



## **ESTATE AGENTS COUNCIL**

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

## **REPORT ON STANDARDS AND BEHAVIOUR AND MANAGEMENT AND SUPERVISION**

**JULY 2010**

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## **1. EXECUTIVE SUMMARY**

This paper considers the areas of standards and behaviour, management and supervision concerning property agents throughout Australia and contains a list of recommendations by the Council in regards to the national harmonisation of conduct provisions.

It is anticipated that the Council's work will be incorporated into the broader work program of harmonising specific conduct provisions for property occupations being undertaken for the Standing Committee of Officials Consumer Affairs (SCOCA) at the request of the Ministerial Council of Consumer Affairs (MCCA).

The criteria used for assessing the feasibility of harmonising conduct provisions have been the implications for consumers and the industry, consideration of jurisdictional differences, whether having such industry specific provisions replicates provision in fair trading legislation and what overall represents best practice.

### **Standards and Behaviour**

#### **The Feasibility of Harmonising Conflict of Interest Conduct Provisions**

#### **The Feasibility of Harmonising Conflict of Interest Conduct Provisions**

There is some consistency with regard to conduct provisions addressing conflicts of interest in property agent legislation throughout Australia and thus there is potential for harmonisation. All jurisdictions have provisions concerning agents, their employees and relatives not obtaining beneficial interest in a property they are commissioned to sell. Similarly, in all states and territories an offence is not committed if disclosure of the nature of conflict of interest is provided to the client and authorised in written form. However, Victoria and South Australia are the only jurisdictions where approval by the regulator is required before the agent can act in a conflict of interest situation. The Council considers this additional element of conflict of interest disclosure worthy of further consideration as part of the harmonisation process.

Most jurisdictions (except NSW and ACT) do not allow for agents retaining commission in such circumstances with Victoria and the Northern Territory also not allowing for the acceptance of the title. It is recommended that such a provision be incorporated into a best practice model as an agent should not be financially rewarded by the client when they have not acted in the best interests of the principal.

The ACT, NSW and SA are the only jurisdictions to feature a provision specifically prohibiting an agent acting for both the vendor and purchaser. The Council sees merit in such an approach but shares the concerns of the REIV regarding any detrimental impact posed to those operating or using estate agency services in small regional areas by such provisions. The Council would support a model, which enabled the principal to grant permission to waive this protection in certain circumstances, similar to the principle in place regarding section 55 of the EAA. Alternatively, it could be determined that a breach has not occurred if an agent who represents both parties demonstrates that they have acted in accordance with good estate agency practice and the principal is in as good a position as if the provision had been adhered to, which reflects the model applied in section 29W of the SOLA.

Victoria, NSW, the ACT and Tasmania also feature additional principles in their legislation stating that the agent must act in the best interests of their clients and must not accept an appointment to act when to do so would place the agent's interests in conflict with that of the client. The Council considers such a provision important to replicate nationally as it sums up the essence of good estate agency practice and the agent or salesperson's obligations regarding conflicts of interests. In summary the harmonisation of conduct provisions, concerning conflicts of interest is feasible.

### **The Feasibility of Harmonising Ethical Behaviour Conduct Provisions**

Provisions addressing ethical behaviour of estate agents and representatives throughout the various jurisdictions are fairly uniform, with the exception of South Australia. Most jurisdictions have a provision requiring estate agency practitioners to have an understanding and knowledge of the law relevant to their business activities, including fair trading principles. The Council views this provision to be of critical importance in any best practice model, as do the REIV and TUV.

Almost all jurisdictions have provisions prohibiting agents or representative from disclosing confidential information they have acquired while conducting estate agency business on behalf of a client. Such a provision ties into arrangements already in place regarding conflict of interest and in more general terms privacy legislation. It is recommended that such a clause be incorporated into a best practice model proposed under the harmonisation of conduct provisions. However, it must be acknowledged that an agent is also bound by the instructions of the client as well as relevant legislation (for example, a practitioner is not able to make false or misleading representations in responding to enquiries which would require them to disclose confidential information).

There is uniformity found amongst most state and territories regarding featuring a provision which states that an agent or representative must act in accordance with the instructions of the client and the best interests of the principal. Most jurisdictions also have a provision directing agents or representatives to communicate all offers to the client. Both provisions are important in terms of clarifying the obligations of the agent to the client and thus should be featured in a best practice model, it is not envisaged this would pose any impediments to the overall task of harmonising conduct provisions.

The vast majority of jurisdictions feature provisions requiring agents or representatives to act fairly and honestly and exercise due skill, care, diligence and general standards of professional conduct. These are important principles to enshrine in the professional conduct or code of conduct regulations, which should be featured in any best practice model given their value and that they are common to virtually all state and territories.

The Council also recommends that provisions regarding not knowingly inducing a person to breach a contract and not permitting agents or representatives to engage in unconscionable conduct are important safeguards to incorporate into a best practice model.

In summary, the Council finds that there are no significant impediments posed to the harmonisation of conduct provisions concerning the ethical behaviour of agents and representatives as there is widespread consistency and much value to be gained from adopting a best practice model incorporating knowledge of the law, confidentiality, professional standards and fair trading requirements.

## **The Feasibility of Harmonising Advertising Conduct Provisions**

The potential for the national harmonisation of conduct provisions concerning advertising is extremely high. There is widespread consistency because of uniform state and territory fair trading legislation addressing false or misleading representations/statements made in published material, which also manifests itself in similar provisions in estate agency legislation. At the national level, this has culminated with a model addressing false and misleading representations concerning land forming part of the Australian Consumer Law (s.30, Trade Practices Amendment (Australian Consumer Law) Act 2010). Rather than query whether there is the potential for harmonisation of conduct provisions addressing false and misleading conduct in the estate agency specific industry legislation of the various jurisdictions, perhaps the question is whether such provisions are necessary given that such an area is already addressed in the Australian Consumer Law (ACL). The REIV supports this stance contending that the ACL which applies to all businesses should also bind estate agency businesses rather than industry specific legislation.

Similarly, while there is a high potential for harmonisation regarding conduct provisions requiring that advertisements must feature the contact details of the agent publishing the material, the question needs to be posed as to whether such provisions are necessary in industry specific legislation given that they already feature in terms of business name and fair trading legislation?

In summary, while the Council considers that both central elements of advertising conduct provisions are important and harmonisation is entirely feasible, it recommends that further thought be given in the context of developments at the national level regarding the ACL and business name regulation in order to avoid legislative duplication.

## **The Feasibility of Harmonising Rebate Requirement Conduct Provisions**

The Council considers the area of rebates worthy of significantly more deliberation in terms of the harmonisation of such conduct provisions. There needs to be a dialogue between the jurisdictions regarding the effectiveness of the Victorian system, which does not allow for the retention of any rebates, and whether disclosure is enough or there needs to be an additional consumer protection mechanism embedded in the process, such as requiring approval by the Director such as in Victoria. On the one hand, the aim of rebate provisions should be to protect consumers from estate agents not acting in their best interests due to possible financial gain via rebates. At the same time, regulation should not impede the estate agency business if there is no detriment posed to the consumer, for example, a retailer may obtain a rebate when buying in bulk and not pass this discount on to the consumer, who is still receiving the product that they paid for at the agreed price. The Council does not consider the harmonisation of rebate provisions unfeasible, but perhaps more work will be involved at arriving at a best practice model.

## **The Feasibility of Harmonising False and Misleading Statements or Representation Conduct Provisions**

There is widespread consistency regarding false and misleading representation provisions across the various jurisdictions. There are stylistic differences with more detail in some industry specific acts such as the EAA and QLD Act, particularly around price representation, while other jurisdictions defer more heavily to their fair trading legislation. The Council considers that, there is great potential for harmonisation. However, as stated in its Modernising the Estate Agents Act 1980 Final Report in October 2009, it questions whether

there is a need to replicate narrow false and misleading representation provisions in property agent conduct legislation. This seems unnecessary given that such wide fair trading principles are already addressed in the Australian Consumer Law, which applies to all businesses, including estate agencies, and operates nation wide. That being said the Council would welcome any provisions put in place that provided the marketplace with greater clarity regarding price representation and views substantiation clauses as an important mechanism to keep estate agency practitioners accountable for the representations they make to consumers.

## **Conclusion**

The Council concludes that the conduct provisions addressing standards and behaviour, that is conflicts of interest, rebate requirements, ethical conduct, advertising and false representations, contain a degree of consistency throughout the jurisdictions as well as posing some interesting issues worthy of further consideration. An important opportunity exists to adopt the best practice elements of the various jurisdictions and consider whether there is a need to feature provisions in industry specific legislation concerning advertising and false statements, or this would be perhaps be better handled by deferring to such provisions under the Australian Consumer Law.

## **Management and Supervision**

### **The Feasibility of Harmonising Place of Business/ Office Provisions**

There is a high potential for the harmonisation of conduct provisions concerning the establishment of the registered office and management and supervision of the place of business.

The concept of the registered office location, whether the principal or branch office, and need to provide the authority of any change in address details is consistent throughout most jurisdictions. There is also a fair degree of uniformity concerning branch offices having a licensed estate agent in charge of the day-to-day management of the office, although South Australia allows for sales representatives to take on this role under certain circumstances and providing an estate agent is responsible for the maintenance of the trust account. As stated in the Modernising the Estate Agents Act 1980 Final Report (October 2009), the Council considers the establishment of the registered office to be a significant provision in terms of consumer protection, but worthy of further consideration in the context of the virtual office and the operation of national licensing across borders.

The Council would advocate a best practice model incorporating key features of the respective Victorian and Tasmanian Acts. Specifically sections 29B of the EAA in terms of management and supervision of the estate agency office, incorporating proper supervision, adequate processes being in place and ensuring employees comply with the law. Section 7 of the TAS Act also features a useful emphasis on responsibility for the activities of the estate agency office rather than necessarily full time attendance by the licensee. This position was supported by the REIV, ALPA and participants in the consultation meeting.

In summary, the Council views the harmonisation of provision concerning the establishment of the registered office and management and supervision of the place of business to be entirely feasible and of critical importance.

### **The Feasibility of Harmonising Unlicensed Employees Conduct Provisions**

While there is a degree of consistency across jurisdictions regarding provisions about disqualified persons being employed by, licensees and the proper supervision of unlicensed employees key questions must be asked. To an extent, this area is dependent on how agent's representatives or real estate salespersons are classified under the National Licensing Scheme. For example in contrast to other jurisdictions Victoria has a negative licensing scheme for agent's representatives. In addition, conduct provisions about the proper management and supervision of the estate agency office already exist and it must be considered whether there is a need to duplicate such provisions specifically in respect to unlicensed employees. As suggested in its Modernisation Review, the Council is in favour of enshrining the accountability of the licensee for the activities of their representatives; however, it also sees merit in establishing a more streamlined best practice model with a focus on overall proper management and supervision, which would extend to unlicensed employees in the estate agency office, which is supported by the REIV.

### **The Feasibility of Harmonising Record Keeping Conduct Provisions**

There are jurisdictional differences regarding record keeping, but in general, there is agreement regarding the basic concept that an estate agency must keep the prescribed documentation regarding real estate transactions and trust money, which can be inspected or

audited. However, thought needs to be given when adopting a best practice model to how keeping documents at the place of business fits with the concept of the virtual office and electronic storage of documents in an environment with estate agents doing business across jurisdictional borders. The Council also views enshrining provisions regarding processes for the maintenance of electronic records to be extremely important as did the REIV, ALPA and other participants at the EAC Working Group Consultation Meeting (23 July 2010). Victoria, Queensland and South Australia have such arrangements in place regarding electronic trust account records requiring regular backing up and retention of such back up material off-site. A best practice model would have to incorporate such provisions addressing electronic documentation, which would also modernise legislation that at times still struggles to come to terms with the emergence of technology in the estate agency office.

There is variation regarding the number of years records are required to be retained, from seven years in Victoria, five years in both the Australian Capital Territory and South Australia to just three years in New South Wales. The Council argues that it may be useful to have a longer timeframe for the retention of documents such as in Victoria because sometimes trust account deficiencies or offences, which become known through the auditing of records, cannot be detected for some time. Seven years is also model applied by the Australian Tax Office regarding the retention of records and thus this should be adopted as an appropriate benchmark<sup>1</sup>.

As suggested in the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009), provisions mandating the retention of a log of employee details such as in Victoria, Queensland and Tasmania seem unnecessary. Employee information is provided to the licensing authority, appears on the public register and would presumably be retained as part of general business processes, so it is not immediately clear why there is a need to have such provisions in industry specific legislation. The Council would recommend that such provisions were not incorporated into a best practice model as part of the national harmonisation of record keeping conduct provisions.

In summary, the Council sees potential for harmonisation of record keeping provisions with agreement about the general principle of the retention of documents concerning real estate transactions and trust money for a period of seven years. However, it argues that more work needs to be done to incorporate features like the electronic record keeping and give greater thought to document storage beyond the place of business.

### **The Feasibility of Harmonising Action RE Absence Conduct Provisions**

Victoria is the only jurisdiction to feature a provision regarding the notification about the short-term absences of the estate agent or branch manager. The Council would not recommend that such a provision be included in a best practice model of harmonised conduct provisions.

