as that in place in New South Wales and Victoria in terms of requirements regarding signatures and written acknowledgement of receipt of the document (s.55, NSW Act, s.53 EAA).

(j) False and misleading statements or representation¹⁴

New South Wales

In New South Wales a real estate agent or employee must not falsely understate the estimated selling price of the property while marketing a residential property for sale, that is quote an amount less than their true estimate of that selling price as stated in the agency agreement. Such a provision concerning false and misleading representation extends to statements

¹⁴ This section outlines specific provisions in industry specific legislation. However false and misleading representation is also dealt with by the Trade Practices Act 1974 (and 2010 amendments to include the Australian Consumer Law) at the Commonwealth level and the following pieces of legislation within each state and territory - Fair Trading Act 1987 (NSW), Fair Trading Act 1999 (VIC), Fair Trading Act 1989 (QLD), Fair Trading Act 1992 (ACT), Fair Trading Act 1990 (TAS), Consumer and Fair Trading Act 2008 (NT), Fair Trading Act 1987 (WA) and Fair Trading Act 1987 (SA).

featured in published advertisements or oral and written representations made to prospective purchasers (s.73, NSW Act). This provision in the NSW Act is consistent with fair trading principles.

South Australia

The SA Act features a number of provisions addressing false and misleading representations. These include providing false information in certificates (s.13, SA Act), the ability to claim damages due to misrepresentation within terms of an agreement for sale (s.35, SA Act) or providing false or misleading information for the purposes of inducing a person to sell or purchase property (s.36, SA Act). Again, this is in line with fair trading principles.

(k) Remedies

South Australia

The SA Act provides that where a vendor's statement is not given or certified as required, the purchaser may apply to a court for an order. If the court is satisfied that the purchaser has been prejudiced by a failure to comply with the provision it may allow the contract to be avoided, award damages or take any other action seeking to restore the parties to the contract to their respective positions before entering into the contract (s.15, SA Act). This is similar to the provisions in Victoria in terms of allowing the contract to be avoided with the additional feature of damages aside from expenses being refunded.

(l) Statutory warranties

(m) Defences

South Australia

Under the SA Act, it is a defence to a charge of an offence, or to civil proceedings related to a contract for the sale of land, if the defendant proves the purchaser received independent advice from a legal practitioner (who signed the required certificate attesting to the provision of such advice) and the purchaser has signed an instrument of waiver in the form required by regulation (s.16, SA Act, reg.16, SA Regs). It is also a defence if the offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence (s.37B). An officer, employee or agent of a person will be taken to be liable unless it is established that they acted outside the scope of their authority (s.38, SA Act). In the event that a body corporate is guilty of an offence each director is liable to the same penalty as imposed on the principal unless it can be shown that the director could not by the exercise of reasonable diligence have prevented the commission of the offence (s.39, SA Act).

Tasmania

Under the TAS Act a purchaser may not rescind a contract if a court is satisfied that the vendor has acted honestly and ought fairly to be excused for the contravention and the purchaser is in as good a position as if the relevant provisions of the division had been complied with (s.198, TAS Act).

Contract Provisions in Other Australian Jurisdictions Legislative Summary

(a) Form of contracts

- The property must not be for sale unless the required documents are available for inspection at real estate agent's registered office (s.63, NSW Act, s.89A, ACT Act).
- Contracts for the sale of land should be in writing (s.63, NSW Act, s.26, SA Act, s.11 & s.59, PLA QLD).
- Contract can be rendered void within six months of the contract being made unless in writing and the purchaser will be able to recover costs (s.18, SA Act).
- Agent is authorised in writing to sell the property and this agreement is signed with a copy given to the vendor within forty-eight hours (s.21, SA Act).
- Warning statement in contract stating that both parties will be bound by the contract, specifying the cooling off period and that independent legal advice should be sought if in doubt (s.16B, SA Regulations).
- A real estate agent is able to complete a contract if in the prescribed form without being penalised for not being a legal practitioner (s.121A, NT Act, s.89B, ACT Act, s.13 Legal Professions Act 2007 TAS).
- Defective contracts that are not able to rescinded still enable the purchaser to recover their deposit or any payments made under the contract and be absolved of liability under the contract (s.29, PLA QLD).

(b) Conflicts of interest

- Agent must not act when to do so would be in conflict with the client's interest (Schedule 1, clause 11, NSW Regulations, Reg.17, QLD Regulations, s.64, WA Act).
- Agent must disclose any conflict of interest (Reg.26, QLD Regulations).
- Agent must not act when they have had any previous direct or indirect interest in the property being sold (s.22, TAS Act).

(c) Price requirements

- Contracts for the sale of land that provide for the payment of part of the purchase price (apart from the deposit) price to settlement are void and money may be recovered by court action (s.6, SA Act).
- A contract where the person has the right to purchase the land but an obligation to pay rent in respect of a period of occupation of the land of more than six months before the purchase is completed is voidable at any time at the option of the person (s.6, SA Act).
- The sales agreement must specify the agent's genuine estimate of the selling price expressed as a single figure or a price range with an upper limit that does not exceed 110 per cent of the lower limit and specifies the selling price acceptable to the vendor (s.21, SA Act). This figure also forms the prescribed minimum advertising price with it being an offence for the agent to advertise below this amount (s.24, SA Act).
- Provision of written guide that explains vendor's rights and obligations under an agency agreement (s.20, SA Act).

(d) Payments

- Allows for expression of interest deposits (s.5, NSW Act).
- Prohibits the payments aside from the deposit stated in the contract (s.5-6, SA Act).
- The contract to be signed by the vendor and purchaser immediately following the fall of the hammer with the purchaser to pay a deposit (s.24I, SA Act, Reg.16H, SA Regulations).

(e) Cooling off periods

- A client can rescind a contract by way of giving written notice to the agent up to one clear business day after the agreement was signed. The purchaser is entitled to the refund of any money paid and is not liable for further payment (s.59-61, NSW Act).
- A client can rescind a contract by way of giving written notice within two clear business days after signing the contract. The purchaser is entitled to have any money paid under the contract refunded minus an amount no greater than \$100 that the purchaser can retain. This cooling off period does not apply regarding the sale of a small business, body corporate, if the purchaser has sought legal advice, previously entered into a similar contractual arrangement or was bought at auction (s.5, SA Act).
- Cooling off period can be exercised by way of written notice within five days with money paid out on the contract refundable except for 0.25% of the purchase price. A warning statement must be signed by the purchaser before signing the contract. Cooling off rights can be shortened or waived (s.366D, s.367-70, QLD Act).
- Cooling off period of two business days for residential property except when the property is purchased at public auction or the parties have previously entered into a similar contractual arrangement (s.200, TAS Act).

Contract Provisions in Other Australian Jurisdictions Legislative Summary (continued)

(f) Termination

- Agent must not retain commission on rescinded contract (s.61 NSW Act, s.23, SA Act)
- Contract can be rescinded by purchaser by way of written notice if the house is damaged prior to the completion of the contract (s.64 PLA QLD).
- A vendor is not entitled to exercise any right to rescind the contract on the ground of any requisition or objection made by the purchaser unless the purchaser is given seven days notice of the vendor's intention to rescind the contract (s.67, PLA QLD).
- A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser (s.68, PLA QLD).
- Ability to terminate contract if not all disclosure material provided, purchaser able to recover all money paid (s.69D-E, STA WA).

