

11 March 2016

Our ref: AN:12720:ms
Your ref:

Consumer Property Law Review
Policy and Legislation Branch
Consumer Affairs Victoria
GPO Box 123
Melbourne VIC 3001

By email to: consumerpropertylawreview@justice.vic.gov.au

Dear sir/madam,

Re: Estate Agents Act 1980

Please find attached our submission concerning aspects of the *Estate Agents Act*.

The submission is particularly directed to the matters raised in point 2.4 of the Consumer Property Acts Review Issues Paper No. 1.

Yours faithfully,

**NICHOLSONS
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Thank you for the opportunity to provide comments in respect of aspects of the Estate Agents Act 1980 ("the Act") as part of the Consumer Property Law Review being conducted by your Branch.

1. This submission focuses on the adequacy of the present measures in the Act that are designed to ensure that consumers are able to compare estate agent fees or commissions and make an informed purchasing decision based on representations by those agents.

Those measures were described by Smith J in *TJ Board & Sons Pty Ltd v BGG Pollard Pty Ltd*:¹

"The purpose of the provisions is, presumably, to inform and so empower potential clients of estate agents to negotiate commission and expense arrangements. In those aims, it might be said to recognise an imbalance of bargaining power between estate agents and their prospective clients."

2. It is noteworthy that the current National Consumer Policy Objective, adopted in mid 2011, is "to improve consumer well-being through consumer empowerment and protection, fostering effective competition and enabling confident participation of consumers in markets in which both consumers and suppliers trade fairly". There are six supporting objectives:
 - To ensuring that consumers are sufficiently well-informed to benefit from and stimulate effective competition;
 - To ensure that goods and services are safe and fit for the purposes for which they were sold;
 - To prevent practices that are unfair;
 - To meet the needs of those consumers who are most vulnerable or are at the greatest disadvantage;
 - To provide accessible and timely redress where consumer detriment has occurred; and
 - To promoting proportionate, risk-based enforcement.²
3. It is fundamentally dishonest and anti-competitive to represent to a consumer that the only professional fee they are paying to their service provider is an agreed

¹ [2000] VSC 497

² See the Charter of Terms of Reference for Consumer Affairs Australia and New Zealand accessible at http://consumerlaw.gov.au/files/2015/09/Companion_to_OECD_Toolkit.pdf at page 3-4.

amount when in fact the provider is receiving other direct or indirect benefits. The more so when it is contended by the service provider that an outgoing cost that is being passed on to the consumer is, in reality, costing the service provider less than the amount disclosed to the consumer.

4. The scheme of the Act is, by s. 50, that an estate agent is not entitled to take or keep payment for its commission or any outgoings incurred unless the agent has complied with s. 49A(1), has not breached s. 49A(2) and has complied with both s. 48A and s. 48B.
5. Compliance with s. 49A(1) necessitates the agent, inter alia:
 - Informing the consumer that the amount of commission payable and any money payable in respect of outgoings are subject to negotiation.³
 - Referring in the engagement document to details of the commission and outgoings that have been agreed.⁴
 - Providing a rebate statement that is in a form approved by the Director of Consumer Affairs Victoria⁵ ("Approved Form").⁶
6. The requirement for provision of an approved rebate statement was brought in by the *Estate Agents and Sale of Land Acts (Amendments) Act of 2003*⁷.
7. On 30 April, 2003 the then Attorney General Mr Hulls in making the second reading speech in respect of the Estate Agents and Sale of Land Acts (Amendments) Bill observed:

"The bill will also enable the regulations **to specify consumer protection information** that must be given by estate agents to consumers of estate agency services. **This information will cover matters such as negotiating the agent's commission, entering into a contract with an agent to sell or manage a property, warnings about engaging in prohibited auction practices, and advice on underquoting and overquoting, rebates and dispute avoidance and resolution processes.** It is hoped that, through the provision of this information, consumers will be better informed of their rights and responsibilities when engaging the services of an estate agent."⁸ (emphasis added).
8. The Approved Form (referred to in point 5) states, immediately after its heading:

"Important information for Vendors/Landlords

³ Section 49A(1)(b) of the *Estate Agents Act*

⁴ Section 49A(1)(c)(i) of the *Estate Agents Act*

⁵ As defined in section 3 of the *Australian Consumer Law and Fair Trading Act 2012*

⁶ Section 49A(1)(c)(iii) of the *Estate Agents Act*

⁷ The original form of this provision as introduced by the *Estate Agents (Amendment) Act 1994*, was to require the agent to provide "a statement identifying the source and the estimated amount of any rebate, discount or commission that the agent may receive in respect of any advertising expenses or other outgoings that the agent may incur on behalf of the person"

⁸ Hansard 30 October, 2002 page 1042.

A rebate includes any discount, commission, or other benefit, and includes non-monetary benefits. It is illegal for an Agent to keep any rebate they receive for advertising or other outgoings purchased by the Agent on your behalf. Section 48A of the Estate Agents Act 1980 requires the Agent to immediately pay you any rebate they receive in relation to the sale, management or leasing of your property. The agent is not entitled to retain any rebate and must not charge you an amount for any expenses that is more than the cost of those expenses.”