In the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009) it was recommended that section 30A of the EAA be repealed. The rationale was that the officer in effective control or agent is ultimately responsible for the estate agency business even in the event of their short-term absence due to ill health or recreational leave. This places the onus firmly on the principal agent for ensuring that suitably qualified staff and adequate processes are in place to allow good estate agency practice to continue even when they are temporarily away from the office. Improved communication channels in this modern era also mean one can virtually run an office off-site if necessary. Short-term staff absences occur in every

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<sup>1</sup> The REIV, ALPA and other participants at the EAC Working Group Consultation Meeting, 23 July 2010, supported the retention of records for seven years.

business and systems need to be put in place to accommodate such periods. It is not clear why an estate agency office requires industry specific regulation to address such a routine people management issue. The Council perhaps understands the need for the authority to be notified in the case of long term or permanent changes in management, such as when the agent has been absent for ninety days such as in WA, but otherwise it views such a provision as an unnecessary administrative burden with no real benefits. This position was supported by the REIV, ALPA and other participants in the EAC Working Group Consultation Meeting (23 July 2010).

## **Conclusion**

Overall, while there is potential for harmonisation regarding management and supervision provisions amongst the jurisdictions, there are also many issues, which need to be addressed when forming a best practice model. For example while there is consistency regarding the existence of the registered office, a best practice model should incorporate the proper management and supervision of the estate agency office and there should be consideration given to what constitutes a place of business given the virtual office and national licensing allowing for working across jurisdictional borders. There is also a degree of uniformity regarding unlicensed persons working in the estate agency office but a need to consider how this role will function under the NLS. Jurisdictions share general principles regarding the maintenance of prescribed records about real estate transactions and trust money, but there is a need to consider for how long documents should be retained, whether documents need to be available at the place of business or there is greater potential for electronic document storage processes. Victoria was the sole jurisdiction to have a provision regarding the notification of the short-term absence of the estate agent or branch manager. It is contended that such a provision should be abolished with proper management and supervision provisions being part of a best practice model addressing such an issue.

## **2. RELEVANT LEGISLATION**

### **Commonwealth**

Trade Practices Amendment (Australian Consumer Law) Act 2010 (“ACL”)

### **Australian Capital Territory**

Agents Act 2003 (ACT) (“ACT Act”)  
Agents Regulations 2008 (ACT) (“ACT Regulations”)  
Fair Trading Act 1992 (ACT) (“FTA ACT”)  
Fair Trading (Consumer Affairs) Act 1973 (ACT)

### **New South Wales**

Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”)  
Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”)  
Fair Trading Act 1987 (NSW) (“NSW FTA”)

### **Northern Territory**

Agents Licensing Act (NT) (“NT Act”)  
Agents Licensing Regulations 1979 (NT) (“NT Regulations”)  
Consumer and Fair Trading Act 2008 (NT) (“FTA NT”)

### **Queensland**

Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”)  
Property Agents and Motor Dealers Regulations 2001 (QLD) (“QLD Regulations”)  
Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) Regulations 2001 (QLD) (“QLD Code of Conduct Regulations”).  
Property Law Act 1974 (QLD) (“PLA QLD”)  
Land Sales Act 1984 (QLD) (“LSA QLD”).  
Fair Trading Act 1989 (QLD) (“FTA QLD”)

### **South Australia**

Estate Agents (Professional Conduct) Regulations 2008 (SA)  
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) (“LAA”)  
Land Agents Regulations 1995 (SA) (“LAR”)  
Law of Property Act 1936 (SA)  
Legal Practitioners Regulations 2009 (SA)  
Fair Trading Act 1987 (SA) (“FTA SA”)  
Fair Trading (General) Regulations 1999 (SA) (“FTA SA Regulations”)

### **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 (TAS) (“CLPA TAS”)  
Fair Trading Act 1990 (TAS) (“FTA 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 (Professional Conducts) Regulations 2008 (VIC) (“VIC PC Regulations”)  
Estate Agents (General, Account and Audit) Regulations 2008 (VIC) (“VIC Audit Regulations”)  
Fair Trading Act 1999 (VIC) (“FTA”)

**Western Australia**

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

Real Estate and Business Agents (General) Regulations 1979 (WA) (“WA Regulations”)

Property Law Act 1969 (WA) (“PLA WA”)

Auction Sales Act 1973 (WA) (“ASA WA”)

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

Fair Trading Act 1987 (WA) (“FTA 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. The commencement of the national licensing scheme for the first wave of occupations including property agents is 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.

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. 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<sup>2</sup>**

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), associated regulations and comparative legislation in other jurisdictions 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 all aspects of the legislative framework 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. It is anticipated that the Council's work will be incorporated into the broader work program of harmonising specific conduct provisions for property occupations being undertaken for the Standing Committee of Officials Consumer Affairs (SCOCA) at the request of the Ministerial Council of Consumer Affairs (MCCA).

In addition to examining estate agency statutes the Council has looked at state fair trading acts when considering the harmonisation of conduct provisions. It is important to consider what consumer protection legislation is already in place and will compliment the operation of the national licence and application of the harmonised conduct provisions and whether there is a need to replicate some fair trading provisions in industry specific legislation.

In May 2010, the Council provided the Minister with a report on conduct provisions concerning contracts and agency agreements, which concluded that while there were jurisdictional differences that there was a high potential for harmonisation.

In this paper, which will conclude this research project, the Council will revisit the areas of standards and behaviour, management and supervision, which were explored in its Modernisation Review. This report 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 criteria used for assessing the feasibility of harmonising conduct provisions have been the implications for consumers and the industry, consideration of jurisdictional differences, whether having such industry specific provisions replicates provision in fair trading legislation and what overall represents best practice.

The Council welcomes the opportunity to contribute to this important area of work.

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<sup>2</sup> The Council thanks Consumer Affairs Victoria for their assistance in terms of the sharing of data concerning conduct provisions in Victoria and other Australian jurisdictions.

## 5. STANDARDS AND BEHAVIOUR CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA

This paper will consider the following five key elements of conduct provisions, which address standards and behaviour in legislation relevant to estate agency practitioners:

- **Conflict of interest** – preventing agents or their associates from obtaining a beneficial interest in a property that they been commissioned to sell without sufficient disclosure occurring.
- **Ethical behaviour** – requiring agents or representatives to have knowledge of the relevant laws governing estate agency practice, act in the best interests of the client, not disclose confidential information obtained while acting as agent and generally displaying professional standards representing good estate agency practice.
- **Advertising** – requiring the contact details of an agent or representative to be featured on all published material so that practitioners are accountable for claims made in advertising, which must not contain false or misleading representations.
- **Rebates** –not retaining any amount obtained from a third party unless disclosed in the prescribed rebate form.
- **False or misleading representations** –prohibiting false or misleading representations or statements in published material, communication with buyers or sellers or generally unless claims can be substantiated.

These areas were selected due to their overall importance to the regulation of estate agency practitioners, protection of consumers and upholding professional standards in the industry<sup>3</sup>.

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<sup>3</sup> The Council has not addressed issues related to qualifications or professional development as this is an area already being examined by a COAG Steering Committee. There is also not a separate section on disclosure as this is already covered by sections on conflicts of interest and rebate requirements, and was addressed in the previous paper examining contracts and agency agreements. This paper does not look at information requirements, such as displaying the name of the business etc as this was determined to be more of an administrative/ office process outside the scope of standards and behaviour per se.

## **6. A SNAPSHOT OF CONFLICT OF INTEREST CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

There are provisions in the legislation of each Australian jurisdiction regulating property agents, which seeks to address the issue of conflicts of interest. This is an important area in terms of preventing estate agency practitioners from using knowledge acquired when conducting their business to gain unfair advantage over consumers. Other consumer protection features addressing conflicts of interest found in such provisions include agent disclosure about any possible beneficial interest, the repaying of commission in such circumstances, the inability of an agent to act for both the vendor and seller and rules concerning rebates. These provisions are also important for the industry in terms of establishing clear guidelines about what constitutes good estate agency practice, such as acting in the best interests of the client, and safeguards for avoiding conflicts of interest that are potentially damaging to the integrity of the profession and most importantly to consumers.

### **Victoria**

The Estate Agents Act 1980 (EAA) features important consumer protection mechanisms 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.

The EAA addresses conflict of interest issues with an agent not permitted to purchase (directly or indirectly) any real estate or business that they have been commissioned to sell. This prevents agents from seeking unfair advantage over the vendor because of their inside knowledge about the property and explains the need to have a vendor approval process for any conflict of interest situation. In addition to any penalties imposed by the court, those found in breach of such provisions can be required to transfer the title or all profits resulting from the purchase to the client. An estate agent cannot charge or will be required to repay the commission paid in the event of contravention of the provision. Provisions also apply to those with a beneficial interest, defined as the estate agent, estate agency employees or alternatively their domestic partner, parent, sibling or child. This ensures that neither the agent, their staff or relatives can seek to gain from conducting themselves in a manner that is not transparent (s.55, EAA).

Conflict of interest provisions do not apply to a person who is a shareholder but not an employee of an estate agency corporation. The rationale being that an average shareholder does not have any knowledge that they could use to commercial advantage when purchasing a property, unless they were for example a company director. However, there is inconsistency in the provision regarding beneficial interest applying to an agent or employee or their close family members who are a member of a corporation, which could be seen to contradict the omission of shareholders<sup>4</sup>. Such provisions do not apply to estate agency employees if they are not licensed estate agents or agent's representatives. This would presumably be in order to exclude clerical staff who are not carrying out estate agency business and therefore do not have any inside knowledge that they could use in the market place.

Provisions regarding beneficial interest also do not apply if the client is informed of the relationship that may be perceived as a conflict of interest in writing and the required

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<sup>4</sup> The REIV has raised this anomaly during the consultation process for the Council's last two papers, Modernising the Estate Agents Act 1980 (October 2009) and Impediments to the Operation of a National Licence Contained in Conduct Provisions –Research Project, Report on Contracts and Agency Agreements (May 2010).

documentation has been submitted to the Director for approval within seven days of being signed. 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). This is an important element of the provision of the EAA dealing with conflict of interests and represents a key difference between arrangements in Victoria and other jurisdictions. Indeed, it could be argued that this represents best practice.

In addition the Estate Agents (Professional Conduct) Regulations 2008 (VIC PC Regulations) state that an estate agent or agent's representative must always act in a client's best interest except where it would be unlawful, unreasonable, improper or contrary to the principal's instructions to do so. An estate agent or agent's representative must not act for a person where to do so would place the agent's interest in conflict and must disclose any personal or commercial relationship when recommending a supplier of goods or services to a client. Such a provision establishes what constitutes appropriate behaviour in accordance with good estate agency practice (r. 12 and r.20, VIC PC Regulations).

### **Australian Capital Territory**

The Agents Act 2003 (ACT) ("ACT Act") prohibits an agent from acting for both the buyer and vendor of a property and in doing so seeks to prevent a rather obvious conflict of interest occurring (s.77, ACT Act). A similar principle exists in the Sale of Land Act 1962 (SOLA) in Victoria concerning a legal practitioner being unable to represent both parties to a contract (s.29W, SOLA).

An agent or salesperson who is acting for either a vendor or buyer of land must disclose precontract information before the principal enters into a contract in relation to the land. The client should provide written acknowledgement that they have received this precontract information (s.84-85, ACT Act). Precontract information is defined as any personal or business relationship that may present a conflict or beneficial interest, including the use of referrals or rebates (s.81, ACT Act).

In addition, an agent commits an offence if the agent or salesperson acts for a vendor of land and intentionally obtains a beneficial interest in the land or is in any way involved in someone else obtaining a beneficial interest in the land. However, the provision does not apply if before the interest is obtained the agent fully discloses to the seller the circumstances surrounding the obtaining of the beneficial interest and the seller agrees in writing in the prescribed form to the obtaining of interest. In such circumstances, the seller does not pay the agent any commission or reward for the sale of land (s.86-87, ACT Act).

The Agents Regulations 2008 (ACT) ("ACT Regulations") also 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 interest (Schedule 8, 8.12, ACT Regulations).

The basic principles of conflicts of interest, beneficial interest, adequate disclosure and the agent acting in the best interests of the client are similar in both the ACT Act and ACT Regulations and provisions found in the EAA and PC Regulations in Victoria. The fundamental difference between the two jurisdictions would be that while the ACT legislation requires disclosure to the seller, such information must be lodged with the regulator in Victoria.

## **New South Wales<sup>5</sup>**

The Property, Stock and Business Agents Act 2002 (NSW) (“NSW Act”) features an identical provision to the ACT Act prohibiting a licensee from acting for both parties to the property transaction (s.48, NSW Act). The Property, Stock and Business Agents Regulations 2003 (NSW) (“NSW Regulations”) also does not permit the agent to recommend the use of the services of a solicitor or licensed conveyancer if they know that they are acting for the other party to the contract (r.13, NSW Regulations).

Under the NSW Act, an agent must disclose to the client for whom they are acting any personal or commercial relationship they have with anyone the agent refers the client to regarding professional services associated with the sale or purchase of a property. The agent must also detail to the client any monetary or other benefit they expect to receive regarding such referrals. The NSW Regulations also prevent an agent from falsely representing that they are independent of a service provider that they have referred the client to if this is not the case (r.12, NSW Regulations). As is the case in both Victoria and the ACT there is the provision for the agent to disclose such conflicts of interest in the prescribed form, which in this instance must also be acknowledged in writing by the client and provided at the time that the referral to such professional services is made (s.47, NSW Act).

An agent or salesperson must not obtain or be involved in obtaining any beneficial interest in a property (which constitutes buying a property or seeking the option to purchase the property). It is not an offence if disclosure has occurred in the prescribed form, the agent or salesperson has acted fairly and honestly, no commission has been sought and the client consent to such arrangements have been obtained. A person with a beneficial interest is defined as a person or close relative<sup>6</sup> or alternatively such a person or close relative in certain circumstances. Such circumstances would include when they are member of a large corporation<sup>7</sup>, an executive officer of a corporation, the trustee of a discretionary trust of which they are a beneficiary, a member of a firm or partnership or when they are able to participate (directly or indirectly) in the income or profit of a business (s49, NSW Act). Such an arrangement is similar to that in place in Victoria, with the difference that estate agency employees, other than salespersons, are not addressed concerning conflicts of interest as in the case in the EAA.