(g) Void contracts and unfair terms

h) Disclosure requirements or vendor statement

- Disclosure documents to be made available thirty minutes prior to auction (s.11, SA Act, reg.14A, SA Regulations, s.188, TAS Act).
- Notice to given re changes to the vendor statement (s.10, SA Act, s.194 TAS Act)
- The availability of disclosure documents during business hours to be cited in advertising (s.186-187, TAS Act). Liability of the vendor and agent to disclose information (s.196-7, TAS Act).
- Not applicable if the sale of the property has been advertised in the preceding six months (s.185, TAS Act).
- Purchaser is entitled to various material related to the title at the cost of the vendor (s.61, PLA QLD, s.21 LSA QLD).

(i) Service of documents

- Documents to be served by delivering it in person, via registered post or electronic communication (s.17, s.41, SA Act).

(j) False and misleading statements or representation

- Prohibits false or misleading representations regarding price or inducing a person to buy or sell a property in published advertising, oral or written communication (s.73, NSW Act, s.13, s.35-36, SA Act).

(k) Remedies

- The purchaser may apply to a court for an order seeking the contract to be avoided or damages if the vendor statement was not given or certified (s.15, SA Act).

(l) Statutory warranties

(m) Defences

- It is a defence if the purchaser received independent advice from a legal practitioner or signed a waiver or the offence was committed unintentionally. An officer, employee or agent is taken to be liable unless shown to have acted outside the scope of their authority. Each director of a body corporate is liable unless it can be shown that they could not have prevented the commission of offence through due diligence (s.16, s.37B, s.38-39, reg.16A, SA Regs).
- A purchaser may not rescind a contract if a court demonstrates that the vendor acted honestly and the purchaser has not been disadvantaged (s.198, TAS Act).

7. A SNAPSHOT OF CONDUCT PROVISIONS CONCERNING AGENCY AGREEMENTS REGULATING PROPERTY AGENTS IN VICTORIA

(a) Requirements for agency agreements

An agent cannot recover commissions or any outgoings unless a signed engagement or appointment to sell real estate is in place at the finalisation of the contract. Upon signing the agency agreement, the agent must inform the person that the commission to be paid to the agent under the engagement or appointment and any money to be paid by the person in respect of outgoings are subject to negotiation (s.49A (1) (b)).

An agent must also ensure that an estimated selling price has been stated (s.47A, EAA). The estimated selling price is what the agent based on their knowledge, experience and relevant evidence such as comparable sales or capital site improvement believes to be an indication of the market value of the property, as opposed to the asking price of the vendor, which may be different. This establishes a figure, which can be quoted in marketing material that should provide potential purchasers with a reasonable estimate of the price range of the property and give vendors a sense of the potential worth of their property.

An estate agent engaged or appointed to do any agency work for a client is not entitled to retain any amount the agent receives from another person as a rebate. Upon receiving any rebate, the agent must immediately pay the amount to the client (s.48A, EAA). Furthermore, an estate agent must not obtain any payment from a person in respect of work done by the agent regarding outgoings incurred by the agent unless the agent holds a written engagement or appointment signed by the vendor. The engagement should contain details of the agreed commission (stated in both percentage and dollar terms) and any outgoings as well featuring a rebate statement in the prescribed form. Such provisions tie into the sentiment of the EAA regarding avoiding conflicts of interest issues or an agent seeking financial gain beyond the agreed commission paid by the vendor through dealings with third parties. It also makes agents and their representatives accountable in terms of maintaining documentation concerning rebates, which ensures a degree of transparency. In addition, if an estate agent takes any money in respect of commission or outgoing from money held in trust by the agent on behalf of the client, the agent must give the person written notice of the amount taken within seven days. This seeks to make agents accountable for their dealings with the vendor's money, which they are holding in trust and thus have a duty of care in terms of practising sound financial management (s.49A, EAA).

If an agreement does not state the end date for an estate agent to act as the sole agent for the sale of any real estate agent it is assumed that the agreement expires thirty days after the date of the auction or in other instances sixty days after the agreement was signed by the vendor (s.54, EAA). This establishes a clear contractual arrangement for a set period and allows both parties to reassess the arrangement following the expiration of this time.

In general terms agency agreements should be free of unfair terms with the Director having the ability to seek an advisory opinion from the Tribunal in this regard (s.32ZD, FTA) and be clearly expressed, legible and free of any false or misleading statements (s.163, FTA).

(b) Conflict of interest

The professional conduct regulations establish that an estate agent must not accept an engagement from, or act for, a person where to do so would place the agent's interests in conflict with that of the person (reg.12).

(c) Disclosure requirements for agreements

Section 48 of the EAA contains disclosure requirements in respect of commission sharing.

Any rebates must be disclosed in the prescribed form in a rebate statement as part of the agency agreement (s.49A, EAA).

An estate agent must advise a person that the estate agent has procedures for resolving complaints and disputes before obtaining a signed written engagement or appointment from the person or as soon as possible after obtaining the engagement or appointment (s.8, professional conduct regulations).

(d) False and misleading statements or representations

Fundamental fair trading principles apply to agency agreements such as not engaging in unconscionable conduct. In this context, this could apply to any undue influence or pressure being exerted on the vendor by the agent to sign the agency agreement or there being a disparity between the relative strengths of the bargaining position of the vendor and agent entering into the agreement (s.8, FTA). Similarly, misleading conduct or false representations are prohibited regarding agency agreements, which would extend to such things as price representation, rebates, commissions and the type of services rendered as per the signed agency agreement (s.11-12, FTA). Such provisions act as safeguards protecting the consumer from practitioners engaging in misconduct in terms of fairness and honesty and other key elements of good estate practice.

Agency Agreement Provisions in Victorian Legislation Summary

- (a)** The agent must state an estimated selling price before obtaining a person's signature on an agency agreement (s.47A, EAA).

Upon receiving a rebate, the agent is required to pay the amount to client (s.48A, EAA).

An agent cannot claim their commission or costs unless a signed agency agreement is in place detailing commissions and rebates (s.49A, EAA).

The vendor must be informed of any commission or outgoings paid using trust money within seven days (s.49A, EAA).

Unless otherwise stated sole agency agreements expire thirty days after the auction date or in other circumstances sixty days after the agreement was signed (s.54, EAA).

- (b)** An estate agent must not accept an engagement from, or act for, a person where to do so would place the agent's interests in conflict with that of the person (reg.12, professional conduct regulations).

- (c)** As mentioned above all rebates must be disclosed in the prescribed form in a rebate statement as part of the agency agreement (s.49A, EAA).

Commission sharing must be disclosed (s.48, EAA).

An estate agent must advise a person that the estate agent has procedures for resolving complaints and disputes before obtaining a signed written engagement or appointment from the person or as soon as possible after obtaining the engagement or appointment (s.8, professional conduct regulations).

