



Australian Capital Territory

# **REVIEW OF THE AGENTS ACT 1968 AND THE AUCTIONEERS ACT 1959**

## **DISCUSSION PAPER**

Released for public consultation by

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**ACT Attorney-General**

This paper reflects the state of ACT law as at April 2001

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## **EXECUTIVE SUMMARY**

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The Australian Capital Territory is required under the national Competition Principles Agreement (CPA) to undertake a review of all legislation that contain anti-competitive restrictions on market behaviour. As part of that obligation, the *Agents Act 1968* and the *Auctioneers Act 1959* were reviewed in accordance with the "public benefit test" as laid down in the CPA. At the same time, however, because of significant shortcomings and the age of the legislation, the opportunity was taken to conduct a general review of the *Agents Act* to improve and enhance its effectiveness.

### **NATIONAL COMPETITION POLICY FINDINGS**

The review concludes that there are no competition policy issues requiring legislative reform within the real estate, stock and station and business agents' markets, but questions the imposition of a licensing regime on the employment agents' market. The review found that while the regulatory costs imposed on auctioneers are minor, the benefits appear insufficient to justify the licensing requirements in the Act. Travel agents were not subjected to a competition policy review, as they are already the subject of an NCP review by the Ministerial Council on Consumer Affairs.

### **GENERAL REVIEW OF THE AGENTS ACT**

The general review identified serious problems with the current regulatory arrangements and has put forward various reform proposals for consideration. The review is recommending the removal of the Agents Board which currently administers the regulatory system.

The Discussion Paper suggests that the registration and licensing of agents be undertaken by the Commissioner for Fair Trading who has overall responsibility for registering and licensing various other service industries in the ACT.

The Paper examined complaint and disciplinary systems in other jurisdictions and has put forward reform models which reflect the "best practice principles" enunciated by the NSW Law Reform Commission, which have achieved Australia wide acceptance.

The proposed complaint and disciplinary reform models will each promote a cost efficient and effective disciplinary system demonstrating the best practice principles of accessibility, openness, transparency and accountability; features not conspicuous in the existing complaint and disciplinary system.

Interested parties are invited to lodge submissions with the:

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**Commissioner for Fair Trading**  
**GPO Box 158**  
**Canberra City ACT 2601**  
**Facsimile: (02) 6207 0538**  
**E-mail: [anna.lennon@act.gov.au](mailto:anna.lennon@act.gov.au)**

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**The date for submissions is 30 June 2001.** Submissions received will be posted on the Office of Fair Trading Internet site at <http://www.fairtrading.act.gov.au> (unless marked confidential).

## **GLOSSARY OF TERMS AND ABBREVIATIONS**

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### **Abbreviations**

The following abbreviations are used frequently throughout this Manual:

<b>AA</b>	Agents Act 1968
<b>ACCC</b>	Australian Competition and Consumer Commission
<b>CFU</b>	Central Financing Unit
<b>COAG</b>	Council of Australian Governments
<b>CPA</b>	Competition Principles Agreement
<b>CPRA</b>	Competition Policy Reform Act 1995
<b>NCC</b>	National Competition Council
<b>NCP</b>	National Competition Policy
<b>PII</b>	Professional Indemnity Insurance
<b>REIACT</b>	Real Estate Institute of the ACT
<b>SIA</b>	Statutory Interest Account
<b>TPA</b>	Trade Practices Act 1974 (Cwth)
<b>TPC</b>	Trade Practices Commission

### **Definitions**

**Agent:** in this Review, agent means a real estate agent, stock and station agent, business agent, a travel agent and an employment agent.

**Barriers to Entry:** factors in a market that make it difficult for a firm or person not presently operating in a market to enter that market. (Typical barriers include licensing requirements or a statutory monopoly.)

**Competition Principles Agreement (CPA):** a key agreement between the Commonwealth and the States/Territories to implement a range of

competition principles including in relation to prices oversight, competitive neutrality and legislation review.

**Competition:** an economic concept involving rivalry between independent firms in a market. This rivalry may take the form of offering goods and services at lower prices or there may be rivalry in other dimensions of business conduct; for example in service, in technology, in quality and consistency of product. Competition amongst firms depends on the structure of the market in which they operate.

**Damages:** a civil remedy of financial compensation available to a person who suffers loss as a result of the illegal conduct of another.

**Economies of Scale:** any factors in a market that cause cost per unit produced to decline as output is increased.

**Market:** an economic concept. Market definition is a preliminary first step to provide a context in which competition is to be analysed. A market includes all goods or services that are substitutable or otherwise interchangeable with each other, taking into account matters such as price, characteristics and uses.

**National Competition Council (NCC):** an independent national statutory body responsible for monitoring the implementation of, and providing advice to government on, competition policy.

**National Competition Policy (NCP):** nationally agreed competition policy (see the background information included below.)

**Principal:** the use of the word "Principal" in the Act means a seller of property, a business or livestock; a landlord; an employer; or, in the case of travel agents, the provider of travel services, such as an airline.

**Public Benefit Test:** under NCP, exemptions from the principles are permitted where it can be demonstrated that the public interest benefits of a particular course of action (eg., legislation which would restrict competition) outweigh the costs of restricting competition. The CPA sets out the considerations which should be taken into account in applying the test.



## TERMS OF REFERENCE

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### NATIONAL COMPETITION POLICY REVIEW OF THE AGENTS ACT 1968 AND THE AUCTIONEERS ACT 1959

The Australian Capital Territory is a party to the Competition Principles Agreement entered into between the Commonwealth, the States, the Northern Territory and the ACT on 11 April 1995.

Subclause 5(1) of the Agreement obliges the ACT to review its legislation to ensure that it does not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
- (b) the objectives of the legislation can only be achieved by restricting competition.

Subclause 5(9) of the Agreement requires that a review should:

- (a) clarify the objectives of the legislation;
- (b) identify the nature of the restriction on competition;
- (c) analyse the likely effect of the restriction on competition and on the economy generally;
- (d) assess and balance the costs and benefits of the restriction; and
- (e) consider alternative means for achieving the same result including non-legislative approaches.

The ACT Government is required to undertake a review of the *Agents Act 1968* and the *Auctioneers Act 1959* in accordance with the above requirements and report the outcome of the review during 2001.

The review should have particular regard to the size of the agents' services markets in the ACT and the need to ensure that the cost impact of any legislative amendments recommended is minimal.

## **PART 1**

### **BACKGROUND**

## Chapter 1: Introduction

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1. This is a review of two ACT laws that deal with agents: the *Agents Act 1968* and the *Auctioneers Act 1959*. It has been prepared to help you make submissions to Government about the review.
2. Under the National Competition Principles Agreement, the Government is required to review these laws. Because of other shortcomings and the age of the legislation, the opportunity is being taken to conduct a general review of the Acts at the same time. Accordingly, the Paper examines ways of improving and balancing both economic efficiency and consumer protection within these markets, as well as proposals to simplify and improve the law.
3. The existing laws are sometimes justified on the basis that they benefit ACT consumers. This Paper examines the underlying costs and benefits of the legislation. In doing so, it examines problems faced by consumers (such as fraudulent misuse of trust accounts by agents) and examines whether it is desirable to have some form of regulatory control. However, the Paper also identifies a number of provisions which appear no longer justified, either because they are duplicative, do not meet consumer needs, impose unnecessary administrative cost, or work against the policy objectives of the Acts.
4. These issues are examined in detail in the succeeding chapters. A brief background to the regulation of the markets and problems within the markets are set out in Part 1 of the Paper. Competition issues are examined in Part 2, which examines barriers to entry into the existing markets, restrictions on business structure, conduct restrictions and other anti-competitive restrictions. Part 3 of the Paper examines a range of problems and limitations with the current operation of the Acts, including the role of the Agents Board and the Magistrates Court, the complaints and disciplinary system, the existing financial structure (including the grants process) and the coverage of the *Agents Act*.
5. The Government is interested in receiving your views on the issues raised in this Paper.

## **Chapter 2: The Existing Regulatory Scheme**

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### **Objectives of the existing legislation**

6. ACT legislation was made dealing with auctioneers in 1959 (the *Auctioneers Act 1959*) and real estate, stock and station and business agents in 1968 (the *Agents Act 1968*) following industry representations to government. The principal aim of the two laws was the prohibition of unlicensed persons carrying on the business of an agent or auctioneer.
7. Subsequently, the *Agents Act* (the Act) was amended to:
  - regulate travel agents in 1988 (the legislation tied into a national compensation fund designed to protect consumers);
  - establish an Agents Fidelity Guarantee Fund in 1992 (to help fund the scheme and give consumers access to a compensation fund in the event of the collapse of a licensed agent); and
  - regulate employment agents in 2000.

### **Consumer concerns about the market**

8. A number of complaints about the conduct of agents and auctioneers is made each year. The level of complaint indicates dissatisfaction with the delivery of their services. Without the existing regulatory scheme, the number of complaints may have been higher. Alternatively, the number of complaints may be an indication that the present schemes are not effectively addressing consumer concerns about market performance.

### ***Serious issues***

9. The range of matters involving agents that can go to the Agents Board is limited by the Act. In the past decade, 30 formal Inquiries involving real estate agents and four involving travel agents have been conducted by the Agents Board, which considers only the most serious of complaints. Licences were surrendered or revoked on 11 occasions because of:
  - the misappropriation of trust funds or the improper use of trust funds by the agent or an agent's employee; or
  - the poor financial position of the agent (eg., the agent was facing liquidation or bankruptcy or had insufficient resources to carry on a business).
10. In the most serious matter, investigation disclosed trust account deficiencies of \$182,000. In a number of cases, receivers or administrators were appointed by the Board to protect clients.

11. Fines were given on four occasions involving audit irregularities (eg., commissions being drawn without authority, late banking and minor deficiencies occasioned by employees). Reprimands were given on three occasions involving agents acting without authority.
12. In relation to auctioneers, in the past, there have been losses associated with the financial collapse of auctioneers and the involvement of a small sector of the industry with the fencing of stolen goods. These matters have been dealt with directly by the criminal justice system.

### ***Less serious complaints***

13. Underlying these more serious matters dealt with by the Board or in the Courts, there has been a continuing level of enquiry/complaint to both the Registrar of Agents and the Office of Fair Trading about agents and auctioneers. A detailed list of the types of complaints about agents is at Attachment "A".
14. While many of these complaints were unable to be substantiated by irrefutable evidence, they are indicative of continuing consumer concerns with market performance.

### **Real Estate Agents**

15. Since 1995, the Office of Fair Trading (OFT) has received 253 complaints concerning the activities of Real Estate Agents.
16. Of these complaints, 80 per cent related to the activities of real estate agents dealing with residential tenancy agreements. A majority of these complaints (64 per cent) were made before 1998 and concerned leases under the now-repealed *Landlord and Tenant Act 1949*. With the commencement of the *Residential Tenancies Act 1997*, there has been a significant drop in complaints referred to the OFT.
17. Of the remaining complaints, a number concern breaches of the agency agreement between the consumer and the real estate agent. These included failure by the agent to list the property for sale. More recently, the OFT has received a number of complaints against real estate agents for failure to list the Energy Efficiency Rating for a property for sale.

### **Travel Agents**

18. Since 1995, the OFT has received 35 complaints concerning the activities of travel agents.
19. Of these complaints, 51 per cent relate to air passenger services for overseas travel. A majority of the complaints received against travel agents relate to unsatisfactory service provided by the travel agent. These complaints include:

- failure by the agent to provide the consumer with accurate information concerning the tour or holiday package;
- breach of contract by the agent in connection with the price of the tour;
- disputes concerning deposits paid in connection with airfares or travel packages; and
- the tour or travel package did not meet the consumer's expectations or did not meet the standard stated by the travel agent.

Other Agents

20. Approximately 10 complaints were lodged concerning auctioneers with the OFT since 1995. These complaints relate to failure to follow a seller's instructions, liability for a buyer's premium or problems with goods bought at auction.
21. There have been few complaints about other agents.



## **PART 2**

# **COMPETITION POLICY ISSUES**



## Chapter 3: Background

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22. In April 1995, at COAG, all Australian Government leaders endorsed a package of national legislative and administrative arrangements to implement the National Competition Policy (NCP) process. The policy is designed to engender greater competition into Australian markets to achieve overall improved economic efficiency creating more employment opportunities and better living standards for all Australians.
23. As part of this national commitment, all Australian Governments signed the Competition Principles Agreement (CPA), which laid the foundation for a review and reform process of legislation that contained market competition restrictions. The review of the *Agents Act* and the *Auctioneers Act* in relation to competition policy issues is required to be conducted within the terms of the CPA.
24. The primary aim of NCP is to develop an open and integrated market for goods and services in Australia by removing unnecessary barriers to trade and to ensure that all participants within that market are subject (with public interest exceptions) to the same market conduct rules.
25. The CPA lays down the guiding principle that legislation "should not restrict competition unless it can be demonstrated that:
  - the benefits of the restriction to the community as a whole outweigh the costs (the cost/benefit test); and
  - the objectives of the legislation can only be achieved by restricting competition".
26. An audit of the *Agents Act* and the *Auctioneers Act* has identified market competition restrictions which directly influence the agents' services markets. The detailed results of the audit are at Attachment "B".
27. An analysis of these competitive restrictions shows that there are a number of types of restrictions. These include:
  - barriers to entry;
  - restrictions on business form or ownership restrictions;
  - conduct restrictions; and
  - cross-subsidies and dynamic efficiency losses.
28. This Part examines each of these issues in order to determine whether the restrictions are justified under the CPA cost/benefit test.

## Chapter 4: Barriers to Entry - the Agents' Services Markets

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29. Barriers to entry, such as licensing or registration schemes, can often reduce the number of service providers and restrict entry of new competitors into a market.
30. This can result in higher prices to consumers, higher incomes to providers, reduced consumption, lower quality services, less consumer choice and a reduction in service innovation by providers in responding to changing market opportunities. However, in some cases, these negative effects can be justified because a regulatory scheme provides valuable protection to consumers.
31. This chapter examines barriers to entry into the agents' services markets (real estate, stock and station, business, travel and employment agents and auctioneers). Other barriers to entry in the *Agents Act* dealing with educational providers and auditors, are examined later in Chapter 7.
32. The *Agents Act* and the *Auctioneers Act* set out eligibility requirements for registration and licences. There are four distinct registration and licensing groups.
  - **Group 1:** real estate, stock and station and business agents are subject to both registration and licensing requirements.
  - **Group 2:** travel agents are subject to licensing requirements based on educational qualifications and experience requirements (the legislation also imposes qualifications on some employees of travel agents).
  - **Group 3:** employment agents are subject to a simple licensing scheme.
  - **Group 4:** auctioneers are subject to a separate licensing scheme administered by the ACT Magistrates Court.
33. Because of the differences between these groups, they are examined separately below. Note that some of these differences may be removed in the process of revising the provisions (which are complex and duplicative). The provisions have not been amended in any coherent fashion since the legislation was originally made (for example, in places they contain references to the implementation arrangements dating back to the 1960s). Any regulatory provisions to be retained will need to be extensively recast. In this process, consideration will be given to the desirability of simplifying the scheme, including the removal of unnecessary differences between these groups.