The NSW Regulations require agents to act in the client’s best interests at all times unless to do so would be unlawful and not to accept an appointment to act if it would place the agent’s interests in conflict with the interests of the client (r.6, r.11, NSW Regulations). This replicates arrangements in place in the regulations in both Victoria and the ACT and reiterates the principles of good estate agency practice.

## **Northern Territory**

The Agents Licensing Act (NT) (“NT Act”) also requires that an interested party must not purchase, directly or indirectly, or be beneficially interested in the purchase of, land or a business from a person who they are acting for as an agent<sup>8</sup>. A person found guilty of such an

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<sup>5</sup> At the EAC Working Group Consultation Meeting, ALPA noted that they viewed the NSW Model as a simpler and more effective model of addressing conflict of interest issues.

<sup>6</sup> Close relative means current or former spouse or domestic partner, child, grandchild, sibling, parent or grandparent.

<sup>7</sup> A corporation of not less than a hundred persons.

<sup>8</sup> An interested party is defined as a licensed real estate or business agent, a registered agent’s representative, an employee of a licensed estate or business agent or a person who holds themselves out

offence must repay the principal all profits (including commission received) and must transfer the title of the land unless there is an agreement to the contrary. Such provisions do not apply if the land is purchased by a shareholder or creditor of a publicly listed or prescribed corporation, the agent acted honestly and reasonably, the principal is in as good a position as if a breach had not occurred or disclosure guidelines have been followed (s.108G, NT Act). . The NT Act requires that an interested party must provide the full details of their intention to buy, sell or acquire a beneficial interest and acknowledge in a statement that by virtue of their relationship with the principal they may have gained information which may place them in a position of advantage (s.108H, NT Act). The importance of full disclosure is also stressed in the Agents Licensing Regulations 1979 (NT) (“NT Regulations”) (r.65, NT Regulations).

## **Queensland**

Under the Property Agents and Motor Dealers Act 2000 (QLD) (“QLD Act”), a residential property agent must disclose any personal or commercial relationship they have with someone that the agent refers a potential buyer to for professional services. A residential property agent is defined as a real estate agent, real estate salesperson acting for the real estate salesperson or a person carrying out estate agency business despite not being a licensed real estate agent or registered real estate salesperson. The agent must also detail the nature and value of the benefit the agent will derive from such a referral. This disclosure must be given to the prospective buyer in the approved form, acknowledged by the prospective buyer in writing on the approved form and provided before entering a contract for the sale of the residential property (s.138, QLD Act).

A real estate agent or salesperson employed by the real estate agent commits an offence if the agent obtains from the client an option to purchase the property in which the agent or salesperson has a beneficial interest. A real estate agent or salesperson is also not permitted to sell a property in which they have a beneficial interest (s.144, QLD Act). However, there are circumstances where an agent or salesperson does not commit an offence in obtaining a beneficial interest in the property. These would include acquiring a client’s written acknowledgment in the approved form that the client is aware of and consents to the person obtaining the interest, vouches that the practitioner has acted fairly and honestly in relation to the sale, no commission has been paid and the client is in as substantially as good position as if the property were sold at fair market value <sup>9</sup>(s.145, QLD Act). If a commission has not been returned in such circumstances the court must order the person to pay the amount to the client and may determine that an additional penalty will be imposed (s.145A, QLD Act)<sup>10</sup>.

## **South Australia**

The Land and Business (Sale and Conveyancing) Act 1994 (SA) (“SA Act”) prohibits an agent or sales representative<sup>11</sup> who is authorised by the vendor to sell land or a business from

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to be real estate or business agent. Beneficial interest means the spouse, de facto partner, parent, brother, sister or child of the interested party or a corporation operating for profit of which the person with beneficial interest is a member.

<sup>9</sup> Concerning livestock sales, the real estate agent must only obtain a written acknowledgement from the client that they are aware of and consent to the real estate agent or salesperson’s intention of obtaining a beneficial interest (s.146, QLD Act).

<sup>10</sup> The QLD Act also replicates these provisions regarding beneficial interest concerning auctioneers (s.221, s.22A, QLD Act).

<sup>11</sup> Also applies to an agent or sales representative who appraises the property or a business for the vendor but is not acting for the vendor in the capacity as the agent or sales representative involved in the sale as such (s.24G (3)-(4), SA Act).

obtaining, or be in any way concerned in obtaining, a beneficial interest in the land or business. Beneficial interest is defined as a person or their associate purchasing land or a business, obtaining an option to purchase land or a business or being granted a general power of appointment in respect of land or a business. An associate means the spouse, relative, employee, a trustee of a trust who the person is the beneficiary of or any other person the agent or sales representative has a notable relationship with (s.24G, SA Act). A person is not considered to have contravened these requirements if the Commissioner approves the obtaining of the beneficial interest of the agent or sales representative after being given the specific details of the prospective beneficial interest in the approved form. The Commissioner's determination will be based on the information provided being accurate, whether the agent or sales representative is acting in the best interests of the vendor and if the vendor is likely to suffer detriment because of the transaction (r.16G, Land and Business (Sale and Conveyancing) Regulations 1995 (SA) ("SA Regulations"). Commission or expenses cannot be retained in such circumstances where there is a beneficial interest and the Court can order that all profits made by the agent should be paid to the vendor (s.24G, SA Act).

An agent is also prevented from acting for both the vendor and purchaser of land or business, with the exception of an auctioneer (s.24F, SA Act, r.16F, SA Regulations). Again, South Australia is fairly consistent with other jurisdictions in terms of featuring provisions addressing beneficial interest and not acting for both parties. It is also notably similar to Victoria in terms of requiring beneficial interest information to be lodged with the relevant regulatory authority.

### **Tasmania**

Under the Property Agents and Land Transactions Act 2005 (TAS) ("TAS Act") a real estate agent, person employed by a real estate agent, a director of a real estate agent or corporation acting as an estate agent must not acquire or attempt to acquire, directly or indirectly, an interest in property that the agent is instructed to sell. A real estate agent is guilty of an offence if a person employed or engaged by the agent acquires, or attempts to acquire, directly or indirectly, an interest in property that the agent is instructed to sell. If the agent can demonstrate that the acquisition was made with the written approval of the owner of the property given before negotiations for the acquisition of the interest were entered into and after a full disclosure of all the relevant facts by the person seeking approval then the agent is not guilty of an offence. It is also a defence to contravention of the provision if it can be demonstrated that the person acted honestly and reasonably and the vendor is in substantially as good a position as if the requirements had been complied with. The agent in circumstances where beneficial interest has been obtained cannot retain commission or a court can order that profits be paid to the vendor (s.22-23, TAS Act).

The Property Agents and Land Transactions Regulations 2006 (TAS) ("TAS Regulations") require that a property agent must at all times act in the best interests of the client (r.7, TAS Regulations). They must also not accept an appointment to act if to do so would put place the agent's interests in conflict with that of the client and must not represent both the vendor and purchaser (r.10, TAS Regulations).

Tasmanian legislation is consistent with many of the principles found in other states and territories in terms of beneficial interest and the obligations of the agent to the client. However, the Tasmanian Act is stronger in terms of stressing the liability of the real estate agent for their employees in terms of breaching the provision and acquiring beneficial interest in a property the agent is instructed to sell (s.22 (2), TAS Act).

## Western Australia

Under the Real Estate and Business Agents Act 1978 (WA) (“WA Act”) an agent or sales representative shall not have, directly or indirectly, any interest, other than in their capacity as an agent, in any transaction in which they act as agent, unless the principal has given prior written consent. A court may order a person convicted of such an offence to pay over to agent’s principal any profit made from the transaction (s.64, WA Act). WA features similarities to other jurisdictions regarding the handling of conflict of interest issues, in terms of returning profits to the client and the importance of disclosure.

## Conclusion -The Feasibility of Harmonising Conflict of Interest Conduct Provisions

There is some consistency with regard to conduct provisions addressing conflicts of interest in property agent legislation throughout Australia and thus there is potential for harmonisation. All jurisdictions have provisions concerning agents, their employees and relatives not obtaining beneficial interest in a property they are commissioned to sell. Similarly, in all states and territories an offence is not committed if disclosure of the nature of conflict of interest is provided to the client and authorised in written form. However, Victoria and South Australia are the only jurisdictions where approval by the regulator is required before the agent can act in a conflict of interest situation. The Council considers this additional element of conflict of interest disclosure worthy of further consideration as part of the harmonisation process<sup>12</sup>.

Most jurisdictions (except NSW and ACT) do not allow for agents retaining commission in such circumstances with Victoria and the Northern Territory also not allowing for the acceptance of the title. It is recommended that such a provision be incorporated into a best practice model as an agent should not be financially rewarded by the client when they have not acted in the best interests of the principal<sup>13</sup>.

The ACT, NSW and SA are the only jurisdictions to feature a provision specifically prohibiting an agent acting for both the vendor and purchaser. The Council sees merit in such an approach but shares the concerns of the REIV regarding any detrimental impact posed to those operating or using estate agency services in small regional areas by such provisions<sup>14</sup>. The Council would support a model, which enabled the principal to grant permission to waive this protection in certain circumstances, similar to the principle in place regarding section 55 of the EAA. Alternatively, it could be determined that a breach has not occurred if an agent who represents both parties demonstrates that they have acted in accordance with good estate agency practice<sup>15</sup> and the principal is in as good a position as if the provision had been adhered to, which reflects the model applied in section 29W of the SOLA.

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<sup>12</sup> Stephen Morgan, Ray White Echuca, supported the importance of Director approval where there is a beneficial interest rather than just the disclosure model in place in NSW. EAC Working Group Consultation Meeting, 23 July 2010.

<sup>13</sup> In addition to such financial disincentives, it should be noted that under s.81 of the Crimes Act 1958 it is an offence to obtain property by deception. In 2009 a Victorian estate agent was sentenced to three years in jail for such an offence for deceiving an elderly man as to the value of his house that the agent later purchased aware that the value of the house was twice what the agent paid the vendor.

(<http://www.theage.com.au/national/deceptive-real-estate-agent-wins-jailterm-cut-20091116-ihvz.html>)

<sup>14</sup> Peter Lowenstern, EAC Working Group Consultation Meeting, 23 July 2010.

<sup>15</sup> The Australian Livestock and Property Agents Association (ALPA) stressed the importance of the adherence of good estate agency practice and representing the interests of the principal in such circumstances where an agent represents both parties. Shane McIntyre, EAC Working Group Consultation Meeting, 23 July 2010.

Victoria, NSW, the ACT and Tasmania also feature additional principles in their legislation stating that the agent must act in the best interests of their clients and must not accept an appointment to act when to do so would place the agent's interests in conflict with that of the client. The Council considers such a provision important to replicate nationally as it sums up the essence of good estate agency practice and the agent or salesperson's obligations regarding conflicts of interests. In summary the harmonisation of conduct provisions, concerning conflicts of interest is feasible.

**Table – Summary of Conflict of Interest Conduct Provisions in Estate Agency Legislation in Australia**

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Agent or their employees or relatives must not obtain beneficial interest in (including purchase of property or referral to service provider) a property they have been appointed to sell</b>	✓ s.55 EAA	✓ s.84-87 ACT Act	✓ r.12 NSW Regs	✓ s.108G NT Act	✓ s.138, s.144 QLD Act	✓ s.24G SA Act	✓ s.22-23 TAS Act	✓ s.64 WA Act
<b>Provisions prohibiting beneficial interest do not apply if details have been disclosed and authorised by the client, the client is shown not to be disadvantaged or the agent demonstrates that they have acted fairly and reasonably.</b>	✓ s.55 EAA (disclosure includes approval by the Director)	✓ s.84-87 ACT Act	✓ s.47, s.49 NSW Act	✓ s.108G NT Act	✓ s.145 QLD Act	✓ r.16G SA Regs (disclosure includes approval by the Commissioner)	✓ s.22-23 TAS Act	✓ s.64 WA Act
<b>Agent must not retain commission from sale of a property which they have a beneficial interest in or profits from transaction must be paid back to client.</b>	✓ s.55 EAA			✓ s.108G NT Act	✓ s.145A QLD Act	✓ s.24G SA Act	✓ s.22-23 TAS Act	✓ s.64 WA Act
<b>Agent must not act for both vendor and purchaser.</b>		✓ s.77 ACT Act	✓ s.48 NSW Act r.13, NSW Regs			✓ s.24F SA Act r.16F SA Regs		
<b>Agent must act in best interests of client and must not accept authority to act if to do so would put the agent's interest in conflict with those of the client.</b>	✓ s.55 EAA	✓ r.8.12 ACT Regs	✓ r.6, r.11 NSW Regs				✓ r.10 TAS Regs	

## **7. A SNAPSHOT OF ETHICAL BEHAVIOUR CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

There are provisions in the legislation of each state and territory regulating property agents, which seek to establish the ethical behaviour expected of estate agency practitioners. This is an important area in terms of consumer protection regulation and ensuring that the industry upholds appropriate standards. Common themes emerge under the banner of ethical behaviour in the various statutes. These would include expecting agents or those conducting estate agency business to have an understanding of the law that regulates their activities, which is a fairly basic professional competency that ensures consumers can have faith that an agent acting on their behalf is complying with the legislative framework. Furthermore, agents are expected to uphold general principles of acting fairly and honestly and professional standards in terms of exercising due care, skill and diligence. Agents are expected to comply with the instructions of their client, communicate all offers, act in the best interests of their principal and not disclose any confidential information acquired. This clearly establishes the relationship between the agent and client and what consumers can expect when they engage the services of an estate agent. Overarching fair trading principles also apply in terms of agents not engaging in misleading or unconscionable conduct, which seek to protect the interests of consumers. In summary fair trading principles, transparency and fundamental professional standards –such as knowledge of the law, confidentiality and representing the interests of the client – govern estate agency practitioners operating throughout Australia.

