

16 May 2017

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

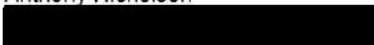

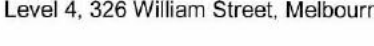
Dear Sir/Madam,

**Re: Options for Reform Document concerning Estate Agents and
Conveyancers**

Please find attached our submission concerning Options 22A and 22B in the Estate Agents and Conveyancers: Options for Reform document.

Yours faithfully,

**NICHOLSONS
LAWYERS & CONSULTANTS**

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**SUBMISSION RELATING TO OPTIONS 22A AND 22B OF THE ESTATE AGENTS AND CONVEYANCER:
OPTIONS FOR REFORM DOCUMENT**

1. This submission supports both option 22A and 22B set out in the Estate Agents and Conveyancer: Options for Reform document.

General Remarks

2. In 2016 his firm provided a submission as part of the Consumer Property Law Review setting out our views on the current provisions in sections 48A and 48B of the *Estate Agents Act* (“*The Act*”) and suggesting an expansion to the width of persons required to make disclosure (referred to in this submission as the “2016 Submission” a copy of which is attached).
3. The perceived purpose of the current provisions is to enable clients of estate agents to make an informed decision about who to engage as their estate agent or more accurately the terms on which any estate agent they might contemplate engaging is truly being engaged.
4. Another motivating factor is the arguably fiduciary nature of the relationship between an estate agent and their client¹. Traditionally the law does not permit a fiduciary to profit from his relationship with their client without express permission.²

¹ Described on the New South Wales Fair Trading site as at 8 May, 2017 under the heading “Property Agents & Managers> Rules of Conduct> Conduct Requirements> Duty of Disclosure” in the following terms: “Agents need to be acutely aware of the fiduciary nature of the relationship with their client (the principal). The

5. Secret commissions or indirect gains are, in our submission, clear examples of unauthorised benefits given they are, by their nature, typically hidden from the knowledge of the estate agent's client. In addition, as pointed out in our 2016 Submission, such commissions or gains have the potential to defeat the aims of regulatory regimes directed towards encouraging effective competition and a fair market.
6. Achieving adequate disclosure and enabling consumers to differentiate between service providers requires a regulatory system that provides a compelling obligation on estate agents to set out in simple terms to the consumer the true nature of the benefits they will receive through their appointment.
7. Ultimately only the estate agent as an individual or as part of a business will be in a position to fully appreciate their prospects of receiving direct or indirect benefits arising from their dealings with third parties in the conduct of a sale. Consequently the onus ought be on the estate agent to provide full and frank disclosure as to the nature and value of benefits and to be penalised for objectively failing to do so. Penalties for failures to make full and frank disclosure can include those presently provided for by *The Act* in terms of loss of commission and the specific offences. By amendment provision can also be made for penalties arising from a failure to make full and frank disclosure and for instances of multiple or consistent failure to do so.
8. Generally it is submitted that both Option 22A and Option 22B together have the potential to achieve the most effective outcome and to address the majority of concerns. Consumers who are armed with full knowledge would be in a position to elect how they would be prepared to allow their estate agent to deal with the disclosed benefits an estate agent would be required to provide. Where necessary the parties could negotiate a satisfactory position.

relationship between principal and agent places an agent in a position of trust, confidence and responsibility in which their foremost duty is to act in the best interests of their client and deal ethically with all parties involved in property transactions.

Agents must always deal with their clients free of the influence of any interest which may conflict with their client's best interests. These general principles are set out in the Conduct requirements which apply to all licence and certificate holders."

² *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2009) 70 ACSR 1 where Owen J noted "In my view the state of the law is this. Where a person has undertaken to act in the interests of another and where the nature of that relationship, its surrounding circumstances and the obligations attaching to it so require, it will be held to be fiduciary. But the fact that it is categorised as fiduciary does not mean that all of the obligations arising from it are themselves fiduciary. Unless there are some special circumstances in the relationship, the duties that equity demands from the fiduciary will be limited to what I have described as the core obligations: **not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict**. They stem from the fundamental obligation of loyalty". Emphasis added.