**Group 1: Real Estate Agents, Stock and Station Agents and Business Agents**

***Who does the Act apply to?***

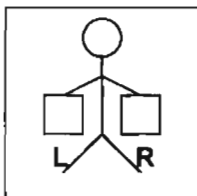
34. The *Agents Act* sets entry requirements for those who act as an agent in:
- the sale, purchase, letting or other dealings in land, livestock or businesses; or
  - the collection of payments under leases or mortgages.
35. The Act restricts use of the titles “real estate agent”, “stock and station agent”, and “business agent” to those who meet the entry requirements and who are registered or licensed under the Act.
36. With a number of exceptions, the Act excludes all other people from acting or advertising as one of these types of agents. Only an agent is entitled to bring an action to recover their commission. For example, people working in related fields such as developers, architects, conveyancers or accountants cannot sell real estate, livestock or businesses or collect rent on behalf of a third party.

***How the registration/licence scheme works***

37. The existing scheme is complex.
38. In the ACT, persons wishing to carry on business as an agent must first be registered. In addition, before these people can practise, they either have to become licensed to practise as a sole trader, be a partner in a partnership where one of the partners is licensed, or obtain a company licence (refer to the Chart below which sets out the mode of participation in these industries).

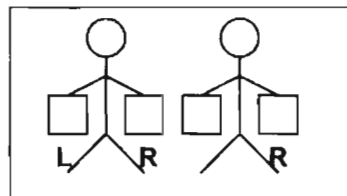
**Chart 1: Licences and registration – real estate, stock and station and business agents**

**Sole Trader**



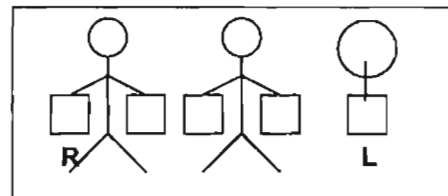
A sole trader must be registered and hold a licence. There are about 30 sole traders in ACT.

**Partnership**



All partners must be registered and one must hold a licence. There is only one partnership in the ACT involving two registered agents.

**Company**



One director of a company must be registered and the company must be licensed. There are about 150 agent companies in the ACT.

39. The Act draws a clear distinction between the licensing of these business entities and the registration of individuals within them. The Act assumes agents will operate as either a company, a partnership or sole trader. (Some of these provisions are also examined in Chapter 5 dealing with restrictions on business structure.)
40. Registration is the first step in obtaining a licence; but on its own, does not entitle the holder to carry on business as a licensed agent. The registration process attempts to ensure that people who wish to either operate their own licensed agency or manage a branch office of a licensee, are of good character and have an appropriate level of knowledge and experience in those industries.
41. The second step of the regulatory scheme is the licence itself. A licence can be issued either to a company, a partner or a sole trader. Every separate business must have at least one licence.

#### **Issue**

1. **The existing regulatory scheme for real estate, stock and station and business agents is complex because of the registration and licensing requirements. Should the scheme be simplified by only providing for licences (as with the regulation of travel and employment agents)? Note that if the scheme is simplified, consideration may be necessary in relation to employees of agents (this issue is dealt with in greater detail in Chapter 9 below).**

#### ***The cost of the current scheme***

42. Licensing and registration restrictions in the current scheme impose direct administrative, compliance and enforcement costs. In addition, there may be indirect costs which result from the reduction of competition in the market and hence, economic efficiency.

#### Direct costs

43. The direct administrative costs may be illustrated by examining the position of a person wishing to enter the industry as an agent (these administrative costs in turn are used to support compliance and enforcement costs under the scheme – this is examined in Chapter 8). Such a person would bear the following entry costs outlined in Chart 2.

**Chart 2: Entry costs – real estate, stock and station and business agents**

<b>Registration</b>	<b>Licensing</b>
<ol style="list-style-type: none"> <li>1. Annual registration fee currently set at \$72.</li> <li>2. Foregone income resulting from three year industry experience.</li> <li>3. Educational qualification fee currently set at \$3,900 for a 12 month course.</li> <li>4. Advertising fee to notify intention to seek registration by public advertisement.</li> <li>5. Police check for 'fit and proper person' test \$36.</li> <li>6. Applicants must be 18 years of age (intangible costs).</li> </ol>	<ol style="list-style-type: none"> <li>1. Annual personal licence fee currently set at \$72.</li> <li>2. Annual company licence fee currently set at \$308, and \$72 for each subsequent business licence.</li> </ol>

44. Registration imposes a number of onerous prerequisites. The two most significant registration costs for this group of agents relate to the three year industry experience restriction and the educational qualification restriction.
  
45. The experience restriction requires people to work in the industry for three years before they are able to apply for registration and then a licence. In circumstances where agents are able to control the conditions of employment and employment itself, the restriction could operate to restrict access by suitably competent individuals from entering and competing in the industry. While these people forgo lost income working at a lower level in the industry on low wages, new entrants into any market need time to acquire industry knowledge and expertise before becoming eligible to command executive positions and salaries. Consumers of agency services expect that people who are providing these services are qualified, experienced and competent to do so. However, if this requirement is intended to ensure that only experienced persons are agents, it may go further than is strictly necessary to protect the interests of the community.

**Issue**

**2. Is the three year industry experience requirement still necessary?**

46. The educational qualification restriction is the second most costly restriction necessary for registration. The educational qualifications for registered real estate, stock and station and business agents are set out in a regulation to the Act. The regulation requires successful completion of the educational program in real estate conducted by the Canberra Institute of Technology (formerly known as Canberra College of Technical and Further Education). The cost of the educational qualifications can be justified on the basis that the course provides a comprehensive treatment of the material in which agents need to be competent. Subjects covered include knowledge of legal issues such as consumer law, trade practices law, agency law (including the *Residential Tenancies Act* and *Agents Act*); financial matters including trust account and general business accounting and core subjects such as listing, selling and managing a variety of real property. In order to work in the industry, a detailed knowledge of these matters is necessary and, arguably, the additional cost of this requirement being articulated in legislation may be low. The course modules are consistent with the national competency standards developed for the real estate industry.

**Issue**

**3. Should the education requirement be mandatory?**

47. It is possible to estimate the impact of these costs on the market. In 1995/96 a snapshot of the market by the Australian Bureau of Statistics estimated that the total income of real estate agents in the ACT was \$58.3 million.<sup>1</sup> Because of the labour intensive nature of these businesses, the direct labour costs in 1995-96 accounted for about 44 per cent of total industry expenses. Other major expense items included advertising and rent, leasing and hiring expenses.<sup>2</sup>
48. By comparison, however, the direct cost of the statutory provisions is less than 0.5 per cent of the total income of agents.

Indirect costs

49. It is difficult to quantify the indirect costs to the community of the existing regulatory system. There is no question, however, that a diminution of competitive pressures on a market will always be counter-productive to economic efficiency unless, of course, there are observable public benefits that outweigh the competitive restrictions.

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<sup>1</sup> Australian Bureau of Statistics, 1995-96, Real Estate Agents Industry, ABS Catalogue No. 8663.0, p.13.

<sup>2</sup> Ibid., p.12.

50. The imposition of licensing on the commercial behaviour of agents has the negative effect of preventing entry into the market of competing service providers, who may or may not be competent to provide the service. Licensing also limits the number and availability of agents in the industry which can result in increased prices for services where consumer demand outstrips supply. Similarly, if there are insufficient agents to meet consumer demand for services, licensing can reduce consumption of services and limit consumer choice.

#### **Issues**

4. **The three year practical experience requirement imposes significant costs on entry to the ACT market. Is this requirement necessary? Can it be replaced with a competency based alternative?**
5. **It is difficult to estimate indirect costs. Is there any evidence that indirect costs are contributing to market inefficiency in the ACT?**

#### ***What are the public benefits of the current scheme?***

51. In the ACT, consumers are not forced to use the services of an agent when selling real property, livestock or a business; they are free to conduct the transaction themselves. However, when a consumer decides to engage the services of an agent, they generally do so because the process is less burdensome for them. Consumers who choose to engage the services of an agent do so on the understanding that the agent knows about the legal requirements and knows and understands the relevant market, has marketing skills and has personal integrity.
52. A registration and licensing scheme predicated on these criteria benefits consumers because they can be easily satisfied that the agent meets these required standards without undertaking necessary inquiries themselves. This saves consumers time and money and also assures them that there will be sanctions available if the agent transgresses accepted best practice standards.
53. In 1992, the Prices Surveillance Authority noted that:

*A feature of the market for residential real estate agency services, from the Authority's perspective, is that in general an individual consumer is an infrequent participant in the market. An important consequence for the consumer and the operation of the market flows from this fact.*

*Infrequent participation is likely to be associated with limited knowledge of:*

- *the process involved in a property transaction;*
- *the legal implications of the two contracts involved - the agency contract between vendor and agent, and the sale contract between vendor and purchaser; and*
- *the price and quality of agency services, in both absolute and relative terms.*

*The Authority believes that, in general, consumers enter the market for agency services with little information, and consequently are disadvantaged relative to an agent at the commencement of the process of engaging an agent. Limited knowledge combined with Australia's cultural unfamiliarity with bargaining, means that consumers may be unlikely to be confident in negotiating down the price of agency services.<sup>3</sup>*

54. Consumers in agents' services markets are exposed to high levels of risk arising from inadequate information where they are purchasers of 'one-off' complex services from a single provider. Chapter 2 identified a number of serious incidents involving the misuse of trust funds. The early identification of these breaches may have reduced the risk that might otherwise exist in an unregulated environment. These risks are pronounced in the agents' services markets because most consumers visit these markets infrequently for the sale and purchase of property (yet, for a consumer, this may be the largest single financial investment they will make in a lifetime).
55. The imposition of a licensing scheme has the effect of redressing this imbalance of information supply in the market and guarantees a level of protection for consumers of these services.
56. In the agents' services markets, a consumer is vulnerable to risks associated with poor choice of service provider and the added risk of exploitation and malpractice. As the complaints discussed in Chapter 2 demonstrate, in an unregulated market consumers may be exposed to a range of unacceptable risks. For example:
  - agents may not meet minimum standards of training and practical experience;
  - the community may be more likely to be subjected to unscrupulous and opportunistic agents;
  - the community may not always have a level of assurance that agents will practise according to professional and ethical standards;
  - the integrity of the market may not be maintained in the knowledge that agents have properly discharged their responsibilities to clients;
  - consumers of agents' services would not be protected from negligent/fraudulent conduct by agents through access to a public fidelity fund;

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<sup>3</sup> "Inquiry into Real Estate Agents Fees Relating to Residential Property Transactions", p. xiii



- there would be an inequality between the uninformed consumer and the expert provider (because consumers generally lack information to make sound decisions about the type of agent services they need and the competence of agents);
  - third parties may suffer unwarranted damage and costs associated with incompetence of agents.
57. One of the primary indicators of a competitive market is how contestable the market is. While the ACT agency market appears to be contestable, despite the existence of a licensing/registration scheme, anecdotal evidence suggests that there is a reluctance or lack of awareness by ACT consumers of their ability to negotiate the level of agents' fees and services with agents. The recent decision by the ACCC to withdraw authorisation of the REIACT's scale of fees means that real estate agents' fees are now entirely a matter of negotiation between vendors and agents and competition between agents.

***Are there alternatives?***

Deregulation

58. As an alternative to a licensing scheme, the Government might remove the existing registration and licensing barriers to entry and open up the markets to anyone wishing to participate in these markets. That way, existing market forces would determine the success or otherwise of these businesses.
59. However, as noted above, a deregulated market would expose consumers to high levels of risk. Consumers would incur additional costs in locating a competent and knowledgeable service provider and consumers would be exposed to inequalities between the uninformed consumer and the expert provider. Consumers would also be exposed to unscrupulous and opportunistic agents and have no guarantee that the integrity of the market is being maintained. During this process, consumers of real estate products could also be exposed to expensive legal costs if the service provider is incompetent. The expense of exercising legal rights is significant for the average consumer.

Self-regulation

60. An alternative to de-regulation might be self-regulation of the industry by its members. An effective industry self-regulatory scheme should, through its association:
- consult with consumers to identify specific problems within an industry and consult with government to identify social or public policy objectives;
  - have wide coverage of the industry to enable its association to deliver effective self-regulation;
  - establish standards of conduct which members will support;

- promote consumer awareness of the scheme so they know where to lodge complaints, and promote industry awareness of the scheme so they know what to do in terms of compliance;
  - provide good administration of the scheme;
  - collect data as a source of market information;
  - be transparent; and
  - operate an effective complaints system.<sup>4</sup>
61. In a market such as the agency services market, a key reason for market failure is information asymmetry where consumers, in comparison with service providers, are less well informed about relevant market information. For example, real estate agents may have market trends and sale data material not generally available to consumers. The problem arises where this type of information may be costly to obtain, require a significant amount of time and effort in the search, or simply be unavailable to a consumer. Consumers are unable to acquire a reasonable degree of knowledge of the industry nor first hand experience to distinguish between high and low quality service providers.
62. In addition, for self-regulation to work effectively, there needs to be a strong commitment from the market and a majority of those in the market.
63. Self-regulation generally occurs in market circumstances where there is no strong public interest concern; where the problem is a low risk event of low consumer impact or significance and the problem can be fixed by market forces - that is, there is an incentive for individuals and groups to develop and comply with self-regulatory arrangements.
64. These market circumstances are not readily apparent in the agents' services markets where consumers are exposed to high levels of risk from defalcations and a paucity of service information.

### **Analysis of costs and benefits**

65. The impact on the market of the direct cost of funding the regulatory system is modest, representing less than 0.5 per cent of total income of agents. However, the level of risk that consumers might be exposed to if the scheme is removed is high. Exposing consumers to this level of risk is undesirable both socially and economically. Alternatives to a licensing scheme are unlikely to reduce this risk.
66. An analysis of the costs and benefits would appear to support government intervention by way of licensing requirements. However, the above analysis suggests that the existing scheme might be improved to minimise the costs to be passed on to consumers and to minimise the effect of the indirect costs. In particular, costs associated with the

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<sup>4</sup> *Industry Self-Regulation in Consumer Markets*, report prepared by the Taskforce on Industry Self-regulation, August 2000.

requirement for industry experience and education may be excessive and will be reviewed in the light of responses to this paper.

### **Issues**

- 6. Is retention of regulation of the industry justified in the public interest?**
- 7. If regulation is retained, should the regulatory requirements be streamlined to reduce costs, and if so, how?**

#### **Group 2: Travel agents**

##### ***Who does the Act apply to?***

67. The *Agents Act* sets entry requirements for those who act as a travel agent in:
  - the sale of tickets entitling another person to travel, or arrangements made for a right of passage for another person, on a conveyance; or
  - the sale or arrangement of rights of passage or the arranging of hotel or other accommodation for another person to places in or outside the Territory; or
  - the purchase for resale of the right of passage on a conveyance.
68. The Act restricts use of the title "travel agent" to those who meet the entry requirements and who are licensed under the Act.
69. With a limited number of exceptions, the Act excludes all other people from acting or advertising as a travel agent.