### **Victoria**

The VIC PC Regulations provide guidance in respect to obligations imposed on estate agents and agent's representatives. These include the requirement that the estate agent and agent's representative possess a working knowledge of the Act, regulations and laws relevant to the industry (r.6, Vic PC Regulations) and ascertain all information relevant to an estate agency transaction or service (r.15 and r.23, Vic PC Regulations). An estate agent or agent's representative is unable to disclose any confidential information obtained while acting on behalf for a person unless instructed by the client or required by the law (r.7, Vic PC Regulations). They must act in accordance with the lawful instructions of the client, except when to do so would be contrary to good estate agency practice, and the best interests of the client (r.10, r.18, r.12 and r.20, Vic PC Regulations). An estate agent or agent's representative should communicate all offers regarding the purchase, sale or lease of a property made whether orally or in writing to the client (r.16 and r.24, Vic PC Regulations).

Furthermore, the Victorian PC Regulations set benchmarks for ethical conduct with estate agents and agent's representatives expected to act fairly, honestly and to the best of their ability (r.11 and r.19, Vic PC Regulations). The concept of what constitutes good practice is established with practitioners required to exercise due diligence, conduct themselves in a professional manner, keep landlords or vendors informed and complete work in a timely manner (r.13 and r.21, Vic PC Regulations). An agent or representative must also not knowingly induce a person to breach a contract of sale, letting, agency or any other kind of contract related to the estate agency practice (r.14 and r.22, Vic PC Regulations).

The Fair Trading Act 1999 (FTA) mandates that agents and representative do not engage in unconscionable conduct (s.7, s.8, s8a, FTA), use harassment or coercion regarding the payment or supply of services (s.21, FTA) or induce a purchaser to enter into a contract by

implying that a rebate or commission will be received in return for the contract being made (s.18, FTA). The FTA seeks to protect consumers by establishing ethical conduct by businesses by prohibiting practices that would constitute undesirable estate agency practice and encouraging transparency.

### **Australian Capital Territory**

The Australian Capital Territory is similar to Victoria in requiring licensed estate agents to have knowledge and understanding of the legislation relevant to carrying out their functions as an agent (s.8.2, Schedule 8, ACT Regulations). In addition, the ACT Regulations require that an agent acts honestly, fairly and professionally, must not mislead or deceive any parties in negotiations or a transaction or offer any inducements (s.8.4, 8.15, Schedule 8, ACT Regulations). The agent is also required to exercise reasonable skill, care and diligence, not engage in unconscionable conduct and always act in the best interests of the client unless to do so would be unlawful (s.8.5-7, , Schedule 8, ACT Regulations). The ACT Regulations require that an agent must not disclose any confidential information obtained while acting on behalf of a client, act in accordance with the terms of their authority to act and the instructions of the client and must keep the principal informed of all offers (s.8.8-10, 8.22, Schedule 8, ACT Regulations). Victoria and the ACT have remarkably similar provisions regarding ethical behaviour with an emphasis on agents acting in the best interest of the client and displaying all the characteristics than entail good estate agency practice.

### **New South Wales**

The NSW Act and NSW Regulations both feature schedule 1, which outlines rules of conduct for estate agents and their employees. Again, there is widespread consistency between the provisions in New South Wales and Victoria and the Australian Capital Territory. In NSW, agents are expected to have knowledge of the law, demonstrate honesty, fairness and professionalism while also exercising skill, care and diligence. Agents must act in the best interests of their client, except when to do so would be unlawful, and are not permitted to accept an authority to act where a conflict exists. An agent cannot disclose any confidential information learnt while acting for the client and must act in accordance with the principal's instructions. An agent is also not permitted to engage in harassment, coercion or unconscionable conduct while carrying out estate agency business (schedule 1, NSW Act, NSW Regulations).

### **Northern Territory**

The NT Act establishes rules of conduct that entail an agent being required to act in the best interest of the client, carry out the lawful instructions of the principal and exercise due skill, care or diligence when dealing with any person in the course of conducting business as an agent. An agent is also not permitted to disclose confidential information acquired while acting for the client and must make the principal aware all of the material facts and circumstances related to them acting as agent (s.65, NT Act). Furthermore, the NT Regulations mandate that an agent shall not advise their client on matters, which they are not trained or qualified or give an undertaking without the approval of the principal. The regulations also state that an agent should have due regard to and comply with the rules of real estate practice published or approved by the Real Estate Institute of the Northern Territory and guidelines for fair trading practices issued by the Trade Practices Commission (Schedule 4, NT Regulations). The sentiment of much of the NT rules of conduct is in line with provisions in Victoria, the ACT and NSW. The exception is requiring agents to comply with industry association guidelines, which seems a somewhat unusual provision to feature in legislation.

## **Queensland**

The QLD Act establishes regulations, which form a code of conduct, The Property Agents and Motor Dealers (Real Estate Agency Practice Code of Conduct) 2001 (QLD Code of Conduct Regulations) (s.154, QLD Act). The QLD Code of Conduct sets standards for estate agents, licensed employees and real estate salespersons as well as general principles of fair trading and accountability applicable to estate agency practice. Familiar themes also feature in the code of conduct such as requiring agents to have knowledge of the law, conduct themselves in a fair, honest and professional manner while exercising skill, care and due diligence (r.5, r.7-8, QLD Code of Conduct). Agents are also required to act in the best interests of those they represent, comply with the instructions of the client unless to do so would be unlawful and communicate offers or developments to the principal (r.9-11, QLD Code of Conduct). Agents must not engage in misleading or unconscionable conduct or induce a breach of contract (r.14-15, QLD Code of Conduct and s.573A-B, QLD Act, r.28, QLD Code of Conduct). All of these provisions are consistent with good estate agency practice principles found in the statutes of most other jurisdictions. The QLD Code of Conduct also states that agents must ensure that employees comply with the requirements of the code of conduct (r.12, QLD Code of Conduct). This area of accountability is an area, which will be explored, in further detail in the chapter of this paper exploring management and supervision provisions.

## **South Australia**

South Australia is somewhat different to the other jurisdictions in terms of provisions coming under the broad ethical behaviour banner in terms of not exploring the common themes of knowledge of law, non-disclosure of confidential information and following the instructions of the client. Rather the focus is on providing the client with a property valuation if requested (s.24E, SA Act), referrals to legal practitioners or conveyancers (s.29, SA Act) and conflicts of interest in terms of beneficial interests (s.16G, SA Regulations) and not acting for both the vendor and purchaser (s.16F, SA Regulations).

## **Tasmania**

The Tasmanian Regulations establish a code of conduct, which features common themes to the provisions of other jurisdictions regarding ethical behaviour of estate agency practitioners. Agents are not permitted to disclose confidential information, use such information in a prejudicial manner or unless authorised in writing by the client. They must also follow the lawful instructions of the principal, exercise due skill, care and diligence and not engage in unconscionable conduct. In addition, there is a provision addressing a general category of professional misconduct, which includes neglecting or delaying the completion of work, charging excessive fees, not meeting reasonable standards or acting dishonestly or fraudulently (r.45, Schedule 2, Tasmanian Regulations).

## **Western Australia**

The WA and Regulations establish that the Real Estate and Business Agents Supervisory Board may establish a code of conduct (s.101, WA Act, r.13, WA Regulations). The Code of Conduct again picks up many of the same themes in the agent acting in the best interests of the client and not accepting an authority to act when to do so would put the agent's interests in conflict with that of the client. The agent must also follow the lawful instructions of the principal, act fairly and honestly and exercise due skill, care and diligence. They must communicate all offers to the client, not disclose confidential information acquired while

acting in the role of agent, induce any breach of contract or engage in unconscionable conduct<sup>16</sup>.

### **Conclusion -The Feasibility of Harmonising Ethical Behaviour Conduct Provisions**

There is widespread consistency amongst the provisions addressing ethical behaviour of estate agents and representatives throughout the various jurisdictions, with the exception of South Australia. Provisions in South Australia focus more on issues associated with conflicts of interest rather than the common themes found in the legislation of the other jurisdictions. That being said this difference in approach in South Australia does not pose any significant impediments to the harmonisation of conduct provisions as overall the legislation reflects the broader principles of fair trading and good estate agency practice which are common to all Australian jurisdictions.

Victoria, New South Wales, the Australian Capital Territory and Queensland all have a provision requiring estate agency practitioners to have an understanding and knowledge of the law relevant to their business activities, including fair trading principles. The Council views this provision to be of critical importance in any best practice model and does not consider it to be inconsistent with the general sentiments regarding ethical behaviour expressed in other statutes which do not feature a specific provision regarding knowledge of the law. The REIV and Tenants Union of Victoria (TUV) also stress the overall importance of knowledge of law provisions<sup>17</sup>.

All jurisdictions except for South Australia and Queensland have provisions prohibiting agents or representative from disclosing confidential information they have acquired while conducting estate agency business on behalf of a client<sup>18</sup>. Such a provision ties into arrangements already in place regarding conflict of interest and in terms privacy legislation. It is recommended that such a clause be incorporated into a best practice model proposed under the harmonisation of conduct provisions. However, it must be acknowledged that an agent is also bound by the instructions of the client as well as relevant legislation (for example, a practitioner is not able to make false or misleading representations in responding to enquiries which would require them to disclose confidential information<sup>19</sup>).

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<sup>16</sup> Real Estate and Business Agents Supervisory Board Code of Conduct - [http://www.reba.wa.gov.au/Content/Agents/Code\\_of\\_Conduct.html](http://www.reba.wa.gov.au/Content/Agents/Code_of_Conduct.html)

<sup>17</sup> Peter Lowenstern, REIV, EAC Working Group Consultation Meeting (23 July 2010). Mark O'Brien, TUV, Submission to EAC Modernisation Review, May 2009.

<sup>18</sup> The REIV raised at the EAC Working Group Consultation Meeting (23 July 2010) that there may be circumstances whereby the agent is obliged to disclose confidential information in order not to breach their false or misleading representation obligations.

<sup>19</sup>This was recently reported in the press regarding the obligations of an agent to disclose that a property for sale was the site of an infamous double murder or be found in breach of false and misleading representation provisions, even though they may be disclosing confidential information or not acting in the interests of the principal. Source - <http://www.realestatereview.com.au/agents-required-to-disclose-the-history-of-the-property/> In NSW there is also the example of where an agent did not disclose that a murder had taken place at the property and was subsequently fined \$20,000 by the Tribunal and the deposit was returned to the purchaser and house put back on the market due to the religious beliefs of the purchasers being in conflict with residing in a house with such a history. Source -<http://www.smh.com.au/news/National/Gonzales-murder-house-drops-80000/2005/05/30/1117305546443.html>; <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWADT/2006/299.html?stem=0&synonyms=0&query=mahevi%20and%20pty%20and%20ltd> <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWADT/2006/257.html?stem=0&synonyms=0&query=mahevi%20and%20pty%20and%20ltd>

There is uniformity found amongst the states and territories (with the exception of South Australia) regarding featuring a provision which states that an agent or representative must act in accordance with the instructions of the client and the best interests of the principal. Victoria, the Australian Capital Territory, Queensland and Western Australia also feature a provision directing agents or representatives to communicate all offers to the client<sup>20</sup>. Both provisions are important in terms of clarifying the obligations of the agent to the client and thus should be featured in a best practice model, it is not envisaged this would pose any impediments to the overall task of harmonising conduct provisions.

The vast majority of jurisdictions feature provisions requiring agents or representatives to act fairly and honestly and exercise due skill, care, diligence and general standards of professional conduct. These are important principles to enshrine in the professional conduct or code of conduct regulations, which should be featured in any best practice model given their value and that they are common to virtually all state and territories<sup>21</sup>.

The Council also recommends that provisions regarding not knowingly inducing a person to breach a contract and not permitting agents or representatives to engage in unconscionable conduct are important safeguards to incorporate into a best practice model. Such provisions already feature in most jurisdictions regarding contractual obligations and ethical behaviour as well as state and territory fair trading legislation, although one could suggest that perhaps this represents legislative duplication.

In summary, the Council finds that there are no impediments posed to the harmonisation of conduct provisions concerning the ethical behaviour of agents and representatives as there is widespread consistency and much value to be gained from adopting a best practice model incorporating knowledge of the law, confidentiality, professional standards and fair trading requirements.

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<sup>20</sup> However the Sale of Land Amendment Regulations 2008 in Victoria regarding the auctioneer not accepting bids after the fall of the hammer may impede the communication of all offers.

<sup>21</sup> South Australia and the Northern Territory do not have a provision regarding agents acting fairly and honestly per se and South Australia also does not have a specific provision regarding exercising professional standards.