9. The evident purpose of these opening words is, in effect, to inform the agent’s customer that they are protected from any risk that their agent is somehow benefiting from the process of conducting the sale of their property to any extent greater than the commission the customer has agreed to pay for the agent’s services.
10. Put another way it is the clear purport of the notification in the Approved Form that a consumer can feel comforted that their agent is not receiving any secret commission or benefit and that the commission agreed to be paid to the agent is the entire remunerative benefit the agent is going to receive.
11. It is, in our submission, regrettable that while the literal assertion appears to be correct (inasmuch as it quotes the statute) the impression that is given is actually misleading.
12. In our submission a reasonable consumer would not be expected to regard the assertion contained in the Approved Form as permitting their agent to receive additional remuneration through the device of passing that benefit onto an entity that is not legally recognised as an “agent” by the *Estate Agents Act*. The Approved Form is therefore misleading and should, for example, include words to the effect that “Despite the prohibition described above an agent may receive discounts, commissions or other benefits including add on costs by engaging a related entity to provide services that the agent may claim to be outgoings and then receive those discounts, commissions or benefits into that related entity.”
13. The difficulty with the drafting of the prohibition in s. 48A was pointed out in the course of Parliamentary debate when, on 30 October, 2002, it was observed by Mr Perton (then in opposition) that:

“Not only is there the problem of junketing, but a very excellent solicitor, Mr Rohan Ingleton, a partner in Maddocks, who supports the thrust of the legislation wrote an excellent analysis and sent it to me on behalf of his clients. He says:

“The new section 48A provides that an agent is not entitled to retain any rebate it receives and must pay any amount it receives to the vendor. The section is intended to overcome the current situation in which agents receive an advertising rebate for placing a certain amount of advertising so that the agent effectively charges the vendor for advertising and receives a percentage of that by way of a rebate from the relevant newspaper. The section could be easily overcome by an agent setting up a

related company which would be entitled to receive the rebate. I believe this is an obvious omission in the section and needs to be urgently addressed.”⁹

14. The quoted observation might also have referred to the ability such a related entity would have to add its own administrative costs and a profit margin to the actual cost of providing the advertising or outgoing thereby enabling the “marked up” cost to be classified as the outgoing cost to be met by the agent.
15. The ability of an agent to effectively launder the rebates and benefits the agent receives from service suppliers by use of a related entity and to secretly enhance its commission by marking up the true cost of supply without offending s. 48A and therefore having any impact on the right to receive commission leaves it open for unscrupulous agents to flout the evident intent of legislative scheme.
16. It is submitted that the obvious solution to ensuring that agent’s comply with the intent of the legislative scheme is to require disclosure of the details of any rebate, benefit, commission or cost recovery receivable by any related person to the agent and or to require the agent to disclose whether any cost of an outgoing will be paid to a related person or to any person other than the actual provider of the service.
17. For the purposes of disclosure the Act could include a definition of “related person” along these lines:

“A person is a **related person** to an **estate agent**, who is or was at any material time alone or in combination with another person the holder of an **estate agent’s licence**, if that person or any other persons holding that licence:

- (a) being a body corporate is:
 - (i) a related entity to one of those persons (as determined under the *Corporations Act 2001*);
 - (ii) a related person to one of those persons (as determined under the *Corporations Act 2001*);
 - (iii) an associate of one of those persons (as determined under the *Corporations Act 2001*); or
 - (iv) a subsidiary or holding company of one of those persons; or
- (b) being a natural person is:
 - (i) a related entity to one of those persons (as determined under the *Corporations Act 2001*) as if the definition of “related entity” under that Act included natural persons as well as bodies corporate; or
 - (ii) a related person (as determined under the *Corporations Act 2001*) to one of those persons or of any person who would be a related entity under clause (b)(i); or
 - (iii) an associate (as determined under the *Corporations Act 2001*) of one of those persons or of any person who would be a related entity under clause (b)(i); or

⁹ Hansard 30 October, 2002 page 1042.

- (c) being a body corporate or natural person who is alone or in combination with other persons the trustee of a trust, which has:
 - (i) any person who is determined to be a related person under clause (a) or (b) who is (whether alone or in combination with other persons) empowered to remove, replace or appoint a new trustee to that trust; or
 - (ii) any person determined to be a related person under clause (a) or (b) who is a beneficiary of that trust and who has received any distribution from that trust; or
 - (d) the person or any related person (as determined under clause (a), (b) or (c)) has the capacity to determine the outcome of decisions about the other persons financial or operating policies.”
18. Section 48A(2) penalizes an agent who fails to comply with the requirements for returning the benefit to their client. That provision is conditional on the agent receiving the benefit. Where an interposed related entity receives the benefit there is no offence for failure to return that benefit to the agent’s client. This hiatus should be rectified by either:-
- (a) Making it an offence for the related person to fail to pay the benefit to the agent or for the agent to fail to pay any benefit received from the related person to their client; or
 - (b) Making it an offence for the agent to fail to pay to their client any benefit received by any related person.