9. The guiding principles should be that following from disclosure the consumer can choose whether to allow the estate agent to keep a benefit or refuse to use the service provider who would supply that benefit or to negotiate an alternative position. Initially the estate agent should be permitted to propose how each benefit ought be dealt with, eg, by repayment of a rebate ranging to making no adjustment at all. The consumer should have a clear understanding that they are permitted to negotiate their particular arrangements with their estate agent in respect of the various disclosed matters.

Effective full disclosure & options for consumers

10. As noted in the commentary to Option 22A specific disclosure requirements could “simply drive providers of such goods and services to develop innovative ‘rewards’ that do not fall into the definition of ‘benefit’”.
11. This difficulty is a common outcome of regulatory requirements that attempt to categorise all actual and potential classes of benefits. In our submission there is no obvious reason why specific heads of “benefit” to be disclosed need be identified and particularised. Rather the general nature of the benefit should be categorised in the disclosure.
12. Categories to be used in making disclosure could include:
- Benefits by way of cash payments, rebates or discounts received or receivable by an estate agent or a related person to an estate agent by reason placing a particular order with a third party for any goods or services.
 - Benefits by way of cash payments, rebates or discounts received or receivable by an estate agent or a related person to an estate agent by reason placing orders with a third party for any goods or services either over a period, in some quantity or to some value.
 - Benefits by way of valuable goods or services received or receivable by an estate agent or a related person to an estate agent by reason placing a particular order with a third party for any goods or services.
 - Benefits by way of valuable goods or services received or receivable by an estate agent or a related person to an estate agent by reason placing orders with a third party for any goods or services either over a period, in some quantity or to some value.
 - Any other valuable benefit or advantage of any kind received or receivable by an estate agent or a related person to an estate agent that those persons would not have reasonably been likely to receive if a particular order had not been placed with a third party for any goods or services.

- Any interests held by the estate agent or a related person by way of shareholdings or equity in providers of goods or services that are public companies trading their shares or equity on the stock exchange. (As a separate item to the exclusion of the above.)
 - Any other valuable benefits to the agent or a related person not disclosed in the above categories.
13. Full and frank disclosure would require the estate agent to provide a reasonable description of the nature of the benefit and where reasonably possible to assign a value to that benefit.
14. To prevent the use of “Chinese Walls” or deliberate structures designed to quarantine information the giver of disclosure should also be required to make such enquiries as are reasonable of their employees, business associates and their related persons before giving disclosure.
15. Disclosure would be limited to the situation that is known to exist by the maker (either personally or following due enquiry) at the time when disclosure is given. The time for disclosure should be both prior to appointment and immediately prior to any order being placed for provision of a good or service if the situation prevailing at the time of the first disclosure has changed. Where new disclosure is required to be made the estate agent’s client should have the right to terminate the retainer for no cost or to elect to proceed on terms permitting the order to be placed, requiring some form of discount where a benefit is identified or requiring the estate agent to use an alternative provider of the goods or services.
16. By way of example if an estate agent were to be engaged for a typical house sale in the following circumstances:
- A proposed internet advertising estate agency (ABC Internet Ads) gives a 10% rebate to an estate agent if the estate agent refers advertising to a value of \$50,000 or more in a month. It is the beginning of the month and no order has yet been placed. In the previous month \$80,000 in advertising was placed and a rebate of \$8,000 was received.
 - A sign maker (Great Signs) used by the estate agent is offering to do a free sign for a school fete nominating the estate agent’s business as the provider of the sign if the estate agent promotes their company to do its signs in a particular area.
 - A photographic company (Land Shots) that the estate agent proposes to use is operated by the estate agent’s brother.
 - The estate agent company’s directors’ spouses own a company that operates a trust which includes those directors and their families as beneficiaries. The company (Book An Inspection) provides buyer inspection services to estate agents, ie, providing for a fee a service that is usually part of the estate agent’s usual services, and any profits are

distributed in the most tax effective way to the directors of the family members. The directors also receive a salary for consultancy services.