**Table – Summary of Ethical Behaviour Conduct Provisions in Estate Agency Legislation in Australia**

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Agent or representative to have knowledge of law.</b>	✓ r.6 VIC PC Regs	✓ s.8.2 ACT Regs	✓ Sched. 1 NSW Act and Regs		✓ r.5 QLD Code of Conduct			
<b>Agent or representative not to disclose confidential information obtained while acting as agent or representative and ascertain all relevant information.</b>	✓ r.7, r.15, & r.23 VIC PC Regs	✓ s.8.8 ACT Regs	✓ Sched. 1 NSW Act and Regs	✓ s.65 NT Act			✓ r.45 TAS Regs	✓ s.101 WA Act r.13 WA Regs
<b>Agent or representative to act in accordance with lawful instructions and best interests of the client.</b>	✓ r.10, r.18, r.12 & r.20 VIC PC Regs	✓ s.8.9, 8.10 & 8.7, ACT Regs	✓ Sched. 1 NSW Act and Regs	✓ s.65 NT Act	✓ r.9-10 QLD Code of Conduct		✓ r.45 TAS Regs	✓ s.101 WA Act r.13 WA Regs
<b>Agent or representative to communicate offers to client.</b>	✓ r.16 & r.24 VIC PC Regs	✓ s.8.22 ACT Regs			✓ r.11 QLD Code of Conduct			✓ s.101 WA Act r.13 WA Regs
<b>Agent or representative to act fairly, and honestly.</b>	✓ r.11 & r.19 VIC PC Regs	✓ s.8.4 ACT Regs	✓ Sched. 1 NSW Act and Regs		✓ r.7 QLD Code of Conduct		✓ r.45 TAS Regs	✓ s.101 WA Act r.13 WA Regs
<b>Agent or representative to exercise due skill, care, diligence and general standards of professional conduct.</b>	✓ r.13 & r.21 VIC PC Regs	✓ s.8.5 ACT Regs	✓ Sched. 1 NSW Act and Regs	✓ s.65 NT Act	✓ r.8 QLD Code of Conduct		✓ r.45 TAS Regs	✓ s.101 WA Act r.13 WA Regs

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Agent or representative to not knowingly induce a person to breach a contract.</b>	✓ r.14 & r.22 VIC PC Regs	✓ 8.15 ACT Regs			✓ r.28 QLD Code of Conduct			✓ s.101 WA Act r.13 WA Regs
<b>Agent or representative not to use harassment, coercion or unconscionable conduct.</b>	✓ s.7, s.8, s.8A, s.21, s.18, VIC FTA	✓ s.8.6 ACT Regs	✓ Sched. 1 NSW Act and Regs		✓ r.14-15 QLD Code of Conduct s.573A, s.573B QLD Act		✓ r.45 TAS Regs	✓ s.101 WA Act r.13 WA Regs

## **8. SNAPSHOT OF ADVERTISING CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

The provisions of the respective jurisdictions are remarkably similar regarding advertising. There is a requirement that estate agency advertising must feature the contact details of the person publishing the material. This ensures that consumers have a means of identifying the source of such published material and that agents are accountable for statements they make in advertising. Furthermore, there are provisions sometimes in the industry specific legislation as well as in each of the state fair trading statutes outlawing false or misleading representations generally, including in advertising and in relation to land. Such fundamental fair trading principles protect consumers and seek to ensure that appropriate good trading standards are maintained in business generally and more specifically in estate agency practice.

### **Victoria**

The EAA requires that an estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material (s.42, EAA). A similar provision exists in the FTA (s.29, FTA). This enshrines a degree of accountability for all material published. In addition, agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property and will be responsible for any misleading statements made in their advertising (s.42, EAA). Similar provisions also exist in the FTA regarding false or misleading representation (s.9, s.12. s.20, FTA), which seek to ensure fundamental fair trading principles are upheld and consumers can be confident that there is integrity to the representations made by estate agency practitioners.

### **Australian Capital Territory**

The conduct of estate agents or representatives with regard to advertising is addressed in the Australian Capital Territory by generic fair trading provisions prohibiting false or misleading representations (s.14, FTA ACT)<sup>22</sup>.

### **New South Wales**

As is the case in Victoria, the NSW Act requires that a licensee must not publish an advertisement unless the advertisement includes the name of the individual licensee, business name, the name of the partnership or corporation as applicable, thus making parties accountable for the material they publish (s.50, NSW Act). The NSW Act also states that a licensee must not publish anything in the course of conducting their business that is intended to promote the sale or lease of any property that is materially false, misleading or deceptive (whether to the licensee's knowledge or not). A statement is published if it appears in a newspaper or any other type of journal, is exhibited in public, delivered via direct mail, broadcast on radio or television or communicated via a website or electronic mail (s.51, NSW Act). There is also a specific provision in the FTA NSW regarding false and misleading representation or conduct in relation to land (s.45, FTA NSW).

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<sup>22</sup> In the Council's Modernising the Estate Agents Act 1980 (October 2009) it was suggested that it was not necessary to feature a provision regarding advertising in industry specific legislation, rather such an area of estate agency behaviour should be addressed by generic false and misleading representation provisions in fair trading legislation. The ACT demonstrates such a model.

## **Northern Territory**

The NT Act is similar to both Victoria and New South Wales in terms of requiring the name and address details of an estate agent to feature on all published advertising material (s.119, NT Act). The Northern Territory like New South Wales also features a provision in their fair trading legislation, which specifically addressed false and misleading representation with regard to land (s.45, FTA NT). Such provisions provide for transparency in advertising material and maintain fundamental fair trading principles.

## **Queensland**

In Queensland a real estate agent who is a principal licensee must not publish, or permit to be published, in a newspaper or elsewhere an advertisement for the agent's business without stating in the advertisement the particulars that may be prescribed under regulation (s.158, QLD Act)<sup>23</sup>. There is also a provision in state fair trading legislation that addresses false and misleading representation regarding land transactions, which would be pertinent to advertising requirements (s.40A, FTA QLD). Again, there is much common ground between the jurisdictions regarding advertising provisions.

## **South Australia**

In South Australia, the Land Agents Act 1994 (LAA SA) requires that an agent must not publish, or cause to be published, an advertisement relating to the sale of land or a business unless the advertisement specifies, alongside the agent's name or contact details, the agent's registration number preceded by the letters "RLA".(s.48A, LAA SA).

The SA Act also establishes a prescribed minimum advertising sales price for residential transactions, which mandates that any price representation featured in advertising, must reflect the range stated as the agents likely selling price (s.24, SA Act).

The LAA states that a person must not make a statement that is false or misleading (s.54, LAA SA), which is also reflected in state fair trading legislation which features a specific provision regarding representation and conduct concerning land (s.59, FTA SA). The FTA SA also grants the Commissioner the power to write to a person requesting that they substantiate claims made in published material concerning the sale or letting of premises (s.42, FTA SA).

South Australian legislation is similar to other jurisdictions in terms of requiring agents to feature information that can identify them on published material, although it is more specific in terms of requiring a registration number but less prescriptive regarding what constitutes the agent's contact detail (which presumably means that a website address could be deemed acceptable). . SA has additional provisions concerning substantiating claims made in advertising and prescribing price representations made in published material.

## **Tasmania**

In Tasmania, a real estate agent who publishes an advertisement in connection with his or her real estate agency business must ensure that the advertisement contains the real estate agent's

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<sup>23</sup> Similar provisions also exist in the QLD Act regarding residential letting agents (s.123), pastoral houses (s.195), property developers (s.273) and commercial agents (s.352).

name and the address of his or her authorised place of business (s.27, TAS Act)<sup>24</sup>. A real estate agent also must not publish information that the agent knows falsely states that a particular property or business is available for sale or lease or generally contains a false or misleading statement or representation (s.29, TAS Act)<sup>25</sup>. False and misleading representations regarding land are again addressed in state fair trading legislation (s.17, FTA TAS). Again, provisions in Tasmania concerning advertising reflect similar arrangements in place in other Australian jurisdictions.

### **Western Australia**

Under the WA Act, authorised advertising must contain sufficient details to identify the agent or developer in question and failure to feature such information in published material is considered grounds for avoiding a contract (s.62, WA Act). Fair trading legislation in WA also prohibits false representations regarding land (s.13, FTA WA).

### **Conclusion -The Feasibility of Harmonising Advertising Conduct Provisions**

The potential for the national harmonisation of conduct provisions concerning advertising is extremely high. There is widespread consistency because of uniform state and territory fair trading legislation addressing false or misleading representations/statements made in published material, which also manifests itself in similar provisions in estate agency legislation. At the national level the Australian Consumer Law (s.30, Trade Practices Amendment (Australian Consumer Law) Act 2010) addresses false and misleading representations concerning land. Rather than query whether there is the potential for harmonisation of conduct provisions addressing false and misleading conduct in the estate agency specific industry legislation of the various jurisdictions, perhaps the question is whether such provisions are necessary given that such an area is already addressed in the Australian Consumer Law (ACL). The REIV supports this stance contending that the ACL which applies to all businesses should also bind estate agency businesses rather than industry specific legislation<sup>26</sup>.

Similarly, while there is a high potential for harmonisation regarding conduct provisions requiring that advertisements must feature the contact details of the agent publishing the material, the question needs to be posed as to whether such provisions are necessary in industry specific legislation given that they already feature in terms of business name and fair trading legislation.

In summary, while the Council considers that both central elements of advertising conduct provisions are important and harmonisation is entirely feasible, it recommends that further thought be given in the context of developments at the national level regarding the ACL and business name regulation in order to avoid legislative duplication.

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<sup>24</sup> Similar provisions exist in the Tasmanian Act regarding property managers (s.28) and auctioneers (s.37).

<sup>25</sup> Similar provisions exist in the Tasmanian Act regarding property managers (s.30) and auctioneers (s.38).

<sup>26</sup> Peter Lowenstern, REIV, EAC Working Group Consultation Meeting, 23 July 2010.

**Table – Summary of Advertising Conduct Provisions in Estate Agency Legislation in Australia**

<b>Provision</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Advertising material must feature estate agent contact details.</b>	✓ s.42 EAA s.29 FTA		✓ s.50 NSW Act	✓ s.119 NT Act	✓ s.158 QLD Act	✓ s.48A LAA SA	✓ s.27 TAS Act s.23 FTA TAS	✓ s.62 WA Act
<b>False or misleading representations/statements are prohibited, including in advertising material.</b>	✓ s.42 EAA s.9, s.12, s.20 FTA	✓ s.14 FTA ACT	✓ s.51 NSW Act s.45 FTA NSW	✓ s.45 FTA NT	✓ s.40A FTA QLD	✓ s.54 LAA SA s.59 FTA SA	✓ s.29 TAS Act s.17 FTA TAS	✓ s.13 FTA WA

## **9. A SNAPSHOT OF REBATE REQUIREMENT CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA<sup>27</sup>**

### **Introduction**

The disclosure of rebates obtained by the agent or representative from any party other than the client is important in terms of transparency, which benefits both the consumer and the professional standards of the industry. Estate agents are not permitted to retain any rebates from third parties, which ensures that no additional monetary benefit is derived from a property transaction other than the commission paid by the vendor stated in the agency agreement meaning that the onus is on the agent to act in the client's best interests rather than being motivated by further possible financial gain. However, there is provision for agents disclosing rebates in the prescribed form, except in Victoria, which unilaterally prevents the retention of rebates, which ensures consumer confidence and overall transparency.

### **Victoria**

An estate agent engaged or appointed to do any estate agency work for a client is not entitled to retain any amount the agent receives from another person as a rebate and on receiving, any amount must immediately pay the sum to the client (s.48A, EAA). An estate agent must not seek to obtain an amount for any outgoings from the client that is more than the amount paid, or payable, by the agent for those expenses. If it is not possible to determine the final amount payable for any outgoings, the agent may estimate the amount and must immediately pay any difference between the estimate and the amount paid by the agent to the client (s.48B, EAA). An estate agent must detail any outgoings in the prescribed rebate statement, including the name of the person and amount involved, which must be approved by the Director (s.49A, EAA). A person who on three or more separate occasions within any period of twelve months engages in conduct that constitutes an offence against provisions regarding rebates is guilty of an offence (s.48D, EAA).

### **New South Wales**

The NSW Act states that an agency agreement must disclose rebates, discounts and commissions. Furthermore, a licensee is not entitled to any expenses from a person in connection with services performed by the licensee concerning a real estate transaction unless such expenses are contained in a statement that identifies the source and estimated amount of any rebates, discounts or commissions. This provision does not apply to commercial real estate transactions (s.57, NSW Act).

### **Northern Territory**

The Northern Territory addresses rebates in the broader context of general rules of conduct in terms of requiring agents to disclose all material facts and circumstances and prohibiting the acceptance or demanding of payment for service from anyone other than the principal (s.65, NT Act). Such provisions tie into sentiments regarding avoiding conflict of interest and providing for adequate disclosure to ensure transparency.

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<sup>27</sup> Comparable provisions for the Australian Capital Territory, Queensland and Western Australia have not been identified regarding rebate requirements.

## **South Australia**

In South Australia an agent must disclose to the client the nature, source and amount of any benefit the agent receives from a third person to whom the agent has referred the client, or with whom the agent has contracted, for the provision of services associated with the sale or purchase. Such a provision does not apply to a benefit disclosed in a sales agency agreement with the client (s.24C, SA Act). An agent must not also seek to obtain from the client an amount for expenses that is more than the amount paid or payable for those expenses by the agent. In circumstances where the agent refers the client to a third person for the provision of services associated with the sale or purchase of the residential land the agent must immediately pay the amount or value of the benefit to the client. If an agent fails to pay an amount as required, the client may recover the amount as a debt due to the person by the agent except in circumstances that the rebate has been disclosed in the prescribed form (s.24D, SA Act).