##### ***The NCP Review of Travel Agents***

70. The Ministerial Council on Consumer Affairs commissioned the Centre for International Economics to conduct a national competition policy review of the National Cooperative Scheme for the Regulation of Travel Agents.
71. The Ministerial Council approved the release of the independent consultant's report on 14 September 2000; but noted that neither the Council nor any State or Territory endorsed the report or its recommendations. The report was made available for a consultation period until October 2000 (noting that extensions were granted on request).
72. The major recommendations in the report include the:

- retention of the present licensing framework but amended so as to limit it to a “fit and proper person” test and a check to ensure that compulsory insurance requirements are satisfied; and
  - removal of the qualification and experience requirements for travel agents.
73. Public views were sought during 2000 on the NCP report undertaken by the International Centre for Economics. The consultation period has now closed and all jurisdictions are working cooperatively to finalise their views on a national approach to travel industry regulation.

### **Group 3: Employment Agents**

#### ***Who does the Act apply to?***

74. The Agents Act sets minimal entry requirements for those who act as an employment agent in:
- finding or assisting a person to carry out work for another person; or
  - finding or assisting a person to gain employment.
75. The Act restricts use of the title “employment agent” to those who meet the entry requirements and who are licensed under the Act.
76. With a limited number of exceptions, the Act excludes all other people from acting or advertising as an employment agent.
77. In 1999 the regulation of employment agents was introduced by a Private Member’s Bill, but it does not appear to have been subjected to a cost/benefit analysis.
78. Under the national *Competition Principles Agreement*, the ACT Government is required to undertake an NCP review of all legislation that restricts market competition. The Government is required by that Agreement to ensure that legislation should not contain anti-competitive restrictions unless the benefits of the restrictions to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition. If this obligation is not discharged, the ACT stands to lose a proportion of the “competition dividends” which are distributed to jurisdictions under a related Agreement.

#### ***The cost of the current regulatory scheme for employment agents***

79. Employment agents are subject to a single licensing scheme, similar to travel agents. A person or a company can apply for an employment agent’s licence and no educational qualifications or experience are required.

80. The Act imposes a number of barriers to entry into the scheme:
- the licence fee is \$1,000 for the first place of business and \$149 for each additional place of business (the licence fee was set at this rate because the scheme is self-funding, the number of licence holders is relatively small and there is no other readily apparent source, such as interest derivatives or client funds that might defray the cost of the scheme);
  - an applicant for a personal licence must be 18 years of age or over and not be disqualified from holding a licence;
  - an applicant must provide two character references;
  - an applicant must undergo a police check; and
  - an applicant must place an advertisement in the Canberra Times notifying of their intention to seek registration as an agent.
81. The high direct cost of entry differentiates employment agents from other groups regulated under the Act. This cost acts as a positive disincentive to both new entrants and interstate employment agents (who might otherwise only undertake occasional work in the ACT).

***What are the public benefits of the current scheme?***

82. When the amendments were introduced in the Assembly, it was argued that the regulation was necessary to counter the Federal Government's decision to outsource the Commonwealth Employment Service to various private Job Network Employment agency members Australia wide. It was argued that a registration scheme would protect the interests of blue-collar workers, women re-entering the workforce, students and newly arrived migrants who are unable to access social service benefits for two years. There was concern that unemployed people were being asked to pay a fee to private employment agents to obtain work and that some private employment agencies without office facilities were winning million dollar contracts and subcontracting out work to others to perform.
83. While there were concerns in other jurisdictions relating to the new Commonwealth Job Network scheme at the time, proponents of the legislation did not identify any problems with the ACT industry charging genuinely unemployed people fees.
84. While the public may benefit from knowing that employment agents are 'fit and proper' persons to provide these services, there are few, if any other public benefits that flow from the imposition of this licensing scheme that would justify the high entry cost on the industry.

***Analysis of costs and benefits***

85. Other than the high entry cost of the licence fee, the barriers to entry into this market are low, with minimal entry requirements needing to be satisfied. Likewise, the public benefits flowing from the licensing scheme are correspondingly low. Because employment agents do not take funds on trust, there is minimal opportunity for misappropriation of clients' money, with fee for service mostly paid after the agency has found a suitable person to fill the identified position. In this market, where large trust funds are not operated, there is also a commensurate reduction of the risk of market failure in comparison with other industries that operate large trust funds, eg., lawyers and real estate agents.
86. Accordingly, as the risk of market failure in this industry is small, it is difficult to justify the imposition of an expensive licensing scheme on this industry which can be seen as delivering little to the community beyond cost recovery. The licensing scheme is essentially a revenue raising measure to pay for a licensing system that will do little to produce significant public benefits or prevent market failures. The high entry fee simply means that consumers will suffer a detriment because the licensing costs will be passed on to them.

**Issue**

- 8. Is retention of the current regulatory scheme for employment agents justified in the public interest?**

#### **Group 4: Auctioneers**

##### ***Who does the Act apply to?***

87. The *Auctioneers Act 1959* requires the licensing of all persons who "carry on the business" of an auctioneer. This covers the sale by auction of land, businesses, stock and personal items. With a limited number of exceptions, the Act excludes all other people from acting or advertising as an auctioneer.
88. Auctioneers are subject to a court-based licensing scheme. Applications for a licence to the Magistrates Court are dealt with in chambers and do not require the appearance of the applicant. As a result, applicants usually complete the applications themselves without involving a lawyer.
89. The involvement of the court in this process is unusual. It blurs the separation of powers doctrine, whereby regulatory functions should be undertaken by the executive arm of government, and the role of the court in adjudicating disputes that may arise.

##### ***The cost of the current scheme***

90. The present Act imposes barriers to entry into the market:
  - an applicant must apply to a court (while the court process is relatively simple, the fact that the application is to the court rather than some other part of Government may act as a disincentive);
  - the licence fee is \$90 (note that this cost understates the actual cost incurred in licensing auctioneers, in particular, the cost of criminal checks is borne by the AFP at no cost to the applicants);
  - an applicant for a personal licence must be 18 years of age or over; and
  - an applicant must provide three character references.
91. As in other schemes, these barriers to entry limit the number of dealers in the market, thereby restricting competition. This may not be as pronounced in this market – the number of licensed auctioneers has fluctuated over the past decade between 100 and 200 auctioneers. The annual turnover of auctioneers in the market is fairly high (from 25 per cent to 50 per cent) suggesting that the costs of entry into the market are not a significant barrier in what appears to be a fairly fluid market.
92. It should be noted that a large number of licensed auctioneers are real estate agents. It would appear that one undesirable effect of the present scheme is that it requires real estate agents who wish to sell by way of auction to obtain a second licence. This appears to be a duplicative and unnecessary requirement (particularly as the agent entry requirements are more onerous than the auctioneer requirements).

***What are the public benefits of the current scheme?***

93. The scheme is designed to preclude entry of persons with prior criminal convictions into the market. Because of the structure of the market, the Act probably does not meet this objective. The principal business conducted by most licensed auctioneers is regulated under different legislation (eg., as a real-estate agent or a second-hand dealer). In these cases, the Auctioneers Act simply duplicates the entry requirements in the other licensing schemes concerning past criminal conduct. In these cases, the requirements in the Auctioneers Act do not provide any additional protection to consumers.
94. Anecdotal evidence from consumers suggests that a principal risk in this area may exist with the financial collapse of auctioneers between an auction and payment to a client. There has been a number of such collapses in the ACT in the past decade – these have sometimes seen owners waiting considerable time to get any moneys repaid to them. To date, the amounts concerned have been relatively small and the problems have occurred infrequently.
95. While the Auctioneers Act does not address the (low-level) risk of auctioneer collapse, it may exacerbate the risk. When agents fall within the scope of the *Agents Act*, they are required to deal with trust money by way of trust account. However, since auctioneers are expressly excluded from the operation of the *Agents Act*, when agents act as auctioneers, they are not regulated in this respect. Instead, they are simply bound by the terms of the agency agreement (note that under some such agreements, there is no requirement to hold trust money separately). In this circumstance, the legislation actually reduces the protection available to consumers under the *Agents Act*.

***Analysis of costs and benefits***

96. The cost of the existing legislation is minor and having regard to the apparent turnover within the market, appears to have a negligible effect on the number of participants in the market. However, the benefits of the existing legislation are questionable, as the Act negates the beneficial effect of other legislation.
97. In other jurisdictions, legislation dealing with auctioneers has been repealed. In NSW, licensing requirements for auctioneers were removed in 1992 and today, when a real estate agent acts as an auctioneer, they remain subject to their ordinary agent obligation to keep a trust account. Likewise, in Victoria, auctioneers dealing with real estate are required to hold an estate agent's licence and to keep a trust account.



98. The repeal of the *Auctioneers Act 1959* would remove the requirement for auctioneers to be licensed under that Act. However, those who conduct auctions may be required to comply with other regulatory legislation:

- in dealings as a real estate agent, stock and station agent or business agent - the *Agents Act*; and
- in dealings with second-hand goods - the *Second-hand Dealers and Collectors Act*.

**Issue**

**9. Is retention of the current regulatory scheme for auctioneers justified in the public interest?**

## Chapter 5: Restrictions on Business Structure, Form or Ownership

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99. The second type of market restriction concerning the agents' services markets deals with restrictions on business form, structure and ownership in the market. Restrictions of this nature can sometimes affect the capacity of the market to achieve economies of scale.
100. The effect of restrictions in the *Agents Act* and *Auctioneers Act* are separately examined below.

### Agents Act restrictions

101. Chapter 4 identified the three modes under which licences could be granted to agents under the *Agents Act*. However, it also pointed to a significant disparity in the number of licensed companies and partnerships. While there may be a number of market explanations for this, this chapter explores a number of restrictions that may influence the choice agents make.
102. The *Agents Act* imposes three types of restrictions on business form:
- it prohibits certain types of corporations from obtaining a licence;
  - it prevents a licensed agent from sharing agency income with an unlicensed agent (this restriction does not apply to travel agents or sharing income with registered agents within a partnership); and
  - it imposes particular requirements on partnerships.

### ***The prohibition on certain types of corporations from obtaining a licence***

103. Subsection 5(1B) in conjunction with Part 5 of the *Agents Act* has the effect of preventing the following types of corporations from being licensed under the Act:
1. a body corporate incorporated within the Commonwealth that is a public authority or instrumentality or agency of the Crown;
  2. a corporation sole;
  3. a building society;
  4. a credit union; or
  5. an association, society, institution or body incorporated under the *Associations Incorporation Act 1991*.
104. Limitations one and two originally concerned government operations which were elsewhere exempted from the Act (note that in relation to the second limitation, until recently, only Crown entities could be structured as corporations sole). The provision was originally included to remove

any argument that these entities were to be regulated under the Act (other provisions in the Act remove the need for government activities to be licensed under the Act when undertaken by a Minister or a prescribed authority). However, because of changes to the *Corporations Law* (allowing private companies to be formed as corporations sole) the second provision now has a different effect. The limitation now excludes such private companies from being licensed under the Act – an unnecessary and undesirable result. Limitations one and two should be repealed.

105. Limitations three and four prevented building societies and credit unions from being licensed agents. Originally, these types of organisations were regulated under separate ACT ordinances that set out the organisation's powers. Since the passage of amendments to the Commonwealth *Banking Act 1959*, the prohibition has ceased to have any effect as, like banks, these types of organisations can now claim exemption from the operation of the Act (under subsection 3(1)). Limitations three and four should be repealed.
106. Limitation five prevents not-for-profit organisations from being licensed agents. The original policy reason for excluding such organisations from the Act is unclear. The effect of the prohibition today is that an incorporated association (conducting agent-like activities) would be unable to apply for a licence.

### Issues

- 10. Are there circumstances where a not-for-profit organisation might wish to be an agent? If so,**
- 11. Is there a reason (supported by a cost/benefit analysis) for the continued prohibition of not-for-profit incorporated associations from being licensed agents?**

### ***Sharing agency income***

107. While section 101 of the *Agents Act* prevents a licensed agent from sharing agency income with an unlicensed agent, the Act does not prevent a licensed company from distributing income to unlicensed or unregistered directors of the company. Accordingly, for many years, the market has been able to effectively by-pass the limitation in section 101.
108. However, the limitation continues to operate to prevent:

- a sole trader from sharing income with an unlicensed person; or

- a licensed partner sharing income with an unlicensed or unregistered partner.

109. This places sole traders and partners at a comparative disadvantage to companies. In future, the rule may also operate to stifle innovative multi-disciplinary firms from arising outside of a company structure.

110. For these reasons, arguably the rule should be repealed.

### ***Special requirements on partnerships***

111. The Act provides a concession to agents working within a partnership: while all agents must be registered within a partnership, only one agent needs to hold a licence. This concession is overshadowed by the advantages of a company structure.

112. The concession resulted in the inclusion of other provisions designed to ensure regulatory control of partnerships. The Act:

1. requires partnership details to be kept current;
2. specifies that all partners have the same rights and duties as the licensed partner; and
3. provides that the licensed partner is deemed to be guilty of a breach of the rules of conduct or an offence by another partner (note that this does not pick up the converse situation).

113. The first two items seem acceptable; item 1 does not impose any greater requirements than would be faced by an agent company keeping records of directors current under the *Corporations Law*. Similarly, Item 2 seems a desirable measure.

114. Item 3, however, seems unnecessarily harsh. It may be that the licensed partner would not have been aware of the particular breach by the other partner or may have had a defence. Accordingly, it would seem more appropriate to trigger the disciplinary provisions of the Act directly, rather than by having recourse to a deemed criminality provision.

### **Auctioneer Act restrictions**

115. Chapter 4 identified a number of licensing restrictions under the *Auctioneers Act*. Two of these also constitute restrictions on business structure:

- only natural persons may hold an auctioneer's licence; and
- a pawnbroker cannot hold an auctioneer's licence (this was originally included in the legislation to ensure that a requirement for a public auction of pawned but uncollected goods could proceed without the risk of a conflict of interest).

116. In Chapter 4, it was suggested that the *Auctioneers Act* should be repealed. If the Act is repealed, the restriction concerning pawnbrokers will also be lost, unless specifically saved.

**Issue**

**12. Is there a reason (supported by a cost/benefit analysis) for the continued prohibition of pawnbrokers acting as auctioneers?**

## **Chapter 6: Conduct Restrictions in the Agents' Services Markets**

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117. The third type of market restriction concerning the agents' services markets imposes requirements on the conduct of agents and auctioneers. While conduct restrictions may increase the cost of services to consumers, they may also provide valuable benefits to consumers.
118. The effect of restrictions in the Agents Act and Auctioneers Act are separately examined below.

### **Agents Act Restrictions**

119. For ease of analysis, conduct restrictions in the Agents Act are grouped into financial requirements and business conduct requirements.

#### ***Financial requirements***

120. Part 6 of the Agents Act provides for the establishment, maintenance and audit of trust accounts and agents' records. Trust accounts are subject to periodic audit and inspection. Such audits and inspections, in the past, have led to the early detection of potentially serious breaches of the Act.
121. For example, the Act requires agents to engage external auditors to undertake audits of trust accounts. In turn, these audits provide a basis for assurance that accounts are acceptable and help identify anomalies that can then be subject to closer examination by inspectors. The additional requirement on an auditor to submit an audit report to the Registrar provides an independent means of verifying that the audit has been done and that the report is bona fide.
122. The requirements, while given statutory form, conform to ordinary accounting requirements and facilitate the convenient and cost-effective examination of records. Accordingly, while these provisions impose some cost on the market, they are not substantially different from the cost that would be incurred by ordinary prudential accounting obligations. Indeed, it would seem that many agents prepare reconciliation statements on a monthly basis (rather than the statutory quarterly requirement) to detect errors sooner, particularly with property management transactions.
123. The Act also requires agents to keep general accounting and other records of money (other than trust money) received by them in the course of their business. While this may not seem necessary to protect

client money, in practice, fraudulent dealings with trust money are often detected by an examination of these other accounts.