- (d)** Fair trading principles prohibiting unconscionable conduct, false and misleading conduct or representations

8. A COMPARATIVE ANALYSIS OF AGENCY AGREEMENT PROVISIONS CONCERNING CONTRACTS REGULATING PROPERTY AGENTS ACROSS AUSTRALIAN JURISDICTIONS

(a) Requirements for agency agreements

New South Wales

The NSW Act states that a real estate agent must not enter into an agency agreement with a person for the sale of residential property unless the agent has provided the person with a copy of the approved guide not more than one month before the agreement is signed by or on behalf of the person¹⁵. However, a contravention of this section does not affect the validity of the agency agreement. The objective of this provision seems to be to equip consumers with as much information as possible before they enter into an agency agreement so that they are aware of their rights and any potential pitfalls. Such information is available to consumer from the regulator in Victoria however, it is not a provision featured in legislation, as is the case in NSW (s.56, NSW Act).

South Australia

An agent is unable to be engaged to act on behalf of the vendor unless a signed agency agreement is in place as per the requirements of the SA Act. There are similarities between the SA Act and Victorian EAA in terms of the requirement of an estimated selling price, sole agency agreement and that rebates must be disclosed but cannot be retained (s.20, SA Act). Differences are that the prescribed duration of the agency agreement is ninety days, substantially longer than in Victoria, which is thirty to sixty days (s.54, EAA, reg.16A, SA Regulations). In addition, a written guide must be given to a person before they sign up to an agency agreement in line with requirements in New South Wales (s.20, SA Act, s.56, NSW Act).

Tasmania

The TAS Act requires agency agreements to be in writing and not more than ninety days in duration for real estate agents and thirty days for property managers (s.18-19, TAS Act).

Australian Capital Territory

As is the case in Victorian and South Australia under the Agents Regulations 2008 (ACT Regulations) a single price amount or price range must be stated on the agency agreement (schedule 5, Act Regulations). The ACT Regulations also establishes that warning statements regarding exclusive or sole agency agreements are incorporated into documentation (schedule 4, ACT Regulations). In addition, if the duration of the agency agreement is longer than ninety days then the client retains the right to end the agreement by way of thirty days written notice (schedule 4, ACT Regulations).

Northern Territory

The Agents Licensing Act 1979 (NT Act) require that agency agreements are in writing (s.65, NT Act).

¹⁵This guide can be found via the following link:

http://www.fairtrading.nsw.gov.au/Tenants_and_home_owners/Selling_property/Using_an_agent/Agency_agreements.html.

Western Australia

The Real Estate and Business Agents Act 1978 (WA Act) establishes that an agent is not entitled to commission unless they are holding a valid appointment to act signed by the vendor which clearly states the services to be rendered as per the agreement, all relevant details and commission to be received (s.60, WA Act). The Property Law Act also requires that instruments be in writing (s.34, Property Law Act 1969 –PLA WA 1969, s.69, Strata Titles Act 1985 –STA WA).

(b) Conflicts of interest

New South Wales

The NSW Regulations state that an agent must not accept an appointment to act, or continue to act, as an agent if doing so would place the agent's interests in conflict with the client's interests (Schedule 1, clause 11, NSW Regulations).

Queensland

The QLD Regulations state that an agent must not accept an engagement if there is a conflict of interest (reg.17) and must disclose any conflict (perceived or actual) regarding any personal or commercial relationship before entering into an agency agreement (reg.26).

Tasmania

An agent is prohibited from entering into an agency agreement for the sale of a property in which they have previously had a direct or indirect interest (s.22, TAS Act).

Western Australia

Section 64 of the WA Act also states that an agent entering into an agency agreement must not have a conflict of interest and must not receive rewards for undertaking estate agency business as per the terms of the agreement.

(c) Disclosure requirements for agreements

New South Wales

The NSW Act establishes that an agent is not entitled to recover any expenses for services performed unless all rebates, discounts or commissions and the specified amount are set out in the agency agreement. This provision does not apply to land intended to be used for commercial, business or industrial purposes (s.57, NSW Act). This conforms to principles found within estate agency legislation regarding declaring rebates in agency agreements.

The NSW Regulations also state that any commercial or personal relationship or rebates must be disclosed to the principal (Schedule 1, clause 12, NSW Regulations).

South Australia

The SA Act also requires that rebates are disclosed in agency agreements establishing a system of accountability regarding agents receiving possible financial gain from services performed by third parties or referrals (s.20, SA Act).

Tasmania

As is the case in New South Wales and South Australia rebates must be disclosed in agency agreements as per the requirements of the TAS Act. In addition if rebates are not disclosed fees to the agent are not payable or may be recovered by applying to a court or tribunal (s.20, TAS Act).

(d) False and misleading statements or representations¹⁶

New South Wales

The NSW Act prohibits any person carrying out estate agency business from making any statement, representation or promise that is false, misleading or deceptive, whether intentionally or by concealment of a material fact designed to induce any other person to enter into any contract or arrangement. Such a provision is in line with fair trading principles, which apply to agency agreements as a consumer protection mechanism (s.52, NSW Act).

South Australia

The SA Act adheres to fair trading principles as well in terms of prohibiting the use of false or misleading representations to induce a person to enter into a contractual arrangement such as an agency agreement and enabling them to claim damages regarding any misrepresentation concerning the sale of land or a business (s.35-36, SA Act).

Queensland

The QLD Regulations also prohibit misleading conduct while carrying out real estate agency business (reg.14, QLD Regulations).

(e) Cooling off periods

New South Wales

Agency agreements under the NSW Act feature a cooling off period. This cooling off period commences when the agency agreement is signed and ends at the close of business the following day. This cooling off period may be extended by a provision of the agency agreement, or by the agent in writing before the end of the cooling off period (s.59, NSW Act). The objective of such a provision is to provide the consumer who enters into an agency agreement without sufficient information or acting impulsively with the ability to withdraw from the contract.

¹⁶ Please note that provisions related to false and misleading conduct in industry specific acts are referred to in this section, rather than general catch-all provisions found in generic fair trading legislation at the state/territory and commonwealth level, which is addressed in terms of harmonisation by the introduction of the Australian Consumer Law.

Agency Agreement Provisions in Other Australian Jurisdictions Legislative Summary

(a) Requirement for agency agreements

- Provision of an approved guide before a person signs an agency agreement (s.56, NSW Act, s.20, SA Act).
- Provide an estimated selling price on the agency agreement (s.20, SA Act).
- Rebates cannot be retained (s.20, SA Act).
- Agency agreements are for ninety days in duration (reg.16A, SA Regulations, s.18, TAS Act, schedule 4, ACT Regulations).
- Warning statements regarding sole and exclusive agency agreements (schedule 5, ACT Regulations).
- Agency agreements must be in writing (s.18-19, TAS Act, s.65 NT Act, s.60, WA Act, s.34, PLA WA, s.69C, STA WA).

(b) Conflicts of interest

- Agent must not enter into an agency agreement if there is a conflict of interest and must disclose any commercial or personal relationships or rebates (Schedule 1, NSW Regulations, r.17, r.26, QLD Regs, s.22, TAS Act, s.64, WA Act).

(c) Disclosure requirements

- Rebates cannot be retained (s.57, NSW Act, s.20, SA Act, s.20, TAS Act) and must be disclosed (Schedule 1, NSW Regs).

(d) False and misleading statements or representations

- Prohibits the use of false or misleading statements or representations to induce a person to enter into an agency agreement (s.52, NSW Act, s.35-36, SA Act, reg.14, QLD Regs).