## **Tasmania**

Tasmania is consistent with other jurisdictions in terms of requiring agents to disclose any benefits received from a third party and being not entitled to recover for expenses unless detailed in a written statement (s.20-21, TAS Act). Such provisions apply to real estate agents and their representatives as well as property managers.

## **Conclusion -The Feasibility of Harmonising Rebate Requirement Conduct Provisions**

The Council considers the area of rebates worthy of significantly more deliberation in terms of the harmonisation of such conduct provisions. There needs to be a dialogue between the jurisdictions regarding the effectiveness of the Victorian system, which does not allow for the retention of any rebates, and whether disclosure is enough or there needs to be an additional consumer protection mechanism embedded in the process, such as requiring approval by the Director such as in Victoria. On the one hand, the aim of rebate provisions should be to protect consumers from estate agents not acting in their best interests due to possible financial gain via rebates. At the same time, regulation should not impede the estate agency business if there is no detriment posed to the consumer, for example, a retailer may obtain a rebate when buying in bulk and not pass this discount on to the consumer, who is still receiving the product that they paid for at the agreed price. The Council does not consider the harmonisation of rebate provisions unfeasible, but perhaps more work will be involved at arriving at a best practice model<sup>28</sup>.

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<sup>28</sup> This recommendation was supported by the REIV at the EAC Working Group Consultation Meeting, 23 July 2010.

**Table – Summary of Rebate Requirement Conduct Provisions in Estate Agency Legislation in Australia**

<b>Provision</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Disclosure of rebates required.</b>	✓ s.49A EAA (also need Director's approval)		✓ s.57 NSW Act (does not apply to commercial transactions)	✓ s.65 NT Act		✓ s.24C SA Act	✓ s.20 TAS Act	
<b>Must not retain any amount obtained from a third party unless disclosed in prescribed form.</b>	✓ s.48A EAA		✓ s.57 NSW Act (does not apply to commercial transactions)			✓ s.24D SA Act	✓ s.21 TAS Act	

## **10. A SNAPSHOT OF FALSE AND MISLEADING STATEMENTS OR REPRESENTATION CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

Provisions that do not permit false or misleading representation are a fundamental element of not only estate agency statutes, but also more broadly fair trading legislation, which applies to all businesses operating across Australia. Such provisions are important in terms of ensuring that consumers can have faith in the claims made by estate agency practitioners and are protected from deceptive conduct. They are also critical in terms of maintaining the professional standards of the industry.

### **Victoria**

The EAA, FTA and Sale of Land Act 1962 (SOLA) prescribe ethical conduct and industry standards regarding false and misleading misrepresentation<sup>29</sup>. The Act addresses this in terms of the estimated selling price stated on the engagement to sell (s.47A, EAA) and any subsequent representations made to buyers and sellers (s.47B, s.47C, EAA), all of which need to be able to be substantiated (s.47D, EAA). In addition, the SOLA prohibits the promise or publication of any statement that is misleading or deceptive with the view of inducing a person to buy land (s.12, SOLA). The FTA outlaws misleading and deceptive conduct generally, in relation to services and false representations made regarding services (s.9, s11, s.12, FTA). The use of bait advertising, accepting payment without supplying the services or misleading representations about certain business activities are specifically prohibited under the FTA (s.17, s.19, s.20, FTA). Consumer documents are required to be clearly expressed, legible and not contain false or misleading statements, while the supplier must provide a purchaser with a document containing the particulars of the services (s.161, s.163, FTA). Such provisions establish fundamental fair trading principles for those specifically working in the estate agency sphere through the industry specific acts and more broadly for all businesses through consumer protection legislation.

### **Australian Capital Territory**

Under the ACT Act agents or representatives are not permitted to make false representations to buyers or sellers about the estimated selling price and must be able to substantiate any claims made regarding price representation (s.88-89, ACT Act). The ACT Act also prohibits providing false and misleading statements, while the ACT Regulations address the use of false or misleading claims in advertising material for the purpose of soliciting clients and the terms of the agency agreement (s.169, ACT Act, s.8.16, s.8.18, ACT Regulations). The FTA ACT features generic provisions prohibiting false and misleading representation or conduct as well as a provision specifically addressing false representation regarding land (s.12, s.14, s.15, FTA ACT). Generally provisions in the Australian Capital Territory are fairly similar to those found in Victoria as both statutes are guided by fundamental fair trading principles outlawing false or misleading representation.

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<sup>29</sup> At the Commonwealth level similar provisions exist in the Trade Practices Act 1974 (s.52, s.53, s.53A) and Trade Practices Amendment (Australian Consumer Law) Bill 2010 (s.30, s.34, s.37).

## **New South Wales**

The NSW Act prohibits agents or representatives from making false or misleading representations regarding the estimated selling price to either buyers or sellers during the marketing of a residential property (s.72-73, NSW Act). Agents and representatives can be required to substantiate published price representations (s.74, NSW Act). Estate agency practitioners are also not permitted to use misleading, false or deceptive conduct to induce a person into entering into a contract (s.52, NSW Act). Broad state fair trading legislation also addresses misleading and false representations generally and specifically regarding land (s.42, s.44, s.45, FTA NSW). These NSW provisions are similar to those found in Victoria and the Australian Capital Territory.

## **Northern Territory**

The rules of conduct under the NT Act prohibit an agent or representative from publishing false or misleading statements, which are likely to deceive, or publishing price representations, which are higher or lower than the price authorised by the principal (s.65, NT Act). In the FTA NT addresses misleading and deceptive conduct as well as false and misleading representations regarding land (s.42, s.45, FTA NT). While the NT Act is not as prescriptive as some of the statutes in other jurisdictions it contains the same fair trading principle of outlawing false and misleading representation in both its industry specific and fair trading legislation.

## **Queensland**

Under the QLD Act, a licensee or registered employee must not engage in conduct that is misleading or make a false or misleading representation about the price payable for the property, any aspect of the letting, exchange or sale of property or regarding the promotion of the property (s.573A, 573C, s.574, QLD Act). Claims can be required to be substantiated (s.575, QLD Act). The QLD Act also puts in place a process regarding the agent providing comparable market sales data to the vendor to explain how they have arrived at the estimated selling price, which can also be provided to prospective buyers with the written consent of the principal (s.574C-D, QLD Act). The QLD Act also prohibits false and misleading statements being made to the chief executive, inspectors or public service employees or the provision of false or misleading documents (s.582-3, QLD Act). In addition, the FTA QLD prohibits false and misleading representations about land (s.40, FTA QLD). Queensland's provisions are in line with arrangements in other jurisdictions.

## **South Australia**

In South Australia the LAA prohibits the provision of false or misleading information, while the SA Act outlaws misrepresentation and inducing a person into a contract by providing false or misleading information (s.54, LAA, s.35-36, SA Act). In addition, the FTA SA features a provision addressing false and misleading representation and conduct regarding land (s.59, FTA SA). South Australia is consistent with other jurisdictions regarding having provisions in place in both estate agency and fair trading legislation to address false and misleading representation.

## **Tasmania**

In Tasmania, estate agents and property managers are not permitted to make false or misleading representations in published material (s.29-30, TAS Act). Furthermore, state fair trading legislation prohibits false or misleading conduct regarding land (s.17, FTA TAS).

Again, there are stylistic differences between the various statutes but widespread uniformity regarding the intention of the respective provisions.

### **Western Australia**

In accordance with the Western Australian Code of Conduct, an agent must act fairly and honestly, not knowingly mislead or deceive any parties in negotiations or during a transaction (s.101, WA Act)<sup>30</sup>. In addition, it is an offence for any person, firm or corporation associated with the business of auctioning to make or publish a statement that is false or misleading regarding the particulars of a property (s.24, ASA WA). The FTA WA also prohibits false representation regarding the promotion of land, inducing a person to enter into a contract regarding the sale of land, price representation or a person's interest in land (s.13, FTA WA). Again the themes regarding prohibiting false and misleading representations are featured in Western Australian legislation and the Code of Conduct, established under the Act.

### **Conclusion -The Feasibility of Harmonising False and Misleading Statements or Representation Conduct Provisions**

There is widespread consistency regarding false and misleading representation provisions across the various jurisdictions. There are stylistic differences with more detail in some industry specific acts, particularly around price representation, while other jurisdictions defer more heavily to their fair trading legislation. While the Council considers that, there is great potential for harmonisation, as stated in its Modernising the Estate Agents Act 1980 Final Report in October 2009, it questions whether there is a need to replicate false and misleading representation provisions in property agent conduct legislation. This seems unnecessary given that such fair trading principles are already addressed in the Australian Consumer Law, which applies to all businesses, including estate agencies, and nationally<sup>31</sup>. That being said the Council would welcome any provisions put in place that provided the marketplace with greater clarity regarding price representation and views substantiation clauses as an important mechanism to keep estate agency practitioners accountable for the representations they make to consumers.

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<sup>30</sup> Section 5.2, Real Estate and Business Agents Supervisory Board Code of Conduct - [http://www.reba.wa.gov.au/Content/Agents/Code\\_of\\_Conduct.html](http://www.reba.wa.gov.au/Content/Agents/Code_of_Conduct.html).

<sup>31</sup> The REIV made similar observations at the EAC Working Group Consultation Meeting, 23 July 2010.

**Table – Summary of False and Misleading Statements or Representation Conduct Provisions in Estate Agency Legislation in Australia**

<b>Provision</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Prohibit false or misleading representation/statements including re price representation.</b>	✓ s.47A-C EAA s.12, SOLA s.19-20, FTA	✓ s.88, s.169 ACT Act s.12, s.14-15 FTA ACT	✓ s.72-73, s.52 NSW Act s.42, 44- 45, FTA NSW	✓ s.65 NT Act s.42, s.45, FTA NT	✓ s.573A, s.573C, s.574, s.582-3, QLD Act	✓ s.54, LAA SA s.35-36, SA Act  s.59, FTA SA	✓ s.59, FTA TAS	✓ s.101, WA Act  s.24, ASA WA  s.13, FTA WA
<b>Substantiation of price representation claims made.</b>	✓ s.47D EAA	✓ s.89 ACT Act	✓ s.74 NSW Act		✓ s.575, s.574C- D QLD Act			
<b>False or misleading representation/statements in advertising.</b>	✓ s.42 EAA	✓ s.8.16 ACT Regs		✓ s.65 NT Act	✓ s.573A, s.573C, s.574, QLD Act		✓ s.29-30, TAS Act	✓ s.24, ASA WA

## **11. STANDARDS AND BEHAVIOUR CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA CONCLUSION**

The Council concludes that the conduct provisions addressing standards and behaviour, that is conflicts of interest, rebate requirements, ethical conduct, advertising and false representations, contain a degree of consistency throughout the jurisdictions as well as posing some interesting issues worthy of further consideration. An important opportunity exists to adopt the best practice elements of the various jurisdictions and consider whether there is a need to feature provisions in industry specific legislation concerning advertising and false statements, or this would be perhaps be better handled by deferring to such provisions under the Australian Consumer Law.

## **12. MANAGEMENT AND SUPERVISION CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

This paper will consider the following four elements of conduct provisions, which address management and supervision in legislation relevant to estate agency practitioners:

- **Place of business/ office** – the establishment of the registered office and required standards of management and supervision at the place of business.
- **Unlicensed employees** – creating a framework which prevents licensees from employing disqualified or ineligible persons and requiring estate agents to supervise and be responsible for the activities of their representatives/ salespersons.
- **Record keeping** – the maintenance of prescribed documents concerning real estate transactions, employee details and trust money for inspection and auditing.
- **Action re absence** – informing the authority in writing of the absence of the estate agent or branch manager for a period over thirty days.

These areas were selected due to either their overall importance to the regulation of estate agency practitioners, protection of consumers and upholding professional standards in the industry or potential for reform as part of the national harmonisation process.

## **13. A SNAPSHOT OF PLACE OF BUSINESS/OFFICE CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

The emphasis of this chapter is on provisions addressing the management and supervision of the estate agency office and establishment of the principal place of business, both of which are of fundamental importance in terms of consumer protection and the national harmonisation of conduct provisions, building on the establishment of the home jurisdiction under the National Occupational Licensing Scheme.

The establishment of the registered office and maintenance of current address information is an important form of consumer protection in terms of featuring a readily identifiable location where the consumer can contact the agent in the event that there is some sort of grievance. The requirement that each branch office must have a licensed estate agent in charge of day-to-day management builds upon the principle that each place of business must have a licensee in charge that is responsible for the proper supervision and management of the estate agency office.

### **Victoria**

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

The Victorian legislation creates a framework focussed on the accountability of the management of the estate agency office or place of business. A licensed estate agent or officer in effective control must be in charge of the principal office entailing substantial attendance at that office as well as proper control and supervision of the estate agency business. Procedures are expected to be put in place to ensure that all staff comply with the law and branch offices are appropriately managed (s.29B, EAA). A person must not manage the day-to-day operations of a branch office unless they are a licensed estate agent and must not act as the manager of another estate agency office (s.30, EAA).

### **Australian Capital Territory**

The ACT Act features similar provisions to those in place in Victoria such as the establishment of the main place of business as featured on the public register and requirement that the Fair Trading Commissioner must be informed in writing about any changes in details (s.68, ACT Act). Furthermore, a licensed estate agent must be in charge of the estate agency office and an estate agent cannot carry out business at more two or more locations unless a licensed estate agent is appointed responsible for the day-to-day management of the office (s.69-71, ACT Act).