124. These provisions have been successful in the early detection of fraudulent misconduct by agents or their employees. However, a number of matters should be addressed.

- The Act requires real estate, stock and station and business agents to pay out all moneys by cheque rather than electronic transfer. This anomaly was addressed, in part, in 1997 by the Minister for Regulatory Reform who, by instrument, exempted agents and banks from the application of this section on condition that agents maintain appropriate records and an adequate audit trail. These and other provisions in the Act should now be similarly amended to accommodate alternative electronic facilities and to remove the need for the Board to approve on a case by case basis the use of computer generated receipts.
- The Act requires that the trust account be opened at a bank. Note that the *Interpretation Act 1967* now defines bank as an authorised deposit-taking institution under the Commonwealth *Banking Act 1959*. This includes a building society or credit union. The language of the Act should be updated for convenience and to avoid confusion.
- A number of licensees hold licences just in case they decide to enter into real estate, stock and station or business transactions. In a number of cases in the ACT, some licensees have not undertaken transactions for many years and yet are still required by the Act to maintain a bank trust account and cause an audit to be undertaken of the trust accounting records each year. New South Wales legislation provides that where an agent has not operated any trust account transactions during the year, s/he is not required to cause an audit to be undertaken and a statutory declaration to the effect that no transactions occurred is sufficient. However, to protect the interests of potential consumers, it is, nonetheless, desirable that a trust bank account be maintained at all times.

### Issues

- 13. Should the Act be amended to remove the requirement for audit to be undertaken where no trust account transactions have occurred during a financial year?**
- 14. If so, should the Act be amended to require agents to provide a statutory declaration to the effect that no transactions occurred during a financial year?**

### **Business conduct requirements**

125. Placing controls on the market behaviour of licensed agents through publicity, advertising and place of business restrictions may increase costs and inhibit innovation in the market. On the other hand, these types of restrictions can generate consumer benefits or reduced compliance costs.
126. Under the Act, agents operating as individuals or companies are required to have business premises that comply with the lease purpose clause of the Crown Lease of the land or any other law regulating the places at which businesses may be carried on. Recognising that there are innovative, evolving technological ways of selling services today, this requirement could act to inhibit innovation and competition. On the other hand, consumers obtain protection from being able to attend a physical commercial address to do business or to seek any complaint resolution/redress. There are also benefits for inspectors carrying out audit requirements.

<p style="text-align: center;"><b>Issue</b></p>
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<p><b>15. Should the business premises limitation be removed?</b></p>
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### **Employment Agents**

127. Section 19B of the Act prohibits employment agents from demanding or receiving a fee, charge or other remuneration from an unemployed person. At the time this amendment was introduced, proponents of the legislation did not identify any problems with the ACT industry charging genuinely unemployed people fees.
128. During Assembly debates of this amendment, however, the Government always acknowledged that it would support, without hesitation, the need to protect the interests of disadvantaged people in the community where evidence of abuse existed. Consequently, if this behaviour was or is occurring in the industry, the social justice public benefits that flow to the community from this restriction more than compensate for any costs incurred by the industry by its imposition.

### **Auctioneers Act Restrictions**

129. The Act sets out a number of conduct restrictions. Firstly, it prohibits an auctioneer from making misrepresentations about property offered for sale by auction. The requirement prohibiting misrepresentations is duplicated in the *Fair Trading Act 1992* and need not be retained.



130. The Act also requires an auctioneer to keep a full record of property sold at auction in a book for a period of at least 12 months after the date of sale (this must be produced to the Australian Federal Police on request). If the *Auctioneers Act* is repealed, then in relation to auctions caught by the *Agents Act*, the financial requirements outlined above provide a more than satisfactory replacement; and, in relation to auctions caught under second-hand dealers legislation, there are similar record-keeping requirements.
131. The Act also provides rules for the taking of bids (eg., prohibiting 'own' bids in specified circumstances). These rules are duplicated in relation to goods in section 60 of the *Sale of Goods Act 1954*. If the *Auctioneers Act* is repealed, then it will be necessary to include similar rules in relation to real property or services elsewhere in an appropriate ACT law.

## **Chapter 7: Other Anti-competitive Restrictions - Trainers, Auditors and Cross-subsidies**

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### **Trainers**

#### ***Real Estate, Stock and Station and Business Agents***

132. As mentioned in Chapter 4, the educational qualifications for registered real estate, stock and station and business agents are set out in a regulation to the Act. The regulation specifies that the educational program in real estate conducted by the Canberra Institute of Technology is acceptable for registration purposes.
133. This provision restricts other trainers from offering courses and is inconsistent with current vocational training practice whereby training competencies and approved courses are approved nationally for delivery by accredited trainers.

#### **Issue**

**16. Should the regulation be amended to enable other accredited and registered training providers to deliver appropriate training for the real estate industry?**

### ***Travel Agents***

134. The Act prescribes educational qualifications for travel agents by referring to courses offered by specific educational institutions in the Schedule to the Act. As this approach was inconsistent with current vocational training practice, the Attorney-General adjusted the Schedule on 1 February 2001 by instrument to provide that any person who has successfully undertaken the nationally accredited course would be able to apply for a licence to enter the ACT travel industry.
135. The current Schedule to the Act is inconsistent with current vocational training practice and is now redundant.

### **Auditors**

136. The Agents Act restricts the qualifications of a person able to undertake an audit of agents' trust funds to a registered company auditor within the meaning of the *Corporations Law*.

137. The 1997 Report of a Working Party of the Ministerial Council for Corporations, the *Review of Requirements for the Registration and Regulation of Company Auditors* argued that the States and Territories should not simply adopt the Corporations Law audit standard. In situations where a required audit task is neither complex nor onerous, provisions should be recast to permit a broader range of people to undertake audits (eg., where the person is a member of the Institute of Chartered Accountants, the Australian Society of Certified Practising Accountants or the National Institute of Accountants). However, a firm of auditors should not be engaged if any of its partners is a partner, officer or employee of the organisation obtaining the grant.
138. In a number of cases considered by the Agents Board, serious problems in agents' trust accounts have only become apparent when a registered company auditor directed the breach to the agent concerned or the Registrar of Agents. Most agents presently engage registered company auditors because of the audit requirements under the *Corporations law*.

**Issue**

**17. Having regard to the complexity of auditing trust accounts, is there reason to permit a wider range of people to undertake the audit function?**

**Cross-subsidies**

139. Regulation sometimes forces industry to provide inefficient cross-subsidies in relation to services. This can hinder the development of new services.
140. The *Agents Act* is administered in accordance with Government practice to seek to recover the full cost of administering a licensing system. The cost of administering the regulatory scheme is met partly from licence revenue and, in the main, from the interest earned through trust funds associated with the particular industry.
141. Under the present scheme, consumers of agency services are indirectly contributing to the cost of the administration of the scheme through foregone interest. In addition, there are related issues concerning the funding of the Travel Agents scheme and the emergence of an avoidance scheme within the market.

Real Estate, Business and Stock and Station Agents

142. The unit licence cost of administration in relation to real estate agents, business agents and stock and station agents is approximately \$1,500 per licence (it is not possible to disaggregate unit licence costs within this category because of the interrelationship of the agent classes in that group). By comparison, the unit licence cost in relation to travel agents is approximately \$1,100 per licence while the estimated unit cost of administering employment agents is \$1,000 per licence. Note that the estimated cost for employment agents is lower than other schemes because that scheme does not involve additional administrative expense related to trust accounts nor the registration of employees.
143. Real estate agents, business agents and stock and station agents pay fees for licences and registration. These fees contribute approximately 36 per cent of the cost of regulation. The remaining 64 per cent (\$190,000) is contributed from interest foregone by agents' clients when money (generally house deposits) is deposited in the agent's trust account.
144. Consumers of agency services are indirectly contributing to the cost of the administration of the scheme through foregone interest. However, it might be argued that this approach is of some advantage to consumers because:
- the full cost of administration will inevitably be passed on to consumers. Removing the indirect costs will simply mean that direct costs will increase to a similar amount (in addition, if the cost is levied by higher entry costs this may also make the market more anti-competitive);
  - the interest returns on short term deposits are relatively insignificant on a consumer by consumer basis – but when aggregated are able to sustain a fund capable of supporting administration costs and a fidelity fund;
  - consumers gain the advantage of a fidelity fund from which they are able to claim compensation in circumstances where an agent fails.

**Issue**

**18. Should real estate agents, business agents and stock and station agents meet the full cost of the administration of the scheme? Should part of this cost continue to be met from interest earned on client money?**

### Travel Agents

145. Prior to amendments to the Act in 1999, fees paid by travel agents could not be used for administrative expenses and simply accumulated in Board accounts. Fees paid by travel agents can now be used to pay for the costs associated with the administration of the Act. However, there is a shortfall between the fees paid by travel agents and the costs associated with regulating the industry.
146. At present, and into the foreseeable future, because of the accumulation of fees paid by travel agents since the inception of the fund in 1992, there is capacity for the shortfall to be offset against those accumulated funds. However, at some point in the future, this shortfall of funds will need to be addressed. Options may include increasing fees paid by travel agents, managing costs downwards or a combination of both.

#### **Issue**

**19. In terms of managing the expected shortfall with the funding of the travel agents scheme, are there other alternatives that could be pursued?**

### Avoidance problem

147. A practice has developed over the years whereby a number of agents, in particular, those agents active in the commercial market, have set up trust accounts naming themselves as trustee for particular clients, thereby ensuring that interest earned is paid to the nominated client or other person rather than to the Statutory Interest Account (from which funds are drawn to the Fidelity Guarantee Fund).
148. This practice disadvantages those in the industry who comply with the Act because their competitors are able to attract clients with the offer of greater interest returns. This type of transaction also results in a significant leakage of interest from the Statutory Interest Account. It also raises an access and equity issue whereby a client who receives the benefit of interest paid, rather than the Fund, can at the same time enjoy the protection of the Act and lodge a claim against the Fund in the event of loss or defalcation of the moneys held on their behalf. In other words, clients whose moneys have been credited to the agent's trust account are potentially disadvantaged in that they are effectively cross-subsidising those clients who have elected to receive the benefit of the interest themselves. Moreover, if a commercial client falls victim to the collapse of the agent, the call on the Fund would be significantly greater in dollar terms.

**Issues**

- 20. Should the Act be strengthened to ensure that interest earned on all trust moneys, irrespective of how trust accounts are structured, be paid to the Statutory Interest Account?**
- 21. Should commercial and other clients not contributing interest earned on trust moneys to the Fund be exempt from making claims against the Fund?**



## **PART 3**

# **GENERAL REVIEW OF THE AGENTS ACT 1968**



## **Chapter 8: Administration of the Regulatory Scheme**

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### **Current ACT Arrangements**

149. Under the Act, the Agents Board of the ACT (“the Board”) has responsibility for the supervision of the agents’ services markets. It is responsible for the administration of the licensing/registration system and the disciplinary system. It is also responsible for the administration of a number of financial accounts and the promotion of educational programs for real estate matters. It also promotes agent and consumer awareness of the Act and liaises with the Travel Compensation Fund.
150. The ACT system is a co-regulatory model. Throughout Australia, supervision of these markets is modelled on either a co-regulatory or government regulatory system; there are no self-regulatory models.
151. Under the Agents Act, the Board is a body corporate comprised of seven members, one of whom is required to be a legal practitioner. Apart from the legal practitioner requirement, there are no other statutory requirements for the other members. The composition of the Board has varied over the years, but generally there has been a majority of industry representatives appointed.
152. The Board discharges its functions by regular meetings at which:
- in relation to registration and licensing matters, the Board considers applications for grants on the basis of preparatory work undertaken by the Office of Fair Trading; and
  - in relation to disciplinary matters, the Board meets, as required, to consider and adjudicate on disciplinary matters referred by the registrar of agents.
153. Members of the Board make themselves available, as required, to attend to other administrative matters between meetings.
154. Board members are appointed on a part-time basis. Most of the day-to-day work is undertaken by departmental officers within the Office of Fair Trading who assist applicants complete applications, investigate complaints and conduct inspections.

### **Problems with the current arrangements**

155. In recent times, a number of consumers of agency services have expressed frustration with the existing system, criticising it as being out of touch with contemporary community expectations of how a licensing and disciplinary system should operate.

156. Concerns have been raised as to whether the current system offers appropriate consumer protection, bearing in mind the nature of the markets and the exposure of consumers to potential loss or harm.
157. Perhaps the more serious criticisms which have been levelled against the system are that the Board does not conduct its inquiries openly and that it does not inform those affected by its decisions, who may have initiated the Board's involvement in a particular matter. These consumers have called on Government to amend the legislation to:
- require the Board to be more transparent and accountable to the community;
  - be obliged to advise complainants of its decisions and the reasons for them in a timely manner; and
  - be subject to media scrutiny.
158. Criticism has also arisen over the Board's independence in the performance of its functions. Perceptions of conflicts of interest have arisen, which have been considered in the course of an Auditor-General's Inquiry and his conclusions will be taken into account by Government in finalising its position on the final form of the Act. In the meantime, issues are raised here for public consideration and comment.
159. The appointment of industry members to regulatory authorities is often justified on the basis that such members provide valuable information to an authority about the regulated industry. However, there are some problems with this approach:
- the appointment of industry members may give rise to a perception, real or imagined, that the authority is captive to industry;
  - industry members may use their position on a board to further partisan agendas;
  - industry members may have a conflict of interest causing members to be excused from proceedings thereby diminishing the contribution of their membership; and
  - in any event, access to industry knowledge may be obtained in other ways (in disciplinary proceedings by calling industry members to explain a particular industry practice).
160. The existing structure of the body charged with hearing complaints and the appeals system is incongruous. Under the current system, up to seven members of the Board can make a decision that can be overturned by a single member of the Administrative Appeals Tribunal (AAT). It seems unnecessary to have decisions made at first instance by such a large body.

## **Reform of the Current System**

161. In considering a revised system, consideration should be given to how best the Act should be administered. An examination has been undertaken of different approaches to regulation in other jurisdictions for this purpose. While there is no single Australian model for regulating agents' services, Australian jurisdictions can be divided into two camps: those that regulate agents using a co-regulatory model and those that regulate agents using a government regulatory model. An overview of the two different approaches is given below.

### **Co-regulatory models**

#### ***Western Australia***

162. In Western Australia, agents are regulated under the *Real Estate and Business Agents Act 1978*. The WA Real Estate and Business Agents Supervisory Board is a body corporate. The WA Board is comprised of five members; there is a requirement for one of the members to be a legal practitioner. Other members represent the REI<sup>5</sup> of WA and licensed agents in general and one other member is required to be a person experienced in commercial practice.

163. Disciplinary matters are heard by the Board by way of Inquiry after referral by the Registrar or any other person. The Board has the power to reprimand or caution a licensee, impose a fine or suspend or revoke a licence. Appeals against decisions of the Board are heard by the District Court.