(e) Cooling off periods

- Agency agreements have a cooling off period of one business day (s.59, NSW Act).

9. THE FEASIBILITY OF HARMONISING CONDUCT PROVISIONS

The statutes of each jurisdiction share some common elements.

While the objective of the legislation is essentially the same in seeking to provide a framework, which enables a well-functioning market place and a level playing field for both vendors and purchasers, there are stylistic differences.

The feasibility of harmonising such conduct provisions in order to enhance the operation of the national licensing scheme is a complex question that this chapter seeks to answer in respect to contracts and agency agreements. It is the intention of this paper to highlight similarities between the various provisions, where there is potential to incorporate various elements into a best practice model and if any impediments to the operation of the national licence are posed by significant differences in provisions that cannot be reconciled.

9.1 CONTRACTS

(a) Form of contracts

There is common ground in Victoria, the Australian Capital Territory, Tasmania and Northern Territory regarding having a provision in which an estate agent can fill in a standard contract or contract prepared by a legal practitioner without being found guilty of an offence under the Legal Profession Act 2004 or like legislation. Such a provision seems to make sense in terms of increasing business efficiency when filling out such a contract is more of an administrative rather than legal function. It is foreshadowed that there would not be any problem having such a provision replicated in national harmonised conduct provisions.

Victoria is the only jurisdiction with a specific provision requiring that documents must be clear and legible in its fair trading legislation (although there is some discussion in some other Acts about such things as font size). It would be seen as a constructive move if this could be incorporated into a harmonised best practice model of national conduct provisions, as there is potential scope for the use of fine print in contracts to disadvantage consumers if such a section did not exist¹⁷.

While New South Wales and the Australian Capital Territory both require documents to be available for inspection before advertising can be placed regarding the sale of a property, this is not common to other states or territories. The Council has mixed views regarding such a provision, viewing it on one hand as an opportunity for greater transparency but with the potential to act as an impediment in terms of slowing down the sale process. Similarly, there was a difference of opinion amongst participants in the consultation process regarding the merits of such a provision. On the one hand, some viewed the requirement as encouraging transparency¹⁸ or acting as an incentive to ensure documents are prepared in a timelier manner¹⁹. In contrast, the Real Estate Institute of Victoria (REIV) argued that such a practice

¹⁷ At the Commonwealth level the Australian Consumer Law does not feature, a separate provision regarding documents being clear and legible, but it requires certain prescribed documents to be *transparent* (which essentially means clear and legible). The key difference is that this requirement will not apply to consumer agreements at large, but only to specific documents under the ACL and standard form consumer contracts.

¹⁸ Jane Moore, EAC Working Group Consultation Meeting, 23 April 2010.

¹⁹ Toni Planinsek, EAC Working Group Consultation Meeting, 23 April 2010.

would be problematic if applied to the Melbourne residential auction market²⁰ and ALPA contended that is impractical for those practising in regional areas²¹.

All States and Territories have provisions regarding contracts for the sale of land being in writing.

SA also has a requirement that contracts should feature a warning statement regarding cooling off periods and that if a consumer has any doubts they should seek independent legal advice before entering into a contractual arrangement. This is not dissimilar to provisions in Victoria and Queensland regarding conspicuous statements regarding cooling off periods. While such a provision poses no particular impediment to national harmonisation, the Council is not convinced that it adds particular value either in terms of it being replicated in other jurisdictions.

Overall, there seems to be considerable scope for harmonisation of conduct provisions regarding forms of contracts.

²⁰ Peter Lowenstern, Corporate Solicitor, Real Estate Institute of Victoria, EAC Working Group Consultation Meeting, 23 April 2010.

²¹ Shane McIntyre, ALPA Delegation, EAC Working Group Consultation Meeting, 23 April 2010.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Estate agent can fill in standard contract or contract prepared by a legal practitioner	✓ s.53A EAA				✓ s.13 Legal Practice Act 2007	✓ s.89B ACT Act	✓ s.121A NT Act	
2. Declaration of unfair terms in contracts	✓ s.32ZC-D FTA							
3. Documents must be clear, legible and not contain false or misleading statements	✓ s.163 FTA							
4. Documents available for inspection prior to property sale proceeding		✓ s.63 NSW Act				✓ s.89A ACT Act		
5. Contracts for the sale of land to be in writing		✓ s.63 NSW Act	✓ s.18, 21, 26 SA Act	✓ s.11 & 59 PLA QLD	✓ s.36 CLPA TAS			✓ s.34 PLA WA
6. Contract to feature warning statement			✓ Reg.16B SA Regs					
7. Purchaser able to recover deposit and relinquish liability on defective contracts that is not able to be rescinded.				✓ s.69 PLA QLD				

(b) Conflict of interest

The Council views conflict of interest provisions as important in terms of transparency.

During the consultation process, the REIV contended that while conflict of interest provisions in Victoria are important that the current provisions require improvement to make them clearer and reduce the administrative burden on industry²². The REIV suggested that the current anomaly in section 55 whereby conflict of interest disclosure requirements can apply to run of the mill shareholders with no inside corporate knowledge should be abolished. Rather disclosure requirements should apply only to those involved in carrying out estate agency business, sit on relevant corporation boards or their immediate family and associates. As previously stated in its Modernisation Report the Council supports the REIV position regarding this matter²³. ALPA concurred with the comments of the REIV regarding conflict of interest provisions in Victoria, suggesting that New South Wales provided a more streamlined disclosure model²⁴.

The Council would recommend that a best practice model based on a modernised section 55 of the EAA in Victoria be advocated in terms of the harmonisation of conflict of interest conduct provisions. It is not foreshadowed that any significant impediments are posed by this area, as the fundamental principles of good estate agency practice in acting in the interests of the client and disclosing any possible conflict of interest are common to all jurisdictions in some form.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Agent must not enter into agency agreement if there is a conflict of interest or must disclose any personal/commercial relationship or rebate.	✓ Reg. 12 Profess Conduct Regs	✓ Schedule 1 NSW Regs	t	✓ Reg.17 & 26 QLD Regs	t✓ s.22 TAS Act			✓ s.64 WA Act

(c) Price requirements

The Council views the estimated selling price as a flawed concept and advocates the use of broader fair trading catch all provisions prohibiting false or misleading statements/representations or deceptive conduct. Such an approach would be of assistance in terms of harmonising price representation provisions and would be in line with the focus on fair

²² The REIV also suggested that section 55 would benefit from being written in Plain English and through the use of case studies in footnotes, which is a drafting technique used in Commonwealth and Queensland Legislation (Lowenstern, opcit). The Council concurs with these comments, although drafting is a matter outside the terms of reference for this report but was addressed in the Council’s Modernising the Estate Agents Act 1980 Final Report, October 2009.

²³ Estate Agents Council, Modernising the Estate Agents Act 1980 Final Report, October 2009.

²⁴ McIntyre, opcit.

trading principles found in industry specific and fair trading legislation in other states and the Australian Consumer Law²⁵.