### **New South Wales**

The NSW Act requires a licensee to have a registered office and in cases whereby the licensee has more than one estate agency office, a principal place of business must be nominated. The licensee is required to notify the Director General of any changes to the location of this office in writing (s.28, NSW Act). As is the case in both Victoria and the Australian Capital

Territory, the NSW Act requires that there is a person in charge in each office and when a licensee or corporate have more than one estate agency office they must appoint a licensed estate agent in each office to take on the role of branch manager (s.31, NSW Act).

### **Northern Territory**

The NT Act is broad in terms of just requiring that an office be maintained in Australia where business is conducted as per the terms of the licence with the registrar notified of the details of the office and instances where the licensee has more than one office, which location is the principal office (s.110, NT Act).

### **Queensland**

Under the QLD Act, a real estate agent's registered office is the principal place of business cited in the application for a real estate agent's licence or another place reported to the chief executive by the real estate agent in the approved form as the agent's principal place of business (s.156, QLD Act). The real estate agent must notify the chief executive in the approved form of any change in the real estate agent's principal place of business within 14 days after the change. This includes notifying the chief executive in the approved form and within 14 days after the opening or closing of an office location where the agent carries out business (s.157, QLD Act)<sup>32</sup>.

As is the case in other jurisdictions, a real estate agent must be in charge of the business, including in circumstances where there is more than one place of business (s.132, QLD Act). Similar provisions exist regarding pastoral houses, with business unable to be conducted unless another pastoral house, auctioneer or real estate agent is in effective control (s.171-72, QLD Act).

### **South Australia**

In South Australia, the licensed estate agent is required to properly manage and supervise the estate agency office, including in circumstances where there is more than one place of business (s.10-11, LAA). However, there are circumstances whereby a registered sales representative can be nominated in the approved form to supervise the place of business, although only a real estate agent can be responsible for the management of the office trust accounts (r.8A, r.9 LAR).

### **Tasmania**

The TAS Act provides that a real estate agent cannot carry out estate agency business at an authorised office. An agent must not necessarily be in full time attendance at that office but is responsible for the proper management and supervision of the place of business. An agent is not permitted to manage more than one office unless authorised to do on the grounds of proven competency and the multiple offices being based in the same geographical area (s.7, TAS Act). Similar provisions apply to property managers under the Act (s.8, TAS Act).

### **Western Australia**

The WA Act states that a licensee shall have a registered office within the state and any changes in details must be made by way of written notice to the registrar (s.36, WA Act). A similar provision exists regarding property developers (s.57-58, WA Act). A licensee must

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<sup>32</sup> Similar provision exist regarding residential letting agents (s121-22), pastoral houses (193-94), auctioneers (250-51), property developers (271-272) and commercial agents (350-51).

nominate a manager for each branch office (s.37, WA Act). The board must approve franchising agreements and each party to the agreement is jointly and severally liable for any defalcation by the licensee (s.56, WA Act).

### **Conclusion -The Feasibility of Harmonising Place of Business/ Office Provisions**

There is a high potential for the harmonisation of conduct provisions concerning the establishment of the registered office and management and supervision of the place of business.

The concept of the registered office location, whether the principal or branch office, and need to provide the authority of any change in address details is consistent throughout most jurisdictions. There is also a fair degree of uniformity concerning branch offices having a licensed estate agent in charge of the day-to-day management of the office, although South Australia allows for sales representatives to take on this role under certain circumstances and providing an estate agent is responsible for the maintenance of the trust account. As stated in the Modernising the Estate Agents Act 1980 Final Report (October 2009), the Council considers the establishment of the registered office to be a significant provision in terms of consumer protection, but worthy of further consideration in the context of the virtual office and the operation of national licensing across borders.

The Council would advocate a best practice model incorporating key features of the respective Victorian and Tasmanian Acts. Specifically sections 29B of the EAA in terms of management and supervision of the estate agency office, incorporating proper supervision, adequate processes being in place and ensuring employees comply with the law. Section 7 of the TAS Act also features a useful emphasis on responsibility for the activities of the estate agency office rather than necessarily full time attendance by the licensee. This position was supported by the REIV, ALPA and other attendees of the EAC Working Group Consultation Meeting (23 July 2010).

In summary, the Council views the harmonisation of provision concerning the establishment of the registered office and management and supervision of the place of business to be entirely feasible and of critical importance.

**Table – Summary of Place of Business/ Office Conduct Provisions in Estate Agency Legislation in Australia**

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Registered office</b>	✓ s.35 EAA	✓ s.68 ACT Act	✓ s.28 NSW Act	✓ s.110 NT Act	✓ s.156 QLD Act		✓ s.7-8 TAS Act	✓ s.36 WA Act
<b>Change in office details to be provided to the authority in writing.</b>	✓ s.35 EAA	✓ s.68 ACT Act	✓ s.28 NSW Act	✓ s.110 NT Act	✓ s.157 QLD Act			✓ s.36 WA Act
<b>Licensed estate agent in charge of branch office</b>	✓ s.30 EAA	✓ s.69-71 ACT Act	✓ s.13 NSW Act			✓ s.8A-9 LAR	✓ s.7-8 TAS Act	✓ s.37 WA Act
<b>Estate agency office to be properly managed and supervised</b>	✓ s.29B EAA					✓ s.10-11 LAA	✓ s.7-8 TAS Act	

## **14. A SNAPSHOT OF EMPLOYMENT OF UNLICENSED EMPLOYEES CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA<sup>33</sup>**

### **Introduction**

This section does not explore the process of registering real estate salespersons or agent's representatives, as this is an area for consideration in the context of licensing rather than the harmonisation of conduct provisions, which is the focus of this paper. However, it does examine the provisions which prevent unlicensed persons who have been disqualified or are ineligible from carrying out estate agency business. This system protects consumers from unsuitable persons acting on their behalf and ensures that the industry maintains high standards in terms of those employed by licensees. Another key consumer protection mechanism is the emphasis on proper management and supervision of unlicensed employees, which emphasises the importance of the responsibility of the licensee for the activities of their representatives.

### **Victoria**

The Act establishes a number of requirements regarding the employment of unlicensed persons in the estate agency office, namely agent's representatives.

An agent's representative is not permitted to carry out the duties of an estate agent unless authorised to do so in writing by the estate agent they are representing, at which point the estate agent becomes responsible in contract and tort for the activities of their representative (s.47, s.13A, EAA). An estate agent must not employ a person to act as an agent's representative while the person's name is on the register of ineligible persons (s.16, s.16B, EAA) and unless they have a current police check (s.16, EAA). An estate agent shall not employ a person who is currently disqualified from holding a licence, has had a claim allowed against the Fund or whose conduct or reputation indicates that they are not a fit and proper person to be employed in an estate agency (s.44, EAA). Any person that aids or abets a person who is not a licensed estate agent to carry out the business of an estate agent shall be guilty of an offence (s.29, EAA). Suspended or cancelled licences must be returned to the Authority in the timeframe identified by the Tribunal or within seven days of being notified of the cancellation (s.29A, EAA).

The licensed estate agent or officer in effective control must be in charge of the principal office entailing substantial attendance at that office and proper control and supervision of the estate agency business (s.29B, EAA). In addition, a person involved in the management or control of the estate agency business must not prevent or hinder another person from fulfilling their duties as estate agents and officers in effective control (s.29C, EAA).

An individual or corporation is not permitted to convey to the public that they are able undertake the functions of an estate agent for payment or other remuneration unless they are a licensed estate agent (s.12, EAA). Persons are also prohibited from falsely representing themselves by displaying for example a sign near their place of business suggesting that they are a licensed estate agent when this is not the case (s.38, EAA).

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<sup>33</sup> Specific provisions regarding the employment of unlicensed or ineligible persons were not identified in the Northern Territory.

## **Australian Capital Territory**

Under the ACT Act it is an offence for a licensed estate agent, business agent or stock and station agent to employ an unlicensed or deregistered person to perform estate agency functions, which can only be undertaken by a licensed practitioner (s.75, ACT Act). Employees are also obliged to inform their employer within five days of being notified about any disqualification (s.76, ACT Act).

## **New South Wales**

In NSW, a licensee cannot employ a person in connection without carrying out estate agency business on their behalf if they are disqualified, had their licence or certificate of registration cancelled or suspended or had their application refused on the grounds that they were not considered to be a fit or proper person (s.43, NSW Act). An employee must notify their employer of any disqualification within seven days and the licensee must inform the Director-General in writing within seven days of becoming aware that a person in their employment has been disqualified (s.44-45, NSW Act).

A licensee is responsible for the supervision of the registered salesperson as well as in contract and tort for the activities of their employee within the scope of their authority or functions performed for the benefit of the estate agency business (s.11, s.41, NSW Act).

## **Queensland**

In Queensland, a licensee must not employ an unregistered salesperson (s.164, QLD Act). Furthermore, the principal or licensee must ensure that the salesperson must be properly supervised, complies with the requirements of the Act and acts within their employment authority (s.129, QLD Act)<sup>34</sup>.

## **South Australia**

An agent who employs a registered sales representative must ensure that the person is properly supervised in that employment, in addition to the proper management and supervision of each place of business generally (s.8B, s.11, LAA). The Land Agents Regulations 1995 (LAR) also enquire a sales representative to be properly supervised by a person who is a registered agent or sales representative of at least two years standing (r.5, LAR).

## **Tasmania**

A real estate agent must not employ a person to carry out the functions of a property consultant unless the person has the qualifications required and the agent has published in the newspaper a notice stating that the consultant intends to be employed as a property consultant (s.10, TAS Act)<sup>35</sup>. A licensee must not employ a disqualified person in any capacity unless permission is granted by the Board (s.15, TAS Act).

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<sup>34</sup> Similar provisions apply to pastoral house salespersons, trainee auctioneers, property developer salespersons and commercial sub agents (s.169, s.206, s.264, s.340, QLD Act).

<sup>35</sup> Similar provisions apply to property managers and assistant property managers (s.9, TAS Act).

## Western Australia

A licensee commits an offence if they have in their employment a person who has had their licence or certificate of registration cancelled, unless granted permission by the Board (s.106, WA Act).

### Conclusion -The Feasibility of Harmonising Unlicensed Employees Conduct Provisions

While there is a degree of consistency across jurisdictions regarding provisions about disqualified persons being employed by, licensees and the proper supervision of unlicensed employees key questions must be asked. To an extent, this area is dependent on how agent's representatives or real estate salespersons are classified under the National Licensing Scheme. For example in contrast to other jurisdictions, Victoria has a negative licensing scheme for agent's representatives. In addition, conduct provisions about the proper management and supervision of the estate agency office already exist and it must be considered whether there is a need to duplicate such provisions specifically in respect to unlicensed employees. As suggested in its Modernisation Review, the Council is in favour of enshrining the accountability of the licensee for the activities of their representatives; however, it also sees merit in establishing a more streamlined best practice model with a focus on overall proper management and supervision, which would extend to unlicensed employees in the estate agency office, which was supported by the REIV<sup>36</sup>.

**Table – Summary of Unlicensed Employees Conduct Provisions in Estate Agency Legislation in Australia**

PROVISION	VIC	ACT	NSW	NT	QLD	SA	TAS	WA
<b>Licensee responsible for proper supervision and activities of the representative in their employment</b>	✓ s.47, s.13A, s.29B EAA		✓ s.11, s.41 NSW Act		✓ s.129 QLD Act	✓ s.8B, s.11 LAA r.5 LAR		
<b>Licensee must not employ disqualified persons and notify appropriate authority about any disqualification</b>	✓ s.16, s.16B, s.44, s.29A EAA	✓ s.75-76 ACT Act	✓ s.43-45 NSW Act		✓ s.164 QLD Act		✓ s.15 TAS Act	✓ s.106 WA Act

<sup>36</sup> Peter Lowenstern, REIV, EAC Working Group Consultation Meeting, 23 July 2010.

## **15. A SNAPSHOT OF RECORD KEEPING CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA<sup>37</sup>**

### **Introduction**

This section focuses on provisions requiring record keeping as part of the management of an estate agency business, rather than addressing trust account procedures in any detail<sup>38</sup>. The maintenance of documentation concerning real estate transactions, employees and trust account monies at the place of business that are available for inspection or audit seeks to ensure that appropriate processes are in place and produce transparency and accountability in the estate agency office, which ultimately prevents consumer detriment.

### **Victoria**

A number of record keeping processes must be adhered to as prescribed by the Act. An estate agent must keep any police report obtained in relation to an agent's representative for at least two years after the agent's representative ceases to be employed by the agent in that capacity (s.16 (7)). Estate agents are also required to keep a monthly written log of the name, work, salary and commissions of employees, which can be demanded for inspection and false entries in employee statements will be classified as an offence (s.46). In addition, an estate agent must keep all documents, including trust accounts and records, relating to the business carried on at the office available for inspection or audit (s.70B) and must not destroy, conceal or alter any document required to be retained for the purposes of the Act (s.98A). Records required to be kept by the Act or regulations must be maintained for seven years after the date when they were created (s.98). Finally the Act grants the power to make regulations prescribing the books, accounts, documents and records to be kept by licensed estate agents and agent's representatives and the manner in which they are to be kept and for what time period (s.99 (1) (d)).

### **Australian Capital Territory**

The ACT Act requires that an estate agent must record details of each transaction conducted, maintain any records prescribed by regulation and retain records for five years (s.127, ACT Act). Records must be kept at the place of business unless the Fair Trading Commissioner (s.128, ACT Act) approves an alternative location. Receipts must be given to the person paying trust money, while an agent must retain a copy of the receipt, this provision does not apply to electronic transfers (s.130, ACT Act).

### **New South Wales**

The NSW Act requires that records must be retained for three years and maintained at the licensee's registered office unless the estate agent ceases to trade at which time they must authorise the possession, custody and control of the record to another person (s.104, NSW Act).