- The estate agent and their business partner's super fund owns shares in a publicly owned newspaper (Fairfax Media) that is proposed to be used to publish details of the property for sale.
- The home furniture rental service (Flashy Interiors) proposed to be used by the estate agent is also an influential member of a very exclusive golf club with a long waiting list that the estate agent wishes to join and has suggested that work referrals would assist the estate agent's spouse's cause if that person were to apply for membership.
- The estate agent has a potential interest as a beneficiary under a family trust that operates a cleaning company (Neat Homes) that the estate agent wishes to appoint. The trustee of the family trust is a company controlled by the estate agent's brother. The trust has never made a distribution to the benefit of the estate agent or any of the estate agent's immediate family or any business that benefits them.

A form of disclosure might take the form of the document attached to this submission described as EXAMPLE OF DISCLOSURE STATEMENT.

17. As suggested above the disclosure ought also include provision for the consumer to accept the proposed treatment of a benefit in the manner suggested by the estate agent. The EXAMPLE OF DISCLOSURE STATEMENT also contains various proposed options that a consumer might be invited to select in order to deal with any benefits in an acceptable manner. It also includes a form of notice advising the consumer of their right to reject any proposal, to negotiate an alternative or to reject the proposed engagement.
18. For enforcement purposes it should be presumed that any relationship between the estate agent and a provider of a service that is engaged by the estate agent that might result in a direct or indirect benefit should be presumed to be one that does result in such a benefit unless it is reasonably the case that no such benefit could have been expected to flow at the time when the disclosure was made.

Comments on points raised in discussion of the Options

19. This submission does not support the imposition of a regulatory regime on providers of services to estate agents. We would regard such legislative intervention as requiring the supplier to police the conduct of estate agents and potentially of those persons who might be related in some way to active estate agents (if it were to be effective such related parties would need to be included). There is no obvious justification for passing on the responsibilities and the inconvenience of compliance to parties who are otherwise merely providing services to customers that might include estate agents.

20. There may, however, be some justification for a power to be introduced into *The Act* that authorises an investigator to compel production of information relating to the giving of direct or indirect benefits by a business to an estate agent by reason of any business association with that estate agent in order to better enforce the disclosure requirements of *The Act*.
21. While some benefits may take time to manifest the fact of their late manifestation does not alter the fact that the estate agent either knew or did not know, at the time of using the service provider, that they stood to receive a benefit through having done so. If the estate agent had no objectively reasonable basis for believing that a benefit might flow then no disclosure would be necessary. If there was an objectively reasonable basis for such a belief then disclosure would have to be made. A 2 year time frame would not assist in the making of disclosure in this respect. It may be, however, that a time period would be relevant in the context of a proposed method to deal with a benefit that could be presented to a consumer.
22. Following from the above point if an experienced estate agent knew that a particular supplier had a history of rewarding its larger customers with an international holiday it might be absolutely reasonable for that estate agent to expect similar treatment might flow to them as well at some future time. It would be reasonable, based on the information the estate agent knew, to make disclosure of that possibility. The estate agent could then invite the consumer to simply allow the agent to take that benefit if it were to flow to them. Alternatively the estate agent might attempt to negotiate some kind of monetary allowance in favour of the consumer that represented that possibility. Ultimately the consumer, in a situation where they have been fully informed, would have little cause for complaint.
23. This submission has adopted a position of requiring disclosure of interests in publicly traded companies despite the unlikelihood that an estate agent would benefit to any greater degree than the consumer who, like the estate agent, could invest in that entity and receive like benefits. It is conceded that generally speaking investments by holding equity in such companies ought not generate any significant need to offer an adjustment to reflect the benefit. Nevertheless disclosure of all benefits would be a consistent approach even if the appropriate proposal to the consumer was no more than that they too could invest in the same entity if they elected to do so.
24. As noted above this submission does not regard Option 22A and Option 22B as necessarily being alternative responses to the issues of concern. A combination of the two is to be preferred.

EXAMPLE OF A DISCLOSURE STATEMENT (based on the facts described in the submission):

DIRECT AND INDIRECT BENEFITS DISCLOSURE BY ESTATE AGENT & PROPOSED TREATMENT OF THOSE BENEFITS.

NOTICE TO CUSTOMER

This document sets out the nature of any direct or indirect benefits that we as your estate agents or persons related to us might receive as a result of us obtaining goods or services from third parties in the course of conducting the sale of your property or other asset. It also sets out the manner in which we propose to deal with the benefits disclosed. YOU HAVE THE RIGHT TO:

- Select any of the alternative proposals we submit to you; or
- Reject all or some of the proposals we submit to you and negotiate an alternative; or
- Notify us that you do not propose to engage us at all.