It was suggested during the Council's consultation process that section 51 of the EAA regarding estate agents offering finance was an outdated provision in need of modernisation. It was argued by the REIV that this practice does not occur anymore and that such an area was already regulated by legislation concerning the financial services sector found in the Corporations Act 2001²⁶. Therefore while not posing an impediment to national harmonisation such a provision is in need of updating. However both the REIV and Australian Livestock and Property Agents Association (ALPA) contend that section 52 of the EAA which is similar to section 51 concerning businesses is still a relevant and important provision worthy of replication at the national level²⁷.

The Council is not clear whether there is a need for the provisions in South Australia around not allowing payments aside from the deposit prior to settlement or where the person has the option to purchase the land but an obligation to pay rent. That being said the deposit system and terms contracts in other statutes would seem to address such an area and thus it is not foreseen that this would pose an impediment to harmonising conduct provisions.

Warning statements and the mandatory provision of vendor guides seem to be more popular in other jurisdictions such as New South Wales and South Australia (s.20, SA Act) than in Victoria (aside from such an arrangement under the Residential Tenancies Act). The Council does not consider that the provision of information is necessary to enshrine in legislation given the array of material available via regulatory authorities and consumer organisations. That being said while such a provision may be well meaning but unnecessary it does not represent a hurdle in terms of harmonisation.

Overall there is considerable scope for harmonisation of price requirement provisions regarding contracts, although particular attention needs to be given to the use of estimated selling prices and disclosure statements.

²⁵ While the REIV considers that there is no need to replicate fair trading legislation that apply to all businesses in estate agency specific legislation, they do argue that there is some merit in provisions concerning the estimated selling price, despite there being a lack of understanding amongst members of the public regarding such provisions. There was lively debate amongst participants of the Council Working Group's Consultation Meeting on 23 April 2010 concerning price requirement provisions. The position outlined by the Council above reflects the stance argued in the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009).

²⁶ Lowenstern, opcit.

²⁷ McIntyre, opcit.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Establishment of estimated selling price on agreement prescribed minimum advertising price.	✓ s.47A-D EAA		✓ s.21, 24 SA Act					
2. Provision of statement within a set time period otherwise contract deemed void	✓ s.51-52 EAA							
3. Contracts that provide for payment (aside from the deposit) prior to settlement are void.			✓ s.6 SA Act					
4. Contracts where the person has the right to purchase the land but an obligation to pay rent re occupation for more than sixth months is voidable at any time by option of the person.			✓ s.6 SA Act					
5. Provision of written guide that explains vendor's rights and obligations under an agency agreement			✓ s.20 SA Act					

(d) Payments

Victoria has more provisions in place concerning payments than other jurisdictions. This includes stating that the deposit should not exceed ten per cent for off-the-plan-sales, which in a sense simply formalises the convention of the deposit generally being ten per cent in other states such as New South Wales, South Australia, Tasmania and the Northern Territory²⁸. Given the relative consistency regarding such a practice, the Council sees no reason as to why it would be necessary to incorporate this into the harmonisation of conduct provisions.

The Sale of Land Act also establishes that deposits should only be paid to a legal practitioner, conveyancer, licensed estate agent acting for the vendor or held in a special purpose account in the joint name of both the vendor and purchaser. The Council considers this to be an extremely important consumer protection safeguard and should be replicated in other jurisdictions as part of the harmonisation process. Similarly having a provision stating that a legal practitioner must not act for both parties to a contract seems to be a sensible measure designed to avoid conflict of interest issues, which the Council supports provided this standard is also applied to conveyancers. The Council also endorses provisions regarding the vendor statement being given to the purchaser as means of encouraging greater transparency.

Provisions in New South Wales and the Australian Capital Territory allowing for the payment of expression of interest deposits seem to be in conflict with the general principle in South Australia that no payments aside from the deposit should be paid before settlement. The Council does not support expression of interest deposits being adopted as part of the harmonisation process and is unclear on how SA's prohibition of payments aside from the deposit prior to settlement fits in with terms contracts which are paid by instalment.

Provisions in South Australia regarding the contract being signed by the vendor and purchaser immediately following the fall of the hammer essentially formalises current convention. The Council has campaigned in the past regarding the acceptance of bids after the fall of the hammer, which led in part to the amendments to the Sale of Land Regulations 2005. The Council would again argue that having clear provisions to prevent 'gazumping' is the key to maintaining the integrity of the auction system. This position is also supported by the REIV and those who participated in the Estate Agents Council's Working Group Consultation Meeting²⁹.

Overall while there are issues that need to be resolved regarding provisions addressing payments, no significant impediments to harmonisation are posed.

²⁸ In Queensland, the deposit must be at least five per cent.

²⁹ Lowenstern, opcit and refer to section 10 re consultation process.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Deposit should not exceed ten per cent.	✓ s.9AA SOLA							
2. Deposit should be paid to legal practitioner, conveyancer, and licensed estate agent acting for the vendor or held in a special purpose account in the joint name of the vendor and purchaser.	✓ s.9AA SOLA							
3. A legal practitioner must not act for both the vendor and purchaser under a terms contract.	✓ Part 1, Division 4, SOLA							
4. Vendor statement must be given to the purchaser before they sign the contract.	✓ s.32 SOLA							
5. Allows expression of interest deposits		✓ s.5 NSW Act				✓ 8.2.3 Agents Regs 2003		
6. Prohibits payments aside from the deposit before settlement.			✓ s.5-6 SA Act					
7. The contract to be signed by the vendor and purchaser immediately following the fall of the hammer.			✓ s.24I, SA Act Reg.16H SA Regs					

(e) Cooling off periods

There is a high potential for harmonisation regarding cooling off periods with Victoria, New South Wales, South Australia, Queensland and Tasmania already having such provisions in place. However, there is variation regarding the duration of the cooling off period ranging from one day in NSW to five days in QLD. There is a consensus that money paid out on the contract must be returned to the purchaser, although this varies from all money returned to the vendor being able to retain \$100 or 0.2-0.25% of the purchase price. Victoria, SA, QLD and Tasmania also have circumstances in which the cooling off period does not apply. In Victoria, South Australia and Tasmania cooling off periods do not apply to property sold at publicly advertised auction or when a similar contract has previously been entered into. A cooling off period also does not apply in Victoria and South Australia when independent legal advice has been sought or when purchased for commercial purposes. In Queensland, cooling off periods can be shortened or waived. The Victorian model incorporates a cooling off period which represents the middle ground in terms of duration and most of the common exemption features and the amount of money to be refunded. It is argued that the Victorian arrangement could be recommended as a best practice model, which presents few impediments in the harmonisation process.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
<p>1. A purchaser can give the vendor notice that they wish to terminate the contract with all substantial money paid out on the contract returned to the purchaser.</p>	<p>✓ s.31 SOLA</p> <p>3 day cooling off period.</p> <p>All money returned minus \$100 or 0.2% of purchase price.</p>	<p>✓ s.59-61 NSW Act</p> <p>1 day cooling off period</p> <p>Money returned to purchaser.</p>	<p>✓ s.5 SA Act</p> <p>2 day cooling off period.</p> <p>All money returned minus \$100.</p>	<p>✓ s.366D, s.367-370 QLD Act</p> <p>5 day cooling off period.</p> <p>All money returned minus 0.25% of purchase price.</p>	<p>✓ s.200 TAS ACT</p> <p>2 day cooling off period</p>			
<p>2. There are circumstances when cooling-off periods do not apply.</p>	<p>✓ s.31 SOLA</p> <p>Land sold by auction</p> <p>Land used for industrial, commercial or farming purposes.</p> <p>Previously entered similar contractual arrangement</p> <p>Received independent legal advice prior to signing the contract.</p>		<p>✓ s.5 SA Act</p> <p>Land sold by auction</p> <p>Sale of small business or body corporate.</p> <p>Previously entered similar contractual arrangement</p> <p>Received independent legal advice prior to signing the contract.</p>	<p>✓ s.366D, s.367-370 QLD Act</p> <p>Cooling off period can be shortened or waived.</p>	<p>✓ s.200 TAS ACT</p> <p>Land sold by auction</p> <p>Previously entered similar contractual arrangement</p>			