#### ***Tasmania***

164. In Tasmania, agents are regulated under the *Auctioneers and Real Estate Agents Act 1991*. The Auctioneers and Real Estate Agents Council of Tasmania comprises of the President and seven other members. The President is required to be a legal practitioner, three members must be representatives of auctioneers, three members must be representatives of real estate agents, and the remaining member is a representative of the general public, without any connection to the business of auctioneering or real estate.

165. Disciplinary matters are heard by the Council. The Council has the power to reprimand or caution a licensee, require a licensee to pay a fine or suspend or revoke a licence. Appeals against Council decisions are heard by the Magistrates Court.

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<sup>5</sup> REI - Real Estate Institute.

### ***Northern Territory***

166. In the Northern Territory, agents are regulated under the *Agents Licensing Act*.<sup>6</sup> The Agents Licensing Board is also a body corporate and is comprised of five members, one of whom is required to be a legal practitioner, one of whom must be an employee of the NT Public Service, two members who represent the REI of NT and one member representing the interests of consumers. Disciplinary matters are undertaken by the Board. The Board has the power to reprimand or caution an agent, impose a fine or suspend or revoke a licence. Appeals against Board decisions are heard by the District Court.

### **Government regulatory models**

#### ***New South Wales***

167. In NSW agents are regulated under the *Property, Stock and Business Agents Act 1941*. As a result of a rationalisation of licensing functions in NSW in 1994, the statutory functions of the then Property Services Council (a statutory body with similar powers to the ACT Agents Board) were transferred to the Director-General of the NSW Department of Fair Trading who had responsibility for the administration of other licensing schemes in NSW. Licences are now issued by the Director-General as a delegate under the NSW Act and also administered by the same department.

168. The Director-General is responsible for considering licence applications for real estate agents, stock and station agents, business agents, strata managing agents, community managing agents and on-site residential property managers.

169. In practice, upon receipt of a licence application, the Department reviews the application to ascertain whether the applicant meets the prescribed criteria for a licence. Where the Director-General objects to the grant of a licence or the renewal of a licence, the applicant is notified and the applicant can then appeal the decision to the Licensing Court (a special division of the NSW Local Court). The Director-General then lodges his/her grounds for objection to the grant of the licence in the Licensing Court. Where the Director General has reason to believe that a licence should be cancelled, s/he lodges a complaint in the Local Court and the court issues a summons on the licensee to show cause why the licence should not be cancelled. Decisions of the Local Court are appellable to the Supreme Court. The Director-General has power to suspend a licence for a period of 60 days on reasonable grounds.

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<sup>6</sup> The *Land and Business Agents Act 1979* was renamed by amending legislation (No.31 of 1991) to the *Agents Licensing Act (NT)*; the title does not contain a date as it comprises of the later Act and amendments.

170. Under s.30 of the NSW Act, the Director-General is required to maintain a register of licensed agents. In NSW, real estate sales persons, stock and station sales persons, business sales persons and trainee managing agents are required to be registered. The Director-General is required under s.58 of the NSW Act to maintain a register of sales persons and trainee managing agents.
171. The Director-General administers and maintains the Property Services Compensation Fund and the Property Services Statutory Interest Account.<sup>7</sup> The Director-General also handles claims against the Compensation Fund. Under certain circumstances, such as trust fund defalcation, mental infirmity or cancellation of a licence, the Director-General may approach the Supreme Court for the appointment of a receiver to the licensee's business (Part 6A of the NSW Act). In addition to the above powers, an authorised officer under the NSW Act has<sup>8</sup> the power to issue a penalty notice<sup>9</sup> for a breach of the Act.

### **Queensland**

172. In Queensland, the *Auctioneers and Agents Act 1971* was recently repealed and replaced with the *Property Agents and Motor Dealers Act 2000*. A new legislative scheme governing the functions of real estate agents, restricted letting agents, auctioneers, property developers, motor dealers and commercial agents has been enacted.
173. Under the new Act, the administrative function of licensing and registering agents will now be performed by the Chief Executive of the Department of Equity & Fair Trading who has delegatory powers. The shift from a statutory committee structure to a departmental structure was made because of cost and a general level of consumer/industry dissatisfaction with the administration of the system.
174. Appeals against decisions made by the Chief Executive of the department are heard by the newly established Property Agents and Motor Dealers Tribunal. The Tribunal has jurisdiction to review the department's licensing and registration decisions, to determine consumer claims against traders above a value of \$5,000, to review the department's minor claim decisions, to issue summary orders against a person required to reimburse the Claim Fund and to hear and decide disciplinary matters involving licensees and registered employees. The powers of the Tribunal are the powers conferred by the *Property Agents and Motor Dealers Act*.

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<sup>7</sup> The Fund and Accounts are similar in nature to the ACT's Fidelity Guarantee Fund and Agents Administration Account.

<sup>8</sup> An authorised officer is defined to mean the Director-General or a person authorised in writing by the Director-General as an authorised officer for the purposes of s.86C of the NSW Act or an investigator appointed under s.18 of the *Fair Trading Act 1987* (NSW).

<sup>9</sup> A penalty notice is a notice which has the effect of allowing a person served with such notice to pay a penalty determined by regulation in lieu of having the matter dealt with by a court.

175. Disciplinary proceedings are commenced by the Chief Executive filing a notice stating the grounds for the charge and the nature of the matter with the Registrar of the Tribunal. The Tribunal may be constituted:

- by three members for a hearing; or
- by the chairperson sitting alone (in relation to preliminary hearings, reviewing a decision of the Chief Executive on a minor claim, considering an application for a summary order, deciding a claim under \$10,000, considering an application for an extension of time).

176. The Tribunal is not subject to the rules of evidence and may inform itself in any way it considers appropriate. Decisions of the Tribunal may be appealed to the District Court, but only on a question of law.

### **South Australia**

177. In South Australia, agents are regulated under the *Land Agents Act 1994*, *Land Valuers Act 1994* and *Conveyancers Act 1994*.<sup>10</sup> Registration of agents is undertaken by the Commissioner for Consumer Affairs under the *Land Agents Act* and administered by the Office of Consumer and Business Affairs. Appeals against registration decisions by the Commissioner lie with the District Court (Administrative and Disciplinary Division). The power to initiate a complaint alleging grounds for disciplinary action against an agent lies with the Commissioner or any other person.

178. The Commissioner conducts investigations to determine whether a complaint should be laid. Offences against the Act can only be prosecuted by the Commissioner, an authorised officer under the *Fair Trading Act* or a person who has the consent of the Minister for Consumer Affairs. Complaints alleging grounds for disciplinary action and prosecutions are conducted on the Commissioner's behalf by officers of the Crown Solicitor's office.

179. Enforcement proceedings to cancel or suspend registration are brought by the Commissioner in the Administrative and Disciplinary Division of the District Court of South Australia.

180. The Commissioner has no power to cancel or suspend registration, except where the agent has failed to pay their annual fee. Only the Court can de-register an agent.

181. Under the *Land Agents Act*, the Commissioner is required to maintain an indemnity fund. The Commissioner also administers and deals with the auditing and reporting requirements and claims against the indemnity fund. Land Valuers in South Australia are negatively licensed under the *Land Valuers Act 1994*.

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<sup>10</sup> These Acts replace the *Land Agents, Brokers and Valuers Act 1973* (SA).

## **Victoria**

182. In Victoria, agents are regulated under the *Estate Agents Act 1980* and the *Business Licensing Authority Act 1998*. The regulation of agents is undertaken by Consumer and Business Affairs Victoria and the Business Licensing Authority (a statutory body). Licensing of individuals and corporations, employment of agents' representatives and the licence application process is now undertaken by the Business Licensing Authority.
183. Prior to 1994, the Estate Agents Board was responsible for the regulation of estate agents including licensing, but because of a number of real or perceived conflicts of interest, the Board was replaced with an Estate Agents Council which now has a policy and advisory role only.
184. Under the legislation, the Director of Consumer and Business Affairs is responsible for:
- ensuring that estate agents and their representatives comply with trust account procedures, professional conduct rules and the requirements of the Victorian Act;
  - initiating inquiries before the Victorian Civil and Administrative Tribunal ("the Tribunal");
  - dealing with prosecutions, inquiries and complaints under the Victorian Act;
  - providing assistance and support to the Council; and
  - investigating matters referred to it by the Business Licensing Authority.
185. The Estate Agents' Guarantee Fund is administered by the Secretary of the Department of Justice. Claims against the Guarantee Fund are handled by the Secretary. The Guarantee Fund is also used to cover the administration costs of the Fund and the Act by the Secretary and the Director and also to cover the costs and expenses of the Council.

## **Changes in Other Jurisdictions**

186. An analysis of the above regulatory schemes indicates that a majority of Australian jurisdictions have, in the recent past, changed from a co-regulatory structure to a government regulatory structure to regulate the activities of agents. The shift has occurred largely because of real or perceived conflicts of interest, cost implications and/or unacceptable levels of dissatisfaction by consumers and industry with the standard of delivery of the regulatory administration by these co-regulatory bodies. Licensing or registration functions are now handled within government departments together with complaint investigation and audit reporting. Disciplinary matters are initiated by government departments in state courts or specialist tribunals.

### **Reform - ACT Registration and Licensing Function**

187. The administrative function of deciding licensing and registration applications is neither onerous nor complex. The process is largely a matter of vetting a large number of written applications from applicants against a standard checklist of objective criteria. The process is straightforward and uncomplicated.

188. If, as in the majority of other jurisdictions, the ACT were to adopt a government regulatory structure, then it may be appropriate for the Commissioner for Fair Trading to become the licensing authority for the following reasons.

- The Commissioner for Fair Trading has overall responsibility for the licensing and registration of various other service industries in the ACT including the motor vehicle industry, the liquor and adult services industries, credit providers and finance brokers, the security industry and the trade measurement industry, with appeal rights against a refusal to grant a licence lying to the AAT, and in the case of credit providers and finance brokers, to the ACT Credit Tribunal.
- The vetting of licence and registration applications under the Agents Act is already processed by the Commissioner's staff within the Office of Fair Trading. The Board's functions are limited to merely giving formal approval to registrations and licences, where the statutory criteria have been met.
- A governmental administrative structure would help remove the apparent perception held by a significant section of the community that the Board operates as a "closed shop" in the interests of agents. It would provide an independent, impartial and cost-effective forum for licensing and registration applications, and a straightforward administrative process.
- The Commissioner for Fair Trading issuing licences is a more cost-effective option than a seven member Board meeting to agree to issue licences.

Appeals against licensing decisions of the Commissioner would lie to the Administrative Appeals Tribunal.

#### **Issue**

**22. Should the administrative registration and licensing function currently undertaken by the Board be undertaken by the Commissioner for Fair Trading?**



### **Reform - The Complaints and Disciplinary System**

189. The Agents Board is responsible for the administration of the disciplinary system. There is no complaints and disciplinary system for auctioneers under the *Auctioneers Act*.

#### ***Current Statutory Powers of the Board***

190. The Board has a power of inquiry under Part 11 of the Act. An inquiry may be called to consider a range of matters under the Act, including:

- objections or refusal to grant applications for a licence or registration;
- claims for compensation from the Trust Fund; and
- breaches of the rules of conduct.

191. During an Inquiry, the Board has the power to summon witnesses, call evidence and require agents to produce documents. Under Part 10 of the Act, the Board has the power to appoint a receiver or administrator to an agent's business under certain circumstances.

192. Disciplinary matters are heard by the Board by way of inquiry after referral by the Registrar. If the Board determines that a breach of the rules of conduct for agents has occurred, it may take any one or more of the following forms of action:

- reprimand the agent;
- order the agent to pay a fine;
- order the agent to pay the costs of the inquiry;
- disqualify a person involved in the direction, management or conduct of the agent's business;
- revoke an agent's registration;
- impose a condition or restriction on a licence;
- suspend a licence; or
- revoke a licence.

193. Under subsection 71(2) of the Act, the Board may request that documents relating to a trust account be available for inspection by the Registrar and may also withdraw the authority of any person authorised to withdraw money from a trust account.

194. Decisions of the Board are appellable to the AAT.

#### ***Problems with the current complaints and disciplinary system***

195. It is desirable to establish a transparent, open and accountable complaints and disciplinary system for agents. The present complaints and disciplinary system administered by the Board is sometimes criticised on the basis of a lack of independence from the market, a lack of transparency in decision-making, a lack of accountability, and secrecy associated with the conduct of its inquiries.

196. Prior to recent amendments to the Agents Act, agents' names and the outcome of Board inquiries were not publicly available at all. Now the Board is required to include in its Annual Report the number, and an outline of the nature and outcome, of all complaints made to the Board during the financial year, and the name of anyone who was subject to an inquiry by the Board during the financial year, and an outline of the nature and outcome of the inquiry.
197. While the new reporting requirements allow the publication of information about Board proceedings up to 16 months after the event, they do not remedy the community's concerns about independence, transparency and accountability of Board activities at the time inquiries are conducted by the Board.
198. The secrecy surrounding Board hearings is undesirable. While it is appropriate and proper for details of an investigation which may involve the testing of allegations of dubious value to remain outside the public domain, once proceedings move from an investigative phase to a court, tribunal or other body with the power to impose a sanction, the proceedings should be opened to public scrutiny.
199. The disciplinary system also suffers from the anomaly mentioned earlier where a Board of seven members makes decisions in the first instance that can be overturned by one sitting member of the AAT.
200. On the basis of the above problems with the current system, and an earlier suggestion made to remove the registration and licensing function from the Board to Government, it is perhaps desirable to also consider an alternative model for the effective administration of the complaints and disciplinary system.

***Preferred criteria for complaint-handling systems***

201. In 1993 the NSW Law Reform Commission identified criteria against which a complaint-handling system could be judged.<sup>11</sup> In coming to its conclusions, the Law Reform Commission considered developments in Australian and world jurisdictions and formulated the "best practice principles" which have achieved wide acceptance.<sup>12</sup> While the Commission was focusing specifically on lawyers, the principles would equally apply to other regulatory schemes.

202. The best practice principles identified by the Commission are:

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<sup>11</sup> Report 70, "*Scrutiny of the Profession: Complaints Against Lawyers*", February 1993.

<sup>12</sup> The Sackville Committee, in its report, recommended that the Commonwealth should actively encourage all States to examine their disciplinary systems against the model recommended by the NSWLRC and enact legislation as necessary to incorporate best practice principles. In its report, the TPC recommended that all jurisdictions should take steps to reform their systems for complaint-handling to make them more effective, independent and publicly accountable and to increase their emphasis on comprehensive consumer dispute resolution and redress (in addition to professional discipline).