DISCLOSURES

Benefits by way of cash payments, rebates or discounts received or receivable by an estate agent or a related person to an estate agent by reason placing a particular order with a third party for any goods or services.

Internet advertising to a value of \$5,000 is proposed to be placed with ABC Internet Ads. If this agency places advertising with ABC Internet Ads to a certain value a 10% rebate will be paid to us. Based on previous experience it is likely that this agency will qualify for that rebate.

PROPOSAL: If that rebate is actually received in respect of any advertising placed on your behalf it will be paid to you; or

You direct us to use an alternative provider.

Benefits by way of cash payments, rebates or discounts received or receivable by an estate agent or a related person to an estate agent by reason placing orders with a third party for any goods or services either over a period, in some quantity or to some value.

This agency proposes to appoint Land Shots to take photographs of your property. Land Shots is owned by Steve Jones who is the brother of Fred Jones who is a director of this estate agency.

Neither Fred Jones nor this estate agency receives any cash benefits from Land Shots arising from referring work to that business.

PROPOSAL: You permit us to use Land Shots to take the photographs with no adjustment to our fees; or
You direct us to use an alternative provider.

Benefits by way of valuable goods or services received or receivable by an estate agent or a related person to an estate agent by reason placing a particular order with a third party for any goods or services.

This agency generally uses Great Signs to make and install our 'for sale' signs in the Smithton area. Provided we continue to do so Great Signs will provide us with a free sign advertising the local school fete that will feature our name.

The inclusion of our details in the sign represents a value of approximately \$x of a sign the usual cost of which would be \$y. You have the right to require us to use an alternative sign provider if you choose to do so. If you agree to us using Great Signs we will not be required to pay you the value of any benefit

Submission in respect of Estate Agents and Conveyancer: Options for Reform Document

<p>we receive from the making of the school fete sign.</p> <p><i>PROPOSAL: You permit us to use Great Signs for signage with no adjustment to our fees; or You direct us to use an alternative provider.</i></p>
<p>Benefits by way of valuable goods or services received or receivable by an estate agent or a related person to an estate agent by reason placing orders with a third party for any goods or services either over a period, in some quantity or to some value.</p>
<p>Any other valuable benefit or advantage of any kind received or receivable by an estate agent or a related person to an estate agent that any of those persons would not have reasonably been likely to receive if a particular order had not been placed with a third party for any goods or services.</p>
<p>By ordering rental furniture from Flashy Interiors a person related to Steve Jones may receive favourable treatment in respect of an application to join the Smithtown Golf Club as a member. No reasonable estimate of the worth of this potential advantage is possible. You have the right to require us to use an alternative provider of house cleaning services if this is unsatisfactory to you.</p> <p><i>PROPOSAL: You permit us to use Flashy Interiors for rental furniture with no adjustment to our fees; or You direct us to use an alternative provider.</i></p> <p>This estate agency has a practice of using a related company called Book an Inspection to provide assisted inspections of your property. The agency proposes to pay a service fee of \$400 per inspection to that company which will be passed on to you in full. Each of the directors of this estate agency receive a salary from Book An Inspection of \$50,000 per year and any profits are paid to the directors or members of the families of the directors.</p> <p><i>PROPOSAL: You permit us to use Book An Inspection on a fee for service basis, or You agree to pay us an additional 1% commission for the sale of your property.</i></p>
<p>Any interests held by the estate agent or a related person by way of shareholdings or equity in providers of goods or services that are public companies trading their shares or equity on the stock exchange.</p>
<p>We may place advertising orders with Fairfax Media a company which Steve Jones and persons related to him hold shares and from which profits may be derived by way of dividend or income distribution.</p> <p><i>PROPOSAL: You permit us to use Fairfax Media for advertising with no adjustment to our fees; or You direct us to use an alternative provider if one is available.</i></p>
<p>Any other valuable benefits to the agent or a related person not disclosed in the above categories.</p>

Note there would not be any reason to disclose the situation with Neat Homes as the agent would have no reasonable basis on which to expect any valuable benefit of any kind would flow to them by reason of using the entity described.

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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.