(f) Termination

Victoria is the only jurisdiction to feature provisions allowing for a contract to be avoided due to deficiencies in vendor’s statements. New South Wales and South Australia both have provisions regarding agents not retaining commission on rescinded contracts. Queensland features a provision concerning the purchaser being able to rescind the contract in the event of damage to the house (to the extent that is unfit for habitation) before the completion of the contract. In addition, Queensland has guidelines about the amount of notice a vendor must give the purchaser if rescinding the contract and can be required to pay compensation to the purchaser in the event of the termination of a contract. The Council would support the Victorian provisions being incorporated into harmonised conduct provisions dealing with the termination of a contract.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Ability to avoid contract due to deficiencies in prescribed statements.	✓ s.32 SOLA s.51-52 SOLA							✓ s.69D-E STA WA
2. Agent must not retain commission on rescinded contract.		✓ s.61 NSW Act	✓ s.23 SA Act					
3. Ability for purchaser to rescind contract if house damaged before completion of contract				✓ s.64 PLA QLD				
4. A vendor is not entitled to exercise any right to rescind the contract unless the purchaser is given 7 days notice of the vendor’s intention to rescind the contract.				✓ s.67 PLA QLD				
5. A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser.				✓ s.68 PLA QLD				

(g) Void contracts or unfair terms

The use of unfair contract terms and false and misleading information have been incorporated into the Australian Consumer Law, thus to a certain extent this harmonisation process has already occurred. Such developments at the Commonwealth level are most welcome and replicate existing arrangements in Victoria.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. A contract can be declared void due unfair contract terms or false or misleading information.	✓ Part 2B, s.163 FTA							

(h) Disclosure requirements or vendor statement

The Council supports the Victorian model of disclosure via prescribed statements. It is also not opposed to the South Australian and Tasmanian model of notice being given regarding changes to vendor statements.

Victoria, South Australia and Tasmania all have similar provisions regarding making disclosure documents available thirty minutes prior to auction. Such a provision would tie into sentiments found in other states regarding contracts being available for inspection before advertising can be placed (NSW and ACT) and advertising the availability of disclosure documents (Tasmania). While it is not foreseen that impediments are posed by provisions in Tasmania regarding the availability of disclosure documents being cited in advertising or not applying if the property has been advertised in the preceding six months the Council considers such provisions to be unnecessary. Section 196 of the TAS Act states that an agent of the vendor must disclose to a prospective purchaser any information that they know is likely to affect the purchaser’s decision to buy the residential land and is subsequently liable for any damages incurred by the purchaser from a failure to disclose. The Council sees problems with such a provision in terms of it creating a conflict regarding the agent being commissioned by the vendor and being obliged to disclose information obtained in confidence to the purchaser. This is considered to be problematic and such behaviour should rather be addressed through provisions focussed on fair trading principles such as false and misleading representations or deceptive conduct.

There are differences amongst the jurisdictions regarding disclosure requirements but not to the extent that an impediment would be posed to national licensing.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Disclosure requirements via prescribed statements.	✓ s.32 SOLA s.51-52 EAA							
2. Notice to be given re changes to vendor statement.			✓ s.10 SA Act		✓ s.194 TAS Act			
3. Disclosure documents to be made available 30 minutes prior to auction.	✓ s.43 SOLA reg.6 SOLA Regs		✓ s.11 SA Act Reg.14A SA Regs		✓ s.188 TAS Act			
4. The availability of disclosure documents during business hours to be cited in advertising.					✓ s.186-187 TAS Act			
5. Not applicable if the sale of the property has been advertised in the preceding six months.					✓ s.185 TAS Act			
6. Liability of agent to disclose information.					✓ s.196-7 TAS Act			
7. Purchaser entitled to various material related to the title at the cost of the vendor.				✓ s.61 PLA QLD s.21 LSA QLD				

(i) Service of documents

There are differences in terms of the service of documents between Victoria and South Australia. This is not considered to be problematic as none of the models are necessarily mutually exclusive. South Australia's model is just more specific than other statutes regarding acceptable means of delivering signed documents. In the Council's Modernisation Review it speculated as to whether a written acknowledgment of the receipt of signed documents as is required in Victoria was necessary.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Licensee to deliver a signed copy of the document.	✓ s.53 EAA A written acknowledgment of receipt of document.	✓ s.55 NSW Act Documents served within 48 hours of signing.	✓ s.17, s.41 SA Act Delivered in person, via registered post or electronic communication					

(j) False and misleading statements or representation

There is general agreement between Victoria, New South Wales and South Australia regarding prohibiting false or misleading statements or representations (in Victoria this extends to also outlawing unconscionable conduct). Such provisions also tie into fair trading principles included in legislation such as the ACL. It is also anticipated that such provisions would be part of the offences under the national licensing scheme and thus harmonisation of conduct provisions will be quite feasible.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Prohibits false or misleading statements or representations.	✓ S,8,11-12 FTA Unconscionable conduct	✓ s.73 NSW Act	✓ s.13, 35-36 SA Act					

(k) Remedies

Both Victoria and South Australia enshrine the ability to avoid a contract under certain circumstance, for example due to inadequate vendor disclosure via the prescribed statements in Victoria. In SA, a purchaser may apply to a court via seeking an order to avoid the contract or seeking damages, going a little bit further than Victoria where expenses are simply recovered. The Council believes that the objectives of these provisions are similar and are conducive to national harmonisation.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Able to avoid contract	✓ s.51-52 EAA s.32 SOLA s.32 ZA, s.32ZC-D FTA		✓ s.15 SA Act Purchaser may apply to a court seeking order to avoid contract or seek damages.					
2. Not entitled to commission or expenses		✓ s.55 NSW Act If services not performed as per agency agreement within 48 hours of being signed.						

(l) Statutory warranties

The introduction of the Australian Consumer Law means that statutory warranties will apply to all states and territories by mid 2010.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Statutory warranties regarding goods or services valued at less than \$40,000 or for domestic use.	✓ Part 2A FTA					✓ s.130D, Unit Titles Act 2001		

(m) Defences

In South Australia, it is a defence if it shown that a purchaser received independent legal advice prior to entering into a contract; this also excludes cooling off periods from applying in both South Australia and Victoria. Furthermore, it is a defence in SA if a waiver has been signed or the offence was committed unintentionally. Such a provision seeks to offer redress to consumers who have not waived their rights or are equipped with legal advice and penalise agents who have purposely committed an offence not those who have done so inadvertently. The Council has no real problem with such an arrangement given that it seeks to protect vulnerable consumers and focus on penalising agents who have acted wrongly with intent rather than in error.