- **Independence and impartiality:** A legitimate grievance must be dealt with in a fair and unbiased manner free from the perception that the system is run by and for lawyers;
- **Recognition of the multiple aims of a professional disciplinary system:** The system must serve three aims. Firstly, it should address promptly the specific concerns of particular complainants. Secondly, it should secure compliance of professionals with the standards of professional practice. Thirdly, it should ensure that the standards of the profession are maintained at a sufficiently high level. The Commission identified a "profound gap" between the concerns of clients (negligence, delays, incompetence, poor communications, discourtesy and overcharging) and those issues the profession saw as meriting disciplinary action. In relation to this gap, the Commission suggested a range of new enforcement options including apology, reduction of a bill of costs or removal of a solicitor's lien;
- **Accessibility:** There should be one intake system with information widely available written in plain English;
- **Efficiency and effectiveness:** The disciplinary system should be variegated to allow "less serious" allegations to be actionable, faster and easier ways of dealing with overcharging, consensual conflict resolution in some cases and development of preventative measures to deal with poor professional practice through education, counselling and assistance;
- **Procedural fairness:** There should be equal treatment of complainants and lawyers - to address existing problems, complainants should have access to advice and assistance, immunity from civil liability, information about the progress of a complaint, statements made by the other party, adequate reasons for decisions, hearing, and independent review of an adverse decision;
- **Openness and accountability:** The disciplinary system should be open and transparent. Hearings should be open to the complainant and the public and subject to media reporting. Lay participation should be full and meaningful. There should be annual reporting requirements;
- **External scrutiny and review:** An external agency should be able to monitor the complaint-handling process at every level;
- **Contribution to the general enhancement of professional standards:** The system should play a role in identifying trends and patterns from complaints to help raise professional standards;
- **Proper funding and resources:** The disciplinary system should be adequately funded to achieve the above aims.

203. Accordingly, consistent with the best practice principles, a revised ACT complaints and disciplinary system should give specific emphasis to the following issues:

- the need for the system to be independent, yet benefit from the expertise of agents;
- the need to introduce a greater degree of transparency, openness and accountability;
- the need to be cost and time effective; and
- the need to avoid any conflict of interest with the body responsible for issuing licences and handling the complaints and disciplinary system.

### ***Proposed Options***

204. A new ACT disciplinary model must meet the best practice principles. Any proposed model should have regard to the following:

- consumers may be exposed to relatively high levels of financial risk but disciplinary action may result in the loss of business licences and with it agents' livelihood - consumers and industry members alike must therefore be confident that grievances are capable of being dealt with in a fair, unbiased and timely manner; and
- the new system must be cost effective – the Office of Fair Trading (OFT) already undertakes the investigatory functions as well as the function of preparing and pursuing an agent before the Board and, in addition, the OFT already undertakes a range of like investigatory and prosecution functions.

### **Problematical Models**

205. The existing complaints and disciplinary system does not meet the best practice principles because:

- of a community perception (whether true or not) that the Board is partial to the industries it regulates. This contrasts directly with the best practice principles of independence and impartiality whereby a grievance must be dealt with in a fair and unbiased manner, free from the perception that the system is run for agents;
- the system lacks openness and transparency. Board hearings are not open to the public and subject to media reporting, and its decisions are not available immediately to the public. The best practice principles of openness and accountability are essential ingredients for an effective disciplinary system;
- of the potential for conflicts of interest arising involving practising Board members (this issue is currently the subject of an Inquiry by the Auditor-General). Where members are excused from meetings because of conflicts arising, their membership contribution is diminished.

206. Proceedings by the Board might be made more accountable and more transparent. Additionally, the number of members sitting on each hearing could be reduced to three. However, while this would meet some of the best practice principles and make Board hearings more cost effective, a community perception of bias by existing board members would remain. This would defeat the achievement of the best practice principles of independence and impartiality.
207. Alternatively, a summary jurisdiction might be created whereby one body undertakes both investigatory and disciplinary functions, subject to appeal to the AAT. While there may be financial savings in moving down such a path, such a model is not considered appropriate because:
- it would not meet the best practice principles (unless the determinative stage was open and transparent to the public); and
  - while such a model is used in relation to other industries in the ACT, such application can be distinguished. For example, the credit and finance broking industry is subject to a negative licensing scheme whereby industry members have automatic entry into the industry. Negative licensing schemes do not vet industry members on entry; in such circumstances, sufficient powers are necessary to take immediate disciplinary action against undesirable trading practices in the industry.

#### Models for consideration

208. The three options below are consistent with the best practice principles and developments in other jurisdictions and capitalise on the existing skills within the OFT.

#### **Model One: Complaints & Disciplinary Committee with Appeal Rights to the AAT**

209. Under this model, the investigation function would continue to be undertaken by the OFT and thus would involve no change to the existing cost structure.
210. The disciplinary proceedings function would also be undertaken, as happens now, by the OFT instructing the ACT Government Solicitor. There would be no change to the existing cost structure in relation to this function. Similarly, where prosecutions are undertaken and a brief of evidence referred to the DPP, there would be no change to the existing cost structure for this function, as the cost of prosecutions is currently borne by the DPP.
211. A Disciplinary Committee would be established with fewer members, but with the powers of the existing Board, and it would be required to operate in a transparent, accountable and open fashion. It is anticipated that in minor matters, evidence would be considered on the papers by

agreement of the parties, and where there is no agreement, it would be the Committee taking evidence (ie., proceedings would be in the nature of an inquiry). In serious matters, it is important to test the credibility of witnesses.

212. The Committee would consist of the Commissioner (as chair) and two other members, selected from a specialist panel of people with industry experience and financial experience (part-time, remunerated) appointed by the Attorney-General.

213. The Committee could be constituted to hear cases either by the Commissioner sitting alone or as three members sitting. It is proposed that the Commissioner, sitting alone, could handle the following matters:

- conduct preliminary hearings;
- consider an application for a summary order;
- decide a claim under \$5,000;
- consider an application for an extension of time; or
- consider an application for joinder.

214. Appeals from decisions made by the Commissioner or Committee would be to the AAT.

215. Advantages:

- this model meets the best practice principles of openness, accountability, transparency, accessibility and efficiency and effectiveness. It would also benefit from the expertise of agents, where appropriate; and
- costs would be restricted to only two additional members when the Committee is constituted as a three person Committee. This model is the cheapest model.

216. Disadvantages:

- on the basis of these matters being determined by open hearing and bearing in mind the experience of the existing Board, it is anticipated that the time required would be in the order of approximately 12 to 15 full working days each year. In effect, the savings made by using the Commissioner would translate into an additional two to three weeks work per annum for the Commissioner. This may entail a redistribution of other work or priority in the Commissioner's existing functions;
- it may be necessary to establish a "Chinese wall" between the Commissioner and the OFT in relation to matters likely to come on for hearing, to avoid a perception of bias.

**Model Two: The Commissioner for Fair Trading brings Complaints and Disciplinary Matters before an Independent Body**

217. Under this model, the investigation function would continue to be undertaken by the OFT and thus would involve no change to the existing cost structure.
218. Like model one, the disciplinary proceedings and prosecution functions would be the same, and thus there would be no change in the existing cost structure in relation to these matters.
219. The Commissioner alone would determine whether a matter was serious enough to warrant disciplinary proceedings being commenced. The Commissioner would bring disciplinary proceedings, through the Government Solicitor, before an independent body described below.

*The independent body*

220. The independent body may be either:

- (i) **an independent disciplinary tribunal as recommended in Option Three in the Legal Practitioners' Review Paper (IDT):** A recent review of the *Legal Practitioners Act* recommended the adoption of a new disciplinary process under that Act. One of the options suggested was the creation of an independent disciplinary tribunal (IDT) to consider written complaints about legal practitioners and conduct proceedings openly in accordance with the best practice principles of transparency and accountability.

It is proposed that the IDT could also consider written complaints and conduct disciplinary hearings into matters referred by the Commissioner for Fair Trading for determination in accordance with the best practice principles. The open and accountable resolution of complaints is integral to the maintenance of high professional and ethical standards in the agents' services markets. It also protects the interests of consumers and generates public confidence in the provision of agency services. Accordingly, proceedings of the IDT should be in public and protected by absolute privilege. Appeals of decisions made by the IDT would be to the Supreme Court.

In relation to proceedings instituted against agents, as opposed to legal practitioners, the IDT would be constituted in the following manner:

- a chairperson with senior legal qualifications appointed by the Attorney-General (this would be the same person as appointed in relation to other matters concerning the IDT);
- one member selected from a specialist panel of people with agent industry experience (part-time remunerated) appointed by the Attorney-General; and

- one member selected from a specialist panel of people with financial experience (part-time remunerated) appointed by the Attorney-General.

The IDT would be constituted to hear cases either by the Chair sitting alone or, as three members sitting. As with model one, it is proposed that the Chair, sitting alone, could handle the following matters:

- conduct preliminary hearings;
- consider an application for a summary order;
- decide a matter concerning less than \$5,000;
- consider an application for an extension of time; or
- consider an application for joinder.

Advantages:

- this option, like model one, meets the best practice principles of openness, accountability, transparency and accessibility and would be an efficient and effective disciplinary system;
- this option builds on the proposed Option Three model for the legal profession and could take advantage of economies of scale;
- this option is similar to the recently introduced new interstate disciplinary tribunal schemes;
- the IDT could develop specialist disciplinary expertise in this and other occupational and professional areas.

221. Disadvantages:

- the major disadvantage with this option would be the additional cost of having to fund three tribunal members, but only when appropriate. However, while this option would be more expensive than model one, it would still be cheaper than the existing seven member Board structure.

- (ii) **The ACT Administrative Appeals Tribunal (AAT).** While the AAT usually reviews administrative decisions, it would be possible to confer on it by legislation a specialist disciplinary jurisdiction. The *Administrative Appeals Tribunal Act 1989* has some existing flexibility to allow for the arrangement of the AAT into specialist Divisions – one of which might be a Division to consider disciplinary proceedings



brought by the Commissioner. Appeals from decisions by the AAT would be to the Supreme Court, but consistent with existing appeal rights from the AAT, only on a question of law.

Advantages:

- the AAT would hear complaints and disciplinary matters in a transparent, open and accountable fashion - this option meets the best practice principles of openness, accountability, transparency, accessibility and efficiency and effectiveness. Through expert evidence, it would benefit from the expertise of agents, where appropriate;
- there may be opportunities to reduce costs by tapping into existing structures and arrangements, as there would be a modest increase in the number of matters presently heard in the AAT. Accordingly, if the hearing function was discharged by the AAT, the costs would be less than for maintaining a separate disciplinary structure;
- the cost of an AAT member (or when constituted by the President as a three person tribunal) to hear a matter is comparable to the costs in option one - it is cheaper than the existing seven member Board structure.
- this model is similar to the NSW Special Division of the AAT.

Disadvantages:

- there appear to be no obvious disadvantages with this model.

**Cost Issues**

222. At the present time, the complaints and disciplinary system is not a charge on Territory resources, except to the extent that until very recently, the Government Solicitor's Office has not sought to recover its costs of providing services to the Board. Instead, the disciplinary system is funded from the Statutory Interest Account comprised of revenue received from agents' licence fees and interest earned from consumer moneys held in agents' trust funds. The following Chart summaries expenses incurred by the Agents Board from 1997–2000.

**Chart 3: Expenses (including regulatory costs) incurred by the Agents Board in administering the *Agents Act 1968* over the last three financial years.**

<b>Item</b>	<b>1997 – 1998</b>	<b>1998 – 1999</b>	<b>1999 - 2000</b>
Board costs	25,481	17,219	12,299
Salaries and employee entitlements	289,817	244,304	232,107
Office and administration costs (including rent, audit costs, telephone charges and postage)	81,599	80,777	71,532
<b>TOTAL OPERATING COSTS</b>	<b>396,897</b>	<b>342,300</b>	<b>315,939</b>

(Source: Annual Financial Statements of the Agents Board published in Annual Reports.)

223. Disciplinary costs incurred yearly are not constant because of the "transactional" nature of complaints.
224. The historical record of cases heard by the Board suggests that hearings last approximately two to three hours per session with hearings extending sometimes over two to three sittings with an average of six inquiries conducted per year. The size of the Board is generally determined by the availability of an agreed number of members, but no fewer than the quorum constituted by the Chair or Deputy Chair and two other members, required under subsection 16(5) of the Act. Generally, 90 percent of Board members sit on inquiries. It should be noted that the cost of sitting fees is determined by the number of members sitting.
225. The cost of the current Board's sitting fees (including minor incidental costs) is approximately \$2,000 per Inquiry. Based on 90 per cent of Board members sitting and the fact that approximately two thirds of Inquiry costs are for payment of sitting fees, it is estimated that the cost component for member sitting fees under the current regime is about \$1,500 per inquiry.

226. Under Model one, Inquiry costs are estimated to be in the order of \$1,200. Of that amount, the personnel component is around \$700 and other costs are \$500. Based on the fact that the Board averages around six inquiries a year, the total cost would be \$7,200 per annum.
227. In relation to the first two options in Model two, it is estimated that the costs per Inquiry could range between \$1,000 and \$1,500 depending on whether the Chair is sitting alone or the Tribunal is sitting as three members. Based on the lower figure, it is estimated that Inquiry costs would be around \$6,000 per annum. Using the higher figure, this would increase to around \$9,000 per annum. In either case, the costs involved for the two options would appear to be less than the current disciplinary system.

### **Issues**

- 23. Should the responsibility for the existing complaints and disciplinary system currently administered by the Agents Board be conferred on a Committee chaired by the Commissioner for Fair Trading, assisted by other people, with appeal rights to the AAT? Or**
- 24. Should the Commissioner for Fair Trading bring complaints and disciplinary matters before an independent body for determination; that body being either: an independent disciplinary tribunal; or the Administrative Appeals Tribunal?**

## Chapter 9: Coverage of the Act

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### Gaps in the Present Scheme

#### *Rules of Conduct for agents*

228. The Act specifies rules of conduct for licensed agents. Many of these rules simply restate in an accessible form the ordinary duties that an agent owes their principal under the common law (eg., the duty to act in accordance with authority, avoid conflicts of interest and make full disclosure). Other rules concern the conduct of agents generally (eg., the duty to not engage in false, deceptive or fraudulent conduct). The rules also require a registered agent to be in charge of each agency branch.
229. The requirement that agents notify in advertisements that they are licensed does not add to the overall cost of advertising and provides a cost-effective means of monitoring market behaviour.
230. The cost occasioned by compliance with these provisions over and above the cost that would have been occasioned by complying with ordinary business requirements, or the law dealing with agents, or the criminal law, is marginal. There is some benefit in reducing compliance costs and providing the relevant conduct restrictions in an accessible legislative form.
231. The rules of conduct that deal with the principal/agent relationship may inadvertently exclude similar conduct to the matters set out in the Rules that might have occurred outside that relationship (eg., during negotiations to list or manage a property but which ultimately fail to eventuate). In addition, the Rules of Conduct may also exclude inappropriate conduct by agents in their dealings with consumers, outside the principal/agent relationship that warrants regulation.
232. In addressing these types of circumstances, it may be useful to include a catch-all provision that precludes a literal approach to the application of the rules of conduct. One example of inappropriate conduct that fell outside the rules related to a complaint to the Registrar from the Tenants Advice Service where it was alleged that an employee of a real estate agent was passing themselves off as a tenant in order to obtain free legal advice. The Registrar was unable to take the matter further on two grounds: firstly, because employees are not directly regulated by the Act, and secondly, the alleged conduct was not covered by the Rules.

**Issue**

**25. Should the Rules of Conduct be broadened in scope to cover a wider range of conduct engaged in by agents? If so, what sort of conduct should be covered by the Rules?**

**Employees**

233. In the ACT, employees of agents need not be registered or licensed. Instead, sales representatives and property managers work under the supervision of licensed or registered agents (the conduct rules require a registered agent to be in charge of the day-to-day activities of each branch office). The supervision of these employees provides some measure of protection for consumers (and under the conduct rules, agents have been disciplined in the past for the wrongful acts of their employees). However, risks remain where these employees have not been adequately trained. In addition, employees are outside the reach of the existing disciplinary system.