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<sup>37</sup> Specific provisions were not identified for the Northern Territory regarding record keeping.

<sup>38</sup> The Council understands that a substantial amount of work has already been done regarding this area by the Working Group reporting to SCOCA, so it does not feel the need to duplicate work in this area.

## **Queensland**

The QLD Act requires that the principal licensee maintain an employee register, specifying each person's role and activities within the estate agency office (s.159, QLD Act). A similar provision applies to pastoral houses (s.196, QLD Act). A principal licensee must also keep a register of trust account receipt forms, trust account deposit forms in duplicate, trust account cash book and trust account journal of consecutively numbered folios (r.38, QLD Regulations). The principal licensee must ensure that if records are kept electronically the computer system has enough capacity and back up capability to record the information required to be kept under the Act, is backed up at least once a month and that back up information is kept at a location other than the principal place of business and is adequately stored (r.56, QLD Regulations).

## **South Australia**

In South Australia, trust accounts must be kept in a state that can be easily audited and agents must provide receipts to persons paying trust money in addition to retaining a duplicate copy (s.21, LAA). If trust account records are maintained electronically copies must be made with twenty four hours of any alteration being made and a back up copy must be completed once a week, which must be stored at a location other than the place of business (r.10A, LAR, r.20, SA Regulations). More generally, the SA Act requires that documents are retained at the place of business for five years and are readily available for inspection (s.37A, SA Act, s.21, LAA).

## **Tasmania**

Under the TAS Act, a real estate agent is required to keep a record of employees, in terms of their contact and employment details and function within the estate agency office (s.13, TAS Act). A similar provision applies to property management employees (s.14, TAS Act).

## **Western Australia**

Under the WA Act, a developer is required to keep records of real estate transactions (s.59, WA Act). A real estate agent must provide a person paying trust money with a receipt in addition to retaining a duplicate copy (s.69, WA Act).

## **Conclusion -The Feasibility of Harmonising Record Keeping Conduct Provisions**

There are jurisdictional differences regarding record keeping, but in general, there is agreement regarding the basic concept that an estate agency must keep the prescribed documentation regarding real estate transactions and trust money, which can be inspected or audited. However, thought needs to be given when adopting a best practice model to how keeping documents at the place of business fits with the concept of the virtual office and electronic storage of documents in an environment with estate agents doing business across jurisdictional borders. The Council also views enshrining provisions regarding processes for the maintenance of electronic records to be extremely important as did the REIV, ALPA and other participants at the EAC Working Group Consultation Meeting (23 July 2010). Victoria, Queensland and South Australia have such arrangements in place regarding electronic trust account records requiring regular backing up and retention of such back up material off-site. A best practice model would have to incorporate such provisions addressing electronic documentation, which would also modernise legislation that at times still struggles to come to terms with the emergence of technology in the estate agency office.

There is variation regarding the number of years records are required to be retained, from seven years in Victoria, five years in both the Australian Capital Territory and South Australia to just three years in New South Wales. The Council argues that it may be useful to have a longer timeframe for the retention of documents such as in Victoria because sometimes trust account deficiencies or offences, which become known through the auditing of records, cannot be detected for some time. Seven years is also model applied by the Australian Tax Office regarding the retention of records and thus this should be adopted as an appropriate benchmark<sup>39</sup>.

As suggested in the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009), provisions mandating the retention of a log of employee details such as in Victoria, Queensland and Tasmania seem unnecessary. Employee information is provided to the licensing authority, appears on the public register and would presumably be retained as part of general business processes, so it is not immediately clear why there is a need to have such provisions in industry specific legislation. The Council would recommend that such provisions were not incorporated into a best practice model as part of the national harmonisation of record keeping conduct provisions.

In summary, the Council sees potential for harmonisation of record keeping provisions with agreement about the general principle of the retention of documents concerning real estate transactions and trust money for a period of seven years. However, it argues that more work needs to be done to incorporate features like the electronic record keeping and give greater thought to document storage beyond the place of business.

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<sup>39</sup> The REIV, ALPA and other participants at the EAC Working Group Consultation Meeting, 23 July 2010, supported the retention of records for seven years.

**Table – Summary of Record Keeping Conduct Provisions in Estate Agency Legislation in Australia**

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>All required documents to be maintained and available for inspection or auditing</b>	✓ s.70B EAA	✓ s.127 ACT ACT						✓ s.59 WA Act
<b>Records retained for set number of years</b>	7 years ✓ s.98 EAA	5 years ✓ s.127 ACT ACT	3 years ✓ s.104 NSW Act			5 years ✓ s.37A SA Act s.21 LAA		
<b>Electronic records to be regularly backed up, with copies kept at a location other than the place of business</b>	✓ r.30-31 VIC Audit Regs				✓ r.56 QLD Regs	✓ r.10A LAR r.20 SA Regs		
<b>Maintain documents concerning employees details</b>	✓ s.46, s.16 EAA				✓ s.159, s.196 QLD Act		✓ s.13-14 TAS Act	
<b>Maintain trust account records, including receipts</b>	✓ s.63 EAA	✓ s.130 ACT Act			✓ r.38 QLD Regs	✓ s.21 LAA		✓ s.69 WA Act

## **16. A SNAPSHOT OF ACTION RE ABSENCE CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA**

### **Introduction**

Victoria features a unique provision regarding notifying the authority of the short-term absence of the estate agent or branch manager from the office. The intention of this section is to ensure that appropriate individuals manage branch offices even in the short-term absence of the branch manager. This is another accountability mechanism designed to ensure that the requirements of the Act are met, proper processes are in place and adequate supervision occurs even when there is a brief change in personnel. Such a provision aims to avoid such practices as licence lending as well by having a transparent system of who is in charge of the estate agency office.

### **Victoria**

Another feature of office management, supervisory arrangements and accountability structures within the EAA is that licensed estate agents or branch managers must write to the Authority when they are absent from the office in excess of thirty days, appointing a licensed agent or agent's representative to manage the office in their absence. For absences between seven to thirty days, the licensee must appoint a suitably qualified person to act in their absence but this does not need to be communicated to the Business Licensing Authority (s.30A).

### **Other States and Territories**

There are no comparative provisions in other jurisdictions regarding specifically informing the licensing authority about the absence of the licensed estate agent. Generally, management and supervision provisions would just apply in this space, for example in the TAS Act, full time attendance is not required but it is expected that management will be responsible for the operation of the estate agency office (s.7, TAS Act). The WA Act does feature a provision regarding informing the authority of long-term absences (schedule 2 (6), WA Act).

### **Conclusion -The Feasibility of Harmonising Action RE Absence Conduct Provisions**

Victoria is the only jurisdiction to feature a provision regarding the notification about the short-term absences of the estate agent or branch manager. The Council would not recommend that such a provision be included in a best practice model of harmonised conduct provisions.

In the Council's Modernising the Estate Agents Act 1980 Final Report (October 2009) it was recommended that section 30A of the EAA be repealed. The rationale was that the officer in effective control or agent is ultimately responsible for the estate agency business even in the event of their short-term absence due to ill health or recreational leave. This places the onus firmly on the principal agent for ensuring that suitably qualified staff and adequate processes are in place to allow good estate agency practice to continue even when they are temporarily away from the office. Improved communication channels in this modern era also mean one can virtually run an office off-site if necessary. Short-term staff absences occur in every business and systems need to be put in place to accommodate such periods. It is not clear why an estate agency office requires industry specific regulation to address such a routine people management issue. The Council perhaps understands the need for the authority to be notified in the case of long term or permanent changes in management, such as when the agent has been absent for ninety days such as in WA, but otherwise it views such a provision

as an unnecessary administrative burden with no real benefits. This position was supported by the REIV, ALPA and other participants in the EAC Working Group Consultation Meeting (23 July 2010).

**Table – Summary of Action RE Absence Conduct Provisions in Estate Agency Legislation in Australia**

<b>PROVISION</b>	<b>VIC</b>	<b>ACT</b>	<b>NSW</b>	<b>NT</b>	<b>QLD</b>	<b>SA</b>	<b>TAS</b>	<b>WA</b>
<b>Short term absences of estate agent or branch manager reported to authority in writing</b>	✓ s.30A EAA							

### **17. MANAGEMENT AND SUPERVISION CONDUCT PROVISIONS REGULATING PROPERTY AGENTS THROUGHOUT AUSTRALIA CONCLUSION**

Overall, while there is potential for harmonisation regarding management and supervision provisions amongst the jurisdictions, there are also many issues, which need to be addressed when forming a best practice model. For example while there is consistency regarding the existence of the registered office, a best practice model should incorporate the proper management and supervision of the estate agency office and there should be consideration given to what constitutes a place of business given the virtual office and national licensing allowing for working across jurisdictional borders. There is also a degree of uniformity regarding unlicensed persons working in the estate agency office but a need to consider how this role will function under the NLS. Jurisdictions share general principles regarding the maintenance of prescribed records about real estate transactions and trust money, but there is a need to consider for how long documents should be retained, whether documents need to be available at the place of business or there is greater potential for electronic document storage processes. Victoria was the sole jurisdiction to have a provision regarding the notification of the short-term absence of the estate agent or branch manager. It is contended that such a provision should be abolished with proper management and supervision provisions being part of a best practice model addressing such an issue.

## 18. CONSULTATION PROCESS

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 July 2010, the Council Working Group<sup>40</sup> 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 standards and behaviour and management and supervision. 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<sup>41</sup>.

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, REIV
- Peter Lowenstern, REIV
- Brett Philipp, Noel Jones Balwyn and REIV Delegate

### **Australian Livestock and Property Agents Association (ALPA) Delegation:**

- Shane McIntyre, Elders and ALPA Delegate<sup>42</sup>

### **Other Interested Parties:**

- Mario Bertone, Erden Property Agents
- Denise Maxwell, Workroom Productions
- Jane Moore, Real Estate Trainer
- Stephen Morgan, Ray White Echuca
- Barry Novy, Klinger Wood<sup>43</sup>

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<sup>40</sup> 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.

<sup>41</sup> It should also be noted that the REIV, ALPA and Jane Moore considered the Estate Agents (Professional Conduct) Regulations 1997 to be vastly superior to the current Estate Agents (Professional Conduct) Regulations 2008 operating in Victoria. It was recommended that the earlier incarnation of the regulations would be more appropriate to incorporate into a best practice model regarding the ethical behaviour of estate agency practitioners.

<sup>42</sup> Shane McIntyre is also the ALPA nominee on the Estate Agents Council, but was representing ALPA at this consultation meeting.

<sup>43</sup> Barry Novy is an industry member of the Estate Agents Council. He attended the meeting in his capacity as a practitioner in the commercial estate agency sector, rather than as a member of the Council Working Group.

## 19. FINAL REPORT CONCLUSION AND RECOMMENDATIONS

In conclusion, the Council recommends that Victoria advocate the following as part of the national harmonisation of conduct provisions:

<b>Standards and Behaviour</b>	
<b>Conflicts of Interest</b>	
Agents, their employees or relatives are prevented from obtaining a beneficial interest in a property, unless adequate disclosure including approval by the regulator has occurred in the approved form and the agent is not permitted to retain any commission or the title regarding such a transaction.	
The agent must act in the best interests of the client and if to do so places the interests of the agent in conflict with that of the principal, then the agent cannot accept the authority to act.	
The agent cannot act for both the vendor and purchaser unless the agent obtains written approval from both parties to act or it is demonstrated that the agent has acted in accordance with good estate agency practice in representing the best interests of the principal.	
<b>Ethical Behaviour</b>	
Estate agency practitioners are expected to have a working knowledge of sale of land, estate agency, fair trading or any other relevant legislation.	
Estate agency practitioners must not disclose any confidential information obtained while acting on behalf of a client unless to do so would place them in conflict with the instructions of the client or in breach of relevant legislation.	
Estate agency practitioners to act in the best interests of the principal, follow instructions of those who they are acting on behalf of and communicate all material matters, including any offers, to the principal.	
Act fairly, honestly, with skill, due diligence and generally in accordance with professional standards associated with good estate agency practice.	
<b>Advertising</b>	
Further consideration given to the need for industry specific provisions mandating contact details on all advertising material and outlawing false and misleading representations given that this area is covered by other legislation.	
<b>Rebate Requirements</b>	
Further consideration about prohibiting retention of rebates, disclosure and need for approval by the Director.	
<b>False and Misleading Representation</b>	
Further consideration given to the need for industry specific provisions prohibiting false and misleading representations given that similar provisions exist in the ACL.	
<b>Management and Supervision</b>	
<b>Place of Business/ Office</b>	
Further thought regarding what constitutes a registered office and the implications of the virtual office.	
There should be a strong focus in the legislation on the proper management and supervision of the estate agency office by the licensee and their responsibility for their employees and the activities of the business.	
<b>Unlicensed Employees</b>	
Licensees not to employ disqualified or ineligible persons and maintain proper supervision and management over all unlicensed employees in the estate agency office.	
<b>Record Keeping</b>	
Processes for maintenance of electronic documents enshrined in relevant record keeping provisions. Documents should be readily available for inspection or auditing but do not necessarily need to be kept physically at the registered office. Documents should be stored for seven years.	
<b>Action RE Absence</b>	
Authority only notified when absence relates to more permanent, long-term absence from the office, e.g. ninety days. General management and supervision provisions to address short-term absences.	

The Council makes these recommendations focussed on protecting consumers, reducing the regulatory burden on industry and creating a best practice model of conduct provisions concerning standards and behaviour and management and supervision that compliments national licensing rather than presenting any impediments.