Victoria and Tasmania also have provisions in which a contract cannot be rescinded if the court finds that the vendor acted honestly and the purchaser has not been disadvantaged. The Council does not object to the provision examining whether the vendor has acted in good faith, but is unsure about the issue of the purchaser being disadvantaged being part of deliberations. The focus should be on the agent's actions, which caused the contract to be avoided, and recovering costs paid out on the contract not the disadvantage of the purchaser per se.

The Council strongly supports the provision in the South Australian Regulations whereby an agent or employee is taken to be liable unless it is shown that they acted outside their authority and a body corporate director is also accountable unless it is proven that they could not have prevented an offence being committed by due diligence. Such a focus on the responsibility of licensed professionals, their staff and corporation directors ties into accountability issues explored in the Council's Modernisation Report and is in keeping with the approach to penalties foreshadowed as part of the national licensing scheme.

Overall, the harmonisation of provisions regarding defences is feasible.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Not entitled to commission or expenses		✓ s.55 NSW Act If services not performed as per agency agreement within 48 hours of being signed.						
2. Defence if independent legal advice received, waiver signed or offence was committed unintentionally.			✓ s.16, 37B, 38-39 SA Act reg.16A SA Regs					
3. A purchaser may not rescind a contract if a court demonstrates that the vendor acted honestly and the purchaser has not been disadvantaged.	✓ S.32 SOLA				✓ s.198 TAS Act			
4. Officer, employee or agent taken to be liable unless shown to have acted outside the scope of their authority. Each director of a body corporate liable unless it can be shown that they could not have prevented the offence being committed by due diligence.			✓ s.16, 37B, 38-39 SA Act reg.16A SA Reg					

In conclusion, while there are jurisdictional differences in terms of conduct provisions concerning contracts there is good scope for harmonisation and incorporating the strengths of each statute into a best practice model, which will compliment national licensing, rather than acting as an impediment. This process has already commenced with the inclusion of prohibiting false and misleading representations, statutory warranties and unfair contract terms into the Australian Consumer Law.

9.2 AGENCY AGREEMENTS

(a) Requirement for agency agreements

The Victorian provisions stating that an agent cannot receive their commission or recover any outgoings unless a signed agency agreement is in place are useful³⁰. Similarly, provisions in place in Tasmania, Western Australia and the Northern Territory are valuable in clarifying that agency agreements must be in writing. No impediment is posed by the addition of such provisions.

The Council would also support provisions that agents must not retain rebates and must pay them to the client such as found in Victoria and South Australia being replicated nationally.

Victoria, South Australia, Tasmania and the Australian Capital Territory all have provisions concerning the period after which an agency agreement expires. All except Victoria have a period of ninety days, with the agreement able to cease if thirty days notice in the ACT. It would appear that Victoria's thirty days after an auction and sixty days in other circumstances is out of step with the national standard.

The Council considers that the Victorian provision concerning vendors being informed of any commissions or outgoings paid using trust money within seven days to be an important provision in terms of transparency, which should be featured in the conduct provisions of other jurisdictions.

The Council is less interested in provisions regarding estimated selling prices found in Victoria and South Australia being replicated as the focus should be on the false and misleading conduct/ representation that can be dealt with through fair trading legislation.

Mandatory provisions such as those found in New South Wales and South Australia, which require an approved guide to be distributed to a person before signing an agency agreement, seem unnecessary given the amount of information available to consumers regarding buying and selling real estate. The Council is also not sure whether there is a need to have regulation about warning statements but as with sentiments expressed above regarding approved guides, this is well meaning enough but perhaps unnecessary. Such provisions do not pose any impediments but would not be recommended as being part of a best practice model.

Overall there is considerable scope for harmonisation despite some jurisdictional differences.

³⁰ The REIV applauded the sentiment contained in this statement which represents good estate agency practice but stated that technically an agency agreement only needed to be in place by the time the sales transaction was finalised (Lowenstern, April 2010, opcit).

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Agent cannot claim commission or outgoings unless a signed agency agreement is in place detailing rebates and commissions.	✓ s.49A EAA							
2. Agency agreements must be in writing					✓ s.18-19 TAS Act		✓ s.65 NT Act	✓ s.60 WA Act s.34 PLA WA s.69C STA WA
3. Agents who receive a rebate must pay the amount to the client.	✓ s.48A EAA		✓ s.20 SA Act					
4. Period after which the agency agreement expires.	✓ s.54 EAA 30 days auction 60 days otherwise		✓ Reg.16A SA Regs 90 days		✓ s.18 TAS Act 90 days	✓ Schedule 4 ACT Regulations 90 days		
5. The vendor must be informed of any commissions or outgoings paid using trust money within 7 days.	✓ s.49A EAA							
6. The agent must state an estimated selling price before obtaining a person's signature on an agency agreement.	✓ s.47A EAA		✓ s.20 SA Act					
7. Provision of approved guide before a person signs an agency agreement.		✓ s.56 NSW Act	✓ s.20 SA Act					
8. Warning statements regarding sole and agency agreements						✓ Schedule 5 ACT Regulations		

(b) Conflicts of interest

There is consistency regarding agents not entering into an agency agreement whereby there is a conflict of interest or sufficient disclosure occurring around any personal or commercial relationship. This area is not viewed as problematic in terms of harmonisation.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
2. Agent must not enter into agency agreement if there is a conflict of interest or must disclose any personal/commercial relationship or rebate.	✓ Reg. 12 Profess Conduct Regs	✓ Schedule 1 NSW Regs	t	✓ Reg.17 & 26 QLD Regs	t✓ s.22 TAS Act			✓ s.64 WA Act

(c) Disclosure requirements

The Council would recommend that the Victorian provision concerning prescribing the form in which rebates and commission sharing must be disclosed in agency agreements should be included in a best practice model as it encourages transparency. The REIV and ALPA both contended during the consultation process that there was a need to simplify the current Victorian model of disclosing rebates. It was also suggested that there was room for improvement regarding section 48 of the EAA concerning the notification of commission sharing, which is currently an administrative burden for industry practitioners (particularly those working in the regions). The Council would support modernising such provisions in order to reduce the regulatory burden on business provided that adequate disclosure and consumer protection was featured.³¹

Furthermore, it is suggested that provisions stating that rebates cannot be retained such as in New South Wales, South Australia and Tasmania also be replicated in harmonised conduct provisions. There is relative uniformity regarding the principles associated with disclosure in agency agreements.