234. While individual agencies may impose appropriate standards, there is no legislative requirement that these employees meet basic competency standards, have knowledge of relevant legal requirements, or provide any evidence of personal integrity.

235. By contrast, all Australian States require these employees to undertake educational training and police checks. Details of courses, duration and cost are included in Chart 4 below.<sup>13</sup>

**Chart 4: Education requirements for agents' representatives in other jurisdictions.**

NSW	Certificate of Registration Course held over five days with the REINSW costing \$495 or \$575 for members and non-members respectively.
Victoria	Certificate in Real Estate Operations – delivered by TAFE or REIV – six modules.
South Australia	Certificate in Real Estate Sales TAFE approx 550 hours; or specified units offered as part of the Bachelor of Business (Property).
Queensland	REIQ Career Start Sales Course, leading to a Certificate of Attainment in five modules.
Tasmania	Residential Sales Licensing Course offered by the REIT over 4.5 days plus three hour exam.
Western Australia	Certificate 111 in Property Services (from REIWA or TAFE) over four weeks and four modules.

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<sup>13</sup> KPMG Consulting Report: *National Competition Policy Review of Victorian Legislation relating to the Regulation of Estate Agents*, October 2000; p.136.

236. While the cost of a police check is marginal, a requirement for a competency based course is greater. The cost for employees in other states is approximately \$500 in course fees and \$600 in foregone salary (a total cost of \$1,100 per person). As estimates of those who would be caught by any similar requirements range from 500 to 900 employees, if all these employees were to be trained, this would involve an initial impost on the market of between \$.5m and \$1m (in future years this would reduce significantly as it would only be payable by new entrants). Note that as some agencies are already providing comparable levels of instruction, the market may already be absorbing some of these costs. However, these and any new costs would be passed on to consumers.
237. While acknowledging that the requirement for sales representatives and property managers to hold prescribed competency standards does represent a restriction on competition, there are discernible public benefits that flow from such a restriction. The ACT community would have an assurance that sales representatives and property managers would be aware of their responsibilities under the *Trade Practices Act*, the *Residential Tenancies Act* and ACT Fair Trading legislation not to mislead or deceive consumers by making misrepresentations about properties for sale or rental, and would have a basic understanding of contract law.
238. While sales representatives and property managers are not responsible for trust accounts, they deal with large amounts of consumers' money, advise consumers about real estate matters and enter people's homes and have access to homes when owners are absent. The community would expect that sales people who deal with their most significant asset, their homes, are reputable people who have not been convicted of an offence of dishonesty. While the requirement to be a fit and proper person is a barrier to entry, the prohibition only affects those people who are most likely to cause harm, while producing measurable public benefits.

**Issue**

**26. Do the public benefits exceed the costs of requiring employees of licensed agents to hold prescribed competency qualifications and undertake police checks?**

***Investment activities of real estate agents***

239. More recently, the question of whether the financial advising activities of real estate agents who give financial advice to people intending to buy real estate should be regulated was examined by the Australian

Securities & Investments Commission (ASIC).<sup>14</sup> ASIC found that the existing regulatory regime covering real estate agents was not designed to regulate them giving financial advice, especially individually tailored financial advice.

240. Because other investment advisers are obligated to give securities' recommendations according to the individual needs and circumstances of the investor, ASIC felt that real estate agents who give financial advice to consumers and investors should also be regulated; particularly where investors are retail investors who may not be as sophisticated as someone who deals in property all of the time.
241. ASIC has recommended that real estate agents who give specific recommendations about the suitability of particular real estate investments for a particular investor should be subject to the same regulatory requirements as investment advisers who give personal securities recommendations and would need to be licensed.
242. However, where real estate agents give general financial advice, provided as an incidental part of selling real estate, investor protection concerns could be dealt with by regulatory requirements comparable to those applying to general securities advice and would include:
- warnings that the advice is general advice, and has not been prepared taking into account the individual circumstances of the person to whom it is given;
  - warnings that intending purchasers should assess the suitability of any investments in the property in light of their own individual needs and circumstances, which they can do themselves or by consulting an appropriately licensed person; and
  - the provision of information relating to any conflicts of interests of the adviser (such as if the adviser is also acting for the vendor or the developer).
243. The Commonwealth has suggested that the States and Territories regulate these activities through their existing real estate regulatory regimes. This proposal has the support of the Real Estate Institute of Australia.

### **Compensation**

244. It has been suggested that the Act be amended to allow for exemplary damages, otherwise known as punitive damages for breaches of the Rules of Conduct by agents.

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<sup>14</sup> Report by the Australian Securities & Investments Commission into the effectiveness of the regulatory framework governing the financial advice activities of real estate agents, as requested of ASIC by the Commonwealth Government in its response to the Financial System Inquiry report, February 2000.

245. Under the Act, there is no provision for a grant of compensation for breaches of the rules of conduct for agents nor out-of-pocket expenses. The powers of the Board are limited to those forms of action cited in section 75 of the Act which include a reprimand, fine, order for costs, disqualification, suspension, revocation of an agent's registration or licence or imposition of a conditional licence.
246. The reference to compensation in subparagraph 88(2)(aa)(i) of the Act only applies to claimants eligible for compensation from the Agents Fidelity Guarantee Fund where an agent has failed to account for money or other property entrusted to him or her. However, where a claimant has already recovered the actual pecuniary loss from a source, other than the Fund, they are not entitled to claim compensation from the Fund as provided for in subsection 71Y(2) of the Act.
247. Section 71ZC of the Act entitles the Board to require a claimant for compensation under the Fund to institute proceedings against the agent for the recovery of money. This section coupled with section 71Y of the Act essentially means that the Agents Fidelity Fund is the compensator of last resort. The policy rationale behind this approach is to provide protection for those consumers who are unable to access any other means of redress to recover their funds.
248. Some people have argued that the Agents Fidelity Fund should be the compensator of first resort. However, this option would have the effect of passing the risk and expense of recovery of funds onto the Fidelity Fund, rather than the individual.
249. A recent case in the AAT awarded an applicant compensation for consequential pecuniary loss incurred by reason of a failure to account by a licensed agent. This compensation represented the applicant's out-of-pocket expenses incurred in attempting to recover a judgment debt already awarded by the Small Claims Court, which cannot award out-of-pocket expenses.
250. If compensation were to be awarded for breaches of the rules of conduct, should the compensation come from the Agents Fidelity Fund or the offending agent? The use of the Fund for punitive damages is arguably inconsistent with the original purpose for which it was established which was to give consumers access to a compensation fund in the event of the collapse of an agent. If the objective is to punish an agent who has breached the rules of conduct, an alternative option might be increasing the level of fine that the Board is currently able to impose on an offending agent and using the proceeds of that fine to compensate a client.



### **Issues**

**27. Is there any merit in amending the Act to allow for punitive or other damages to be awarded for breaches of the Rules of Conduct by agents?**

**28. If so, who should pay?**

**29. Is there any merit in amending the Act to allow for out-of-pocket expenses from the Fund to compensate applicants for consequential loss?**

### **Financial Issues**

#### ***Interest paid on trust accounts***

251. In relation to amounts of interest paid on agents' trust accounts, it has been suggested that the Agents Act should be amended to ensure better attribution and performance of returns from these accounts. The Government in discharging its obligation to the ACT community to achieve the best possible returns on agents' trust accounts, needs to have an even-handed approach with the financial institutions involved.
252. In NSW, compulsive powers establish a formula for the payment of interest on such accounts. For example, the NSW legislation sets out a two step process designed to control the amount of interest paid on trust accounts. The first step determines for each financial institution a prevailing trust account rate. The second step determines a prescribed percentage of that trust account rate to be paid by the financial institution to the NSW Director-General which is deposited into the Property Services Statutory Interest Account used in part to fund the compensation fund. There are also provisions applied to financial institutions for trust account reporting purposes that currently are not within the ACT legislation. The ACT Auditor-General has recommended that the Board's powers to enter into arrangements with banks should be strengthened.
253. In the ACT, there are no reporting requirements on financial institutions to advise the Registrar of trust accounts maintained with them. In NSW, financial institutions are required to advise the Director-General of the number of trust accounts opened with them and the total amount of interest that the financial institution paid within the month. They are also required to advise the Registrar when a trust account becomes overdrawn. Advice of this nature can be an early warning signal for the Registrar to take immediate investigative action and where appropriate, refer the matter to the Board.

### **Issues**

**30. Should the Agents Act be amended to establish a system which will ensure better attribution and performance of returns from trust accounts?**

**31. Should the Act be amended to require financial institutions to provide information about trust accounts to the Registrar?**

#### ***Existing accounts structure***

254. The Agents Act makes detailed provisions for a number of financial accounts administered by the Agents Board. A brief precis of the existing accounts is at Attachment "C". If the ACT Government were to adopt a government regulatory model, this account would simply become a normal government banking account, subject to the *Financial Management Act 1996*.

#### ***Unclaimed moneys***

255. There are provisions in the Act that require the Board to obtain information from agents about the existence of unclaimed moneys held for more than six years. Upon receipt of that information, the Board is then required to advertise particulars of those moneys in the Government Gazette and the Canberra Times. After the expiration of the statutory period, if the moneys are not claimed, the Board can then direct the agent to pay those moneys to the Registrar-General. The Registrar of Agents carries out this process on behalf of the Board. The six year statutory period appears to be a common requirement in a number of industries and Government agencies dealing with clients' funds.

256. The six year period could be regarded as excessive if agents have made reasonable efforts to locate consumers to repay outstanding trust funds. The six year limit has had the effect of preventing agents from surrendering licences because trust fund moneys have been outstanding for less than six years. If the agent could satisfy the Board or the Commissioner that reasonable attempts have been made to locate the consumers involved, the timeframe could be left to the discretion of the Board or Commissioner.

**Issues**

- 32. Should the six year timeframe for unclaimed moneys be reduced? If so, what would be a reasonable timeframe?**
- 33. Should the statement required to be furnished by agents pursuant to ss.57A(2) be extended to include evidence of attempts made by an agent to repay outstanding trust moneys?**

***Issuing receipts for trust moneys***

257. Section 61 of the Act deals with the issuing of receipts for trust moneys or money referred to in subsections 60(1A) or (1B). This provision was developed at a time where computerised systems were virtually unknown and therefore is significantly out of date with current commercial practice. This requirement has now been impliedly repealed by the Schedule to the *Residential Tenancy Act* in relation to rental payments made by direct debit to an account with a financial institution.
258. Consideration should be given to replacing the restriction in relation to other types of transactions undertaken by electronic transfer. Such transfers leave an audit trail with the tenant's paying financial institution, as well as with the agent's financial institution. However, these transactions do not contain any supporting information that might help identify the purpose of the transaction.

**Issue**

- 34. Should s.61 be revised to accommodate electronic transactions?**

**Attachment "A"**

**Complaints Received by the Office of Fair Trading  
by Product Codes since 1995**

<b>Product Description</b>	<b>No. of Complaints</b>	<b>No. of Agent Complaints</b>
<b>Travel</b>		
Tours (Domestic)	6	0
Tours (Overseas)	13	4
Tour Operators	1	0
Travel Agents	5	5
Travel Goods	0	0
Travel – Miscellaneous	22	5
Air Passenger Services – inter state	4	2
Air Passenger Services – intra city or state	3	1
Air Passenger Services – overseas	33	18
Ship Passenger Services incl ferry services	0	0
<b>Total</b>	<b>87</b>	<b>35</b>
<b>Real Estate</b>		
Property Management – strata title managing agent	1	1
Property Management – commercial	3	1
Property Management – residential	16	15
Property Management – unlicensed agent	0	0
Purchase Sale – rural properties	0	0
Purchase sale by real estate dealer	14	9
Property listing by licensed agent	5	2
Property listing by unlicensed agent	0	0
Property rental agreement – general	197	119
Property rental agreement – commercial	9	1
Property rental agreement – residential	134	70
Property no rental agreement – general	2	0
Property no rental agreement – commercial	0	0
Property no rental agreement – residential	2	0
Energy Efficiency Rating (EER)	48	35
<b>Total</b>	<b>431</b>	<b>253</b>
<b>Stock &amp; Station</b>		
Purchase sale by stock buying agent	0	0
Purchase sale by stock and station agent	0	0
<b>Business</b>		
Purchase Sale by business agent	0	0
<b>Auctioneers</b>		
Non-adherence to terms of auction	1	
Consumer alleged unconscionable	1	

## Review of the Agents Act 1968 and the Auctioneers Act 1959

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buyer's premium.		
Buyer not receiving what he bought at	1	
Goods left for auction, sold below reserve.	1	
Dispute over auction.	1	
Dispute over commercial auction.	1	
Inaction over goods left for auction.	1	
Proceeds of auction not passed on to	1	
Alleged misleading advertising in relation	1	
Goods purchased performed	1	

This is a breakdown of complaints received by the Office of Fair Trading classified by the product codes which relate to the activities of real estate, stock and station, business and travel agents. However, it should be noted that not every complaint received relates to the activities of agents. For example, the Energy Efficiency Rating complaints also deal with private vendors who are not real estate agents.

**Attachment “B”**

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This Attachment contains audits of the *Agents Act 1968* and the *Auctioneers Act 1959*.

**Audit of Agents Act 1968**

Anti-competitive provisions identified in the audit of the *Agents Act 1968* have been organised by type of restriction.

**Barriers to Entry**

Legislation containing barriers to entry can often dramatically reduce the number of new competitors entering a particular market. This is particularly the case with business licences and occupational registration schemes. Barriers can result in higher prices, less consumer choice and unfair restrictions on persons participating in the market.