³¹ Lowenstern, REIV and McIntyre, ALPA, opcit.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Rebates disclosed	✓ s.48 & 49A EAA	✓ Schedule 1 NSW Regs						
2. Rebates cannot be retained		✓ s.57 NSW Act	✓ s.20 SA Act		✓ s.20 TAS Act			

(d) False and misleading statements or representations

There is uniformity throughout the states and territories regarding prohibiting false or misleading statements/ representations, which would apply also to agency agreements. To an extent, harmonisation has already been achieved due to such a fundamental fair trading principle being part of the Australian Consumer Law.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Prohibits use of false or misleading statements/representations re agency agreements	✓ s.8, 11-12 FTA Plus unconscionable conduct	✓ s.52 NSW Act	✓ s.35-36 SA Act	✓ Reg.14 QLD Regs				

(e) Cooling off periods

New South Wales is the only jurisdiction to have a cooling off period specifically applying to agency agreements. According to the REIV and ALPA, cooling off periods should not be applied to agency agreements, as this is unnecessary given that warning statements are featured on agency agreements and there is a range of material available to consumers to inform them of their rights and obligations prior to entering into such an agreement³². The Council takes on board the comments of the REIV and ALPA, but does not view this as a problematic area in terms of harmonisation given that New South Wales is the only jurisdiction with a cooling off period applying to agency agreements.

³² Lowenstern and McIntyre, opcit.

PROVISION	VIC	NSW	SA	QLD	TAS	ACT	NT	WA
1. Agency agreements have a cooling off period of one business day		✓ s.59 NSW Act						

In conclusion, while there are some differences to be reconciled regarding jurisdictional arrangements, some states and territories feature more detail than others, regarding agency agreements the harmonisation of such conduct provisions is entirely feasible.

10. Consultation

In December 2009, the Council wrote to consumer and industry stakeholders and distributed an Estate Agents Council Bulletin to all Officers in Effective Control in Victoria outlining this research project and asking for expressions of interest in participating in the consultation process.

On 23 April 2010, the Council Working Group³³ met with the Real Estate Institute of Victoria (REIV), Australian Livestock Property Agents Association (ALPA), individual estate agents and other interested parties for feedback regarding a draft version of this paper on contracts and agency agreements³⁴. Overall, those participating in the consultation meeting were supportive of the Council's findings in this paper and welcomed national licensing and harmonisation of conduct provisions.

The majority of feedback received at this forum has been incorporated into the body of this report. Additional general comments were also made regarding the need for the national licensing scheme and harmonisation of conduct provisions to take into account the various segments of the market. For example the commercial agent or contractor who is bound by consumer protection legislation even when operating in an environment of complex transactions with corporations or superannuation funds³⁵, management of retirement villages nationally, acting for telecommunications carriers or stock and station agent selling livestock and dairy farms in regional areas³⁶.

³³ The Estate Agents Council Working Group consists of the Chair, who is a legal practitioner with expertise in property law, an industry representative, non-industry representative as well as a consumer representative who is also the Chief Executive Officer of the Tenants Union of Victoria and thus brings to the table the perspective of the consumer sector.

³⁴ Feedback was received at this forum stressing the importance of training and educational qualifications underpinning the operation of the National Licensing System (NLS). While the Council acknowledges this issue, it is outside the terms of reference for this particular paper. Kate Mannion explained at the meeting that this was an area being examined by a NLS Steering Committee, of which ALPA is a member.

³⁵ John Walter, Commercial Real Estate Consultant, EAC Working Group Consultation Meeting, 23 April 2010.

³⁶ McIntyre, *opcit.*

The Council thanks the following people for their contribution to this paper through the consultation process:

Real Estate Institute of Victoria (REIV) Delegation:

- Robert Larocca, Policy, Communication and Research Manager, REIV
- Peter Lowenstern, Corporate Solicitor, REIV

Australian Livestock and Property Agents Association (ALPA) Delegation:

- Mark Brooke, Real Estate Sales Manager (Victoria, Riverina and Tasmania), Landmark
- Kate Mannion, Southern Regional Manager, ALPA
- Shane McIntyre, National Sales Manager – Real Estate, Elders, ALPA Representative on EAC

Other Interested Parties:

- Mario Bertone, Licensed Estate Agent, General Manager Sales, Erden Property Agents
- Jane Moore, Licensed Estate Agent in Victoria and New South Wales
- Brett Philipp, Licensed Estate Agent/ Auctioneer, Noel Jones (Balwyn)
- Toni Planinsek, Officer in Effective Control, Planinsek Property Group
- Julie Valetic, Broker/Owner, Lets Get Real Estate
- John Walter, Commercial Real Estate Consultant

11. Contract and Agency Agreement Conduct Provisions –An Impediment to the Operation of a National Licence?

11.1 Contracts

In terms of forms of contracts, requirements that contracts should be clear and legible and free of unfair contract terms have been incorporated into the Australian Consumer Law. Differences exist between the states and territories in terms of enabling estate agents to fill in a standard contract and only being able to advertise a property once a contract is available for inspection. While these both have the potential to be impede agents operating across borders to a certain extent, there is enormous potential for harmonisation and thus it is not viewed as so problematic that it would undermine the operation of a national licence.

Victoria and South Australia feature estimated selling prices as part of agency agreements, whereas other states and territories focus more on price requirements in terms of substantiating false or misleading representations. It is expected that the operation of provisions within the ACL relating to false and misleading statements will increasingly address such an area rather than industry specific acts so this is not expected to pose problems.

The size of deposits for the sale of land while regulated differently does not vary much so it is not seen as detrimental in terms of agents operating across borders. It is anticipated that the payment of the deposit to a lawyer, conveyancer, the vendor's agent or paid into a special purpose account in the joint names of the parties will be addressed as part of the broader consideration of trust accounting.

While almost all jurisdictions have cooling off periods and share similar features despite having different time periods there is a need to harmonise these conduct provisions to enable consistency for those operating across borders. While this is seen as an area in which work needs to be done, it is not seen as something likely to present a long-term systemic impediment.

Overall there is a need to harmonise conduct provisions concerning contracts regarding having greater consistency concerning disclosure via vendor statements, the ability to terminate a contract, the service of documents, remedies and defences as well as establishing clear standards regarding conflict of interest issues as is the case in Victoria. The Council can foreshadow further work in this space regarding harmonising conduct provisions and adopting a best practice model. This is considered entirely feasible as the various statutes have similar themes and objectives, the harmonisation of conduct provisions is likely to be a process which compliments the introduction of national licensing and will not impede the process.

11.2 Agency Agreements

There are stylistic differences between the states and territories concerning agency agreements and yet there is also a lot of common ground regarding agency agreements being in place, the disclosure of rebates and prohibiting false and misleading statements or representations. There is some variation regarding the duration of an agency agreement with Victoria being out of step with the other jurisdictions and other states featuring such things as the compulsory provision of information guides prior to signing up to an agency agreement, the use of warning statements and cooling off periods. Overall, it is not envisaged that the area of agency agreements will pose any significant impediments in terms of the operation of the national licence.

11.3 Conclusion

The Council's next paper as part of this research project will focus on management, supervision, and behavioural standards within conduct provisions. To a certain extent, this area may expose more significant impediments to the operation of a national licence than an examination of contracts and agency agreement conduct provision, which have similar parameters, and may engage more discussion in terms of the consultation process.

The virtual office is another area that warrants discussion arising out of national licensing and opening up borders. In the area of contract and agency agreement conduct provisions signing parties to agency agreements and contracts, the service of documents, inspection of documents, disclosure and payment of deposits are all worthy of substantial consideration beyond what is possible in this paper.

It is the finding of this paper that while there is a need for the national harmonisation of conduct provisions as part of the national licensing scheme process that there are no significant impediments posed to agents operating across borders in terms of contracts or agency agreements.