Section: details	Notes
5F. Fit and proper person.	Sets out considerations for determination whether someone is a fit and proper person for entry requirements (by reference to past criminal conduct).
18. Natural persons to be licensed.	Prohibits a natural person from carrying on business in the Territory as a real estate agent, stock and station agent or business agent unless licensed. (See also ss.5A, 5B and 5C).
18. Natural persons to be licensed.	Prohibits a natural person from carrying on business in the Territory as a real estate agent unless licensed. (See also ss.5A, 5B and 5C).
18. Natural persons to be licensed.	Prohibits a natural person from carrying on business in the Territory as a travel agent or employment agent unless licensed.
19. Companies to be licensed.	Prohibits a company from carrying on business in the Territory as a real estate agent, stock and station agent, business agent travel agent or employment agent unless licensed.
22. Regulations to prescribe educational qualifications to be held after the prescribed date.	Regulations may prescribe educational qualifications for entry purposes.
26. Qualifications for registration as real estate agent— applications after prescribed date.	Sets entry requirements for registration as a real estate agent. (See also ss.5F, 36).
27. Provisions	(See s.26).

applicable in relation to periods of employment.	
30. Qualifications for registration as stock and station agent—applications after prescribed date.	Sets entry requirements for registration as a real estate agent. (See also ss.5F, 36).
31. Provisions applicable in relation to periods of employment.	(See s.26).
34. Qualifications for registration as business agent—applications after prescribed date.	Sets entry requirements for registration as a real estate agent. (See also ss.5F, 36)
35. Provisions applicable in relation to periods of employment.	(See s.26).
36. Applications for registration.	Applications for registration need to be advertised in a newspaper (entry cost).
41A. Fees payable by registered agents.	Provides for annual fees for registered agents.
42. Eligibility—natural persons.	Eligibility for a licence as a real estate agent for a natural person – (only real restriction is need for registration – note minor inconsistency with s.18).
43. Eligibility—companies.	Eligibility for a licence as a real estate agent for a company (Requirements placed on directors etc).
44. Eligibility—natural persons.	Eligibility for a licence as a stock and station agent for a natural person – (only real restriction is need for registration – note minor inconsistency with s.18).
45. Eligibility—companies.	Eligibility for a licence as a stock and station agent for a company (requirements placed on directors etc).
46. Eligibility—natural persons.	Eligibility for a licence as a business agent for a natural person – (only real restriction is need for registration – note minor inconsistency with s.18).
47. Eligibility—companies.	Eligibility for a licence as a business agent for a company (requirements placed on directors etc).
47A. Eligibility—companies.	Eligibility for a licence as a travel agent for a company – note the role of the Board of Trustees under the trust deed.
47A. Eligibility—natural persons.	Eligibility for a licence as a travel agent for a natural person – note the role of the Board of Trustees under the trust deed.
47C. Qualifications for travel agent, director or manager.	Sets qualifications for travel agents (note educational qualifications set out in the Schedule).
47CA. Eligibility—natural persons.	Eligibility for a licence as an employment agent for a natural person – (only real restriction is fit and proper person test – no educational qualifications).
47CB. Eligibility—	Eligibility for a licence as an employment agent for a

companies.	company – (only real restriction is fit and proper person test – no educational qualifications).
51(3). Grant or refusal of licence.	Applicant for a licence is a bankrupt, is a person who is for the time being taking the benefit of any law for the relief of bankrupt or insolvent debtors or is a person whose remuneration is, for the time being, assigned for the benefit of his or her creditors.
51(3). Grant or refusal of licence.	Applicant is not likely to carry on business as a travel agent or employment agent honestly and fairly.
51(3). Grant or refusal of licence.	Extension of good fame and character, in relation to a company travel agent or employment agent to a person who has or is reasonably believed by the Board to have control or substantial control of the company.
53. Issue of licences.	Licence fees.
64. Qualification of auditors.	Must be a registered company auditor within the meaning of the Corporations Law. Minister has agreed to review this stricture.
71A. Qualified supervisors for travel agents' businesses.	A travel agent must use a qualified supervisor.
103. Improper use of title of real estate agent.	A person other than a licensed real estate agent or a registered real estate agent shall not use, in an advertisement or otherwise, words which would reasonably lead to the belief that he or she is a licensed real estate agent or a registered real estate agent.
104. Improper use of title of stock and station agent.	A person other than a licensed stock and station agent or a registered stock and station agent shall not use, in an advertisement or otherwise, words which would reasonably lead to the belief that he or she is a licensed stock and station agent or a registered stock and station agent.
105. Improper use of title of business agent.	A person other than a licensed business agent or a registered business agent shall not use, in an advertisement or otherwise, words which would reasonably lead to the belief that he or she is a licensed business agent or a registered business agent.
105A. Improper use of title of travel agent.	A person who is not a licensed travel agent shall not use, in an advertisement or otherwise, words which would reasonably lead to the belief that the person is a licensed travel agent.
105B. Improper use of title of employment agent.	A person who is not a licensed employment agent shall not use, in an advertisement or otherwise, words which would reasonably lead to the belief that the person is a licensed employment agent.
113. Misrepresentation of authority to act as real estate agent.	A person other than a licensed real estate agent shall not represent, by any means whatsoever, that he or she is authorised to act as agent in the sale, purchase, exchange, leasing or letting of any land in the Territory.
114. Misrepresentation of authority to act as	A person other than a licensed business agent shall not represent, by any means whatsoever, that he or she is



business agent.	authorised to act as agent in the sale or purchase of the goodwill of a business carried on in the Territory.
116. Actions for commission.	A person, other than an agent, is not entitled to bring an action to recover any commission.
117. Rent collection by persons other than real estate agents.	A person other than a licensed real estate agent or a person employed by a licensed real estate agent who, for fee or reward, collects rents or other moneys payable in respect of the occupation of land in the Territory or payments under a mortgage or a terms contract in respect of land in the Territory is guilty of an offence.
Schedule (see s.47C) Qualifications—Travel Agents.	Sets out minimum qualifications.
Schedule (see s.47C) Qualifications—Travel Agents.	Establishes statutory list of education providers.
Agents Regulations – regulation 3 – Educational qualifications.	Establishes statutory list of education providers.
Agents Regulations – regulation 3 – Educational qualifications.	Sets out minimum qualifications.

### **Restrictions on Business Structure, Form or Ownership**

The second type of market restriction in the Act deals with restrictions on business form, structure and ownership of agency firms. These restrictions can affect the capacity of the market to achieve economies of scale.

Section: details	Notes
3. Exemptions.	The Act does not apply to an executor, an administrator, the Public Trustee for the Australian Capital Territory, a trustee, a trustee company, a liquidator, a manager under the <i>Guardianship and Management of Property Act 1991</i> , a bailiff, a court officer, or a bank, an auctioneer, a legal practitioner, a Minister of State, a prescribed authority. In addition, the Minister may exempt others.
5(1B). Interpretation.	By excluding various types of bodies corporate from the definition of company, effectively excludes certain types of companies from becoming an agent, particularly corporations sole.
18. Natural persons to be licensed.	Provides that a natural person may carry on business in the Territory as a real estate agent, stock and station agent or business agent without a licence provided that the person is a partner where another partner holds a licence.
43. Eligibility—companies.	Effectively (in conjunction with s.5(1B)) restricts certain types of companies from participating in the real estate

	agent market.
45. Eligibility—companies.	Effectively (in conjunction with s.5(1B)) restricts certain types of companies from participating in the stock and station agent market.
47. Eligibility—companies.	Effectively (in conjunction with s.5(1B)) restricts certain types of companies from participating in the business agent market.
47A. Eligibility—companies.	Effectively (in conjunction with s.5(1B)) restricts certain types of companies from participating in the travel agent market.
47CB. Eligibility—companies.	Effectively (in conjunction with s.5(1B)) restricts certain types of companies from participating in the employment agent market.
47E. Notice of partnership.	Requires details of partnership to be provided and maintained. (Note some of the provision is spent).
47F. Rights and liabilities of partners.	All members of the partnership have all the rights and duties of the partner who is the licensee.
47G. Offences by partners.	The licensee of a partnership shall be taken respectively to be guilty of a breach of the rules of conduct or to have been convicted of that offence by another partner; (but not conversely).
47H. Suspension or cancellation of a partner's licence.	(See s.47F).
101. Agent not to share commission.	A licensed agent (other than a travel agent or employment agent) shall not share with another person (not being a licensed agent or a partner of the first mentioned agent) any commission, fee, gain or reward payable to the first mentioned agent in respect of a transaction in his or her capacity as an agent.

### **Conduct Restrictions**

The third type of market restriction imposes restrictions on the conduct of agents that may limit consumer information about the market and reduce diversity in the services being offered.

Section: details	Notes
19B. Licensed employment agents—receipt of remuneration.	An employment agent cannot claim a fee from an employee (other than a model or performer).
53. Issue of licences.	Licence specifies the name or names under which travel agent or employment agent is authorised by the Board to carry on a business.
53A. Licences subject to conditions.	A licence is subject to a condition that each place at which the licensee carries on business as an agent shall comply with any prescribed requirements.
55. Trust money.	All moneys received by a licensed agent (other than a travel agent or employment agent) in his or her capacity

	as agent and in the course of the business that he or she is licensed to carry on and all moneys received by a licensed agent as a stakeholder shall, for all purposes, be deemed to be held in trust by the agent for the principal on whose behalf the moneys are received.
56. Opening of trust accounts.	An agent (other than a travel agent or employment agent) shall open, and shall maintain, a trust account.
57. Payments of moneys into and from trust account.	Trust moneys to be paid into account within a certain time. Money can only be paid out by cheque (not electronic transfer).
57A. Unclaimed trust moneys held by licensed agent.	Obligation to hold and account.
59. Provisions applicable to banks.	Bank can only pay out of trust account using a cheque.
60. Accounting records.	Specifies need for accounting records of specified transactions and where those records are to be kept.
61. Receipts.	Provision of receipt. Need to keep a carbon copy (medium specific). Need to keep a bound book (medium specific).
62. Interpretation.	Sets the financial year.
63. Audit of accounts.	Requirement for audit.
65. Agent to furnish documents and information to auditor.	Provision of records to auditor.
66. Auditor's report.	Auditor to provide a report direct to regulator, and sets out matters to be included in the report.
67. Agent's statement relating to trust money.	Provision of quarterly statements to regulator.
68. Report by auditor to Registrar.	Auditor to provide certain information direct to regulator.
70. Records of other money.	Records to be kept of other money.
71. Inspection of bank accounts.	Bank to permit inspection of trust and other accounts.
71B. Participation in compensation scheme.	A travel agent must participate in the travel compensation scheme.
72. Rules of conduct—licensed agents.	Rules of conduct – needs to apply to situations before there is an agent/principal relationship.
73. Rules of conduct—registered agents.	Rules of conduct – needs to apply to situations before there is an agent/principal relationship.
75A. Approval of code of practice.	For employment agents – empowering provision only.
75B. Complying with approved code of practice.	For employment agents – empowering provision only.
95. Protection of legal practitioners, witnesses etc.	To be discussed in the Legal Practitioners Review – gives an immunity to legal practitioners.

99. Employment of disqualified persons.	A registered or licensed agent shall not employ a disqualified etc person (in general, other employees need no particular qualifications).
107. Preservation of accounting records.	Extends requirement to maintain records to former agents.
109. Production of licence for inspection.	Agents required to produce licence to Registrar.
111. Withholding deposits.	Where an agent is authorised to retain in a trust account money received as a deposit in respect of a transaction in his or her capacity as agent and the money is to be withheld or not repaid, the agent shall, within a period of 14 days from the completion of the transaction, inform in writing all persons involved (including his or her principal) of the reasons for withholding or not repaying the money.
112. Address of agent in advertisement.	A licensed agent shall not publish an advertisement relating to or in connection with his or her business as an agent, unless the licensed agent specifies in the advertisement that he or she is a licensed agent and the address of the place at which he or she carries on business.
115. Notices to be displayed.	Requirement to display licence notice.
120B. Agreements for Regulations of travel agents' business.	The Minister may enter into an agreement with a Minister of State responsible for administering a corresponding law with respect to travel agents, being an agreement relating to the establishment, implementation, administration and maintenance of a joint scheme of Regulations and compensation in relation to business carried on by travel agents.

### ***Cross-Subsidies***

Regulation sometimes forces industry to provide inefficient cross-subsidies in relation to services. This can hinder the development of new services.

Section: details	Notes
71F. Dealings with unlicensed travel agents.	Extension of compensation scheme to certain unlicensed travel agents (adds to the cost of legitimate participants).
71T. Application of moneys in Administration Account.	Hidden cross-subsidy issue.

### **Audit of Auctioneers Act 1959**

Anti-competitive provisions identified in the audit of the *Auctioneers Act 1959* have been organised by type of restriction.

#### **Barriers to Entry**

Legislation containing barriers to entry can often dramatically reduce the number of new competitors entering a particular market. This is particularly the case with business licences and occupational registration schemes. Barriers can result in higher prices, less consumer choice and unfair restrictions on persons participating in the market.

Section: details	Notes
4. Auctioneers to be licensed.	Prohibits unlicensed auctioneers – Exemptions listed.
5. Applications for licences.	Sets minimum qualifications – age, three character references.
10. Granting of licences.	fit and proper person to be the holder of a licence – what constitutes.
13. Cancellation and suspension of licences.	Court can cancel if not fit and proper.

#### **Restrictions on Business Structure, Form or Ownership**

The second type of market restriction in the Act deals with restrictions on business form, structure and ownership of agency firms. These restrictions can affect the capacity of the market to achieve economies of scale.

Section: details	Notes
5. Applications for licences.	Only a natural person may be an auctioneer.
11. Licence not to be granted in certain circumstances.	Cannot issue licence to a pawnbroker.

#### **Conduct Restrictions**

The third type of market restriction imposes restrictions on the conduct of agents that may limit consumer information about the market and reduce diversity in the services being offered.

Section: details	Notes
14. Misrepresentation as to quality etc., of property.	An auctioneer shall not knowingly misrepresent, or cause or permit to be misrepresented, the composition, structure, character, quality, origin or manufacture of any property offered by the auctioneer for sale by auction.
15. Record to be kept by auctioneers.	shall forthwith record, in a book to be kept by him or her for the purpose, full particulars of any property sold by

	the auctioneer at auction and shall preserve the record so made in respect of any sale for a period of at least 12 months after the date of the sale – shall produce to the AFP.
16. Bids by seller.	Duplicates, in part, the bid rules included in s.60 of the <i>Sale of Goods Act</i> . Note that the Auctioneer provisions extend SOG provisions to also apply to bids on real property – Auctioneer provisions are a bit clearer and contain criminal penalties. If the section is repealed, all these provisions (eg., including the SOG provisions) should transfer into appropriate legislation.

## **ATTACHMENT "C"**

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### **EXISTING FINANCIAL ACCOUNTS ADMINISTERED BY THE AGENTS BOARD**

#### **The Administration Account**

In 1992, amendments to the *Agents Act* made provision for an Administration Account under Part VIC of the Act. This account, held with the Commonwealth Bank at present, is topped up immediately prior to the beginning of each financial year and is gradually drawn down to meet operational needs for items such as salaries, other administrative costs and sitting fees. Moneys in this account not immediately required to finance operations are invested through the ACT Government's Central Financing Unit. The balance is left within the bank account and attracts a lower rate of return. This account duplicates the normal departmental accounting processes. Additional cost is expended at present because of the reimbursement process.

#### **The Statutory Interest Account**

Since 1992, the *Agents Act* has provided for a Statutory Interest Account (SIA) to be administered by the Board. This accumulating revenue account is established and maintained under Part VIC of the Act by the Board and is currently with the Commonwealth Bank. The balance of the fund changes from day to day; but the account presently has a notional balance of approximately \$1.4m. This money is partly invested through the CFU and the balance (~\$150,000) attracts a reduced interest return from the Commonwealth Bank. The balance of the SIA is reviewed monthly to ensure that an appropriate sum of money is being invested through the CFU.

The SIA receives funds from the following sources:

- banks (in respect of interest on agents' trust accounts) in 1998-9 of \$745,000;
- licence and registration fees in 1998-9 of \$98,000; and
- interest derivatives (from investment of the Fidelity Fund and balances in the SIA and Administration Account) in 1998-9 of \$170,000.

SIA funds are used to:

- supplement the Fidelity Fund (with the agreement of the Minister);
- pay an annual amount into the Administration Account (to meet salaries and other administrative costs); and
- fund programs (only one program has been funded to date - the REI training centre) with the approval of the Minister (subsection 71Q(4)).

While the Board might appear to have discretion about the application of the money, in practice, it is circumscribed (supplementation of the Fidelity Fund and funding of programs is subject to Ministerial agreement while the administrative vote is largely mechanical).

Note that as the Board's banking arrangements have been "off-budget", there is no provision in the financial infrastructure in ACT Government Shopfronts to remit the fees paid by these agents directly to the Board (ie., it is not possible by way of journal transfer).