

EMPLOYMENT AGENTS ACT 1996

**NATIONAL COMPETITION POLICY
REVIEW**



DEPARTMENT OF **FAIR TRADING**

NSW Consumer Protection Agency

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1 Introduction

1.1 The need for a review

The Minister for Fair Trading, the Hon J A Watkins, MP, has announced a review of the Employment Agents Act 1996. The review is being undertaken as part of the NSW Government's commitment under National Competition Policy to review, by the year 2000, all of its legislation which restricts competition.

The aim of the National Competition Policy is to promote and maintain competition in order to increase economic efficiency and community welfare, while continuing to provide for consumer protection. The Government believes that, provided the public interest is safeguarded, competition will benefit the people of NSW by creating a stronger and more vital economy.

The National Competition Principles Agreement establishes principles for pro-competitive reform of government business enterprises and removal of impediments to markets where they are not in the public interest. The Agreement requires that legislation should not restrict competition unless it can be demonstrated that the benefits to the community as a whole outweigh the costs of the restriction and that the objectives of the legislation can only be achieved by restricting competition.

All NSW legislation is being examined to determine whether it establishes market entry barriers or requires conduct which has the potential to restrict competitive behaviour in the market. It is important to consider whether the costs of such legislation are outweighed by public benefit.

The Employment Agents Act 1996 has been identified as potentially restricting competition and has been set down for review.

1.2 The review process

It is the Government's policy to ensure that the review process takes into account the full range of public benefits of the legislation and that all views are thoroughly considered before any reforms are proposed. To achieve this a Steering Committee, chaired by the Department of Fair Trading, has been established to conduct the review. It is made up of representatives from:

- the Department of Industrial Relations;
- The Cabinet Office and
- the Department of Fair Trading.

A Consultative Committee has also been established to provide advice to the Steering Committee. The Consultative Committee comprises representatives of:

- the Fair Trading Advisory Council;
- the Recruitment and Consulting Services Association;
- the Migrant Employment Taskforce;

- NSW Council of Social Service;
- Jobfutures; and
- the Australian Business Chamber.

The Steering Committee has produced this Issues Paper in order to:

- identify the issues relevant to the impact of the legislation on competition within the industry;
- to stimulate discussion within the community; and
- to assist interested individuals and organisations who wish to lodge a submission to the review.

The paper will be widely circulated to interested parties and will seek responses on the issues raised and any other relevant matter.

Although the emphasis of this review is on anti-competitive aspects of the legislation, areas in which the laws could be made more efficient and equitable will also be considered during the review process. This Issues Paper:

- explains the principles of National Competition Policy and why this review is being carried out (Part 1);
- explains the way in which National Competition Policy relates to consumer protection legislation (Part 2);
- provides background information on the introduction of the Act (Part 3);
- describes the objectives of the legislation and how the Act attempts to meet them (Section 4). This chapter includes explanations of how the various provisions of the Act's function and raises competition and other issues associated with the way the legislation operates; and
- provides a brief discussion of the alternative options that could be used to achieve the regulatory objectives. (Part 6)

Submissions to the Review may be made by any person or organisation, in writing and mailed, faxed or e-mailed to the address given below. Submissions may address the issues raised throughout the paper as well as raise other relevant issues which the paper has not identified. It would assist the Committee if, where possible, submissions note the issue question number to which their comments relate.

There will also be consultation with key stakeholders. A final report with recommendations will then be prepared for the consideration of the Minister for Fair Trading, the Hon. John Watkins.

Written submissions should be sent to:

The Project Manager
Employment Agents Act Review
Policy Division
Department of Fair Trading
PO Q168
QVB Post Shop
SYDNEY NSW 1230

fax:	(02) 9338-8918 or 9338-8935
e-mail:	bel-gamal@fairtrading.nsw.gov.au

The closing date for submissions is 8 May 2000.

1.3 Terms of reference for the review

The review of the Employment Agents Act 1996 shall be conducted in accordance with the principles for legislation reviews set out in the Competition Principles Agreement. The guiding principle of the review is 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, and
- the objectives of the legislation can only be achieved by restricting competition.

Without limiting the scope of the review, the review is to:

1. clarify the objectives of the legislation, and their continuing appropriateness;
2. identify the nature of the restrictive effects on competition;
3. analyse the likely effect of any identified restriction on competition on the economy generally;
4. assess and balance the costs and benefits of the restrictions identified;
5. consider alternative means for achieving the same result, including non-legislative approaches.

When considering the matters in (2), the review should also:

- identify any issues of market failure which need to be, or are being, addressed by the legislation; and
- consider whether the effects of the legislation contravene the competitive conduct rules in Part IV of the Trade Practices Act 1974 (Cth) and the NSW Competition Code.

The review shall consider and take account of relevant regulatory schemes, including those in other Australian jurisdictions, and any recent reform proposals, including those relating to competition policy in those jurisdictions.

The review shall consult with and take submissions from consumers, relevant industry associations and other interested parties.

1.4 Measuring costs and benefits

The legislation review requirements under the Competition Principles Agreement state that, where the costs and benefits of a particular policy or course of action are to be measured, or the merits or appropriateness of a policy or course of action are to be determined or an assessment is to be made of the most effective means of achieving a policy objective, the following matters, where relevant, must be taken into account:

- government legislation and policies relating to ecological sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;
- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian businesses; and
- the efficient allocation of resources.

[Competition Principles Agreement Clause 1(3)].

The Steering Committee will be required to take these matters into account when preparing its final report on the review.

2 NATIONAL COMPETITION POLICY ISSUES

2.1 National Competition Policy and market theory in relation to consumer protection legislation

2.1.1 Restrictions to competition

As was stated in Part 1 of this paper, the goal of National Competition Policy is to remove restrictions on competition to enable Australian businesses to compete efficiently while maintaining appropriate levels of community protection. An underlying principle of National Competition Policy is that legislation should not restrict competition unless the benefits to the community as a whole outweigh the costs of the restriction and the objective of the legislation can only be achieved by restricting competition.¹

Legislation may limit competition if it:

- governs the entry into or exit of firms or individuals out of the market;
- controls the prices or production levels;
- restricts the quality, level or location of goods and services available;
- restricts advertising and promotional activities;
- restricts price or type of input used in the production process;
- is likely to confer significant costs on business; or
- provides advantages to some firms over others by, for example, shielding some activities from pressure of competition.

2.1.2 Market failure and consumer protection

Consumer protection legislation is generally developed as a response to problems experienced by consumers when purchasing goods or services. Such problems may be the result of what economists term *market failure*. A market may fail or become distorted where businesses do not operate in the best interest of economic efficiency or where environmental or social detriment occurs.

Economic theory says that competitive markets for goods and services tend to efficiently allocate the economy's resources. Consumers are considered to play a pivotal role in this process by influencing the supply of goods and services through making optimal purchasing choices. This view sometimes assumes that traders and consumers have equal weight and bargaining power in negotiating transactions. In reality, consumers may have inadequate information about products and services or about the legal rights and obligations that may arise from a transaction.

¹ *New South Wales Government Policy Statement on Legislation Review*, June 1996.

There are significant costs to consumers in adequately informing themselves about prospective purchases which will limit their ability to make the best choices. In addition, some consumers will be more proficient than others in accessing and interpreting information and some traders will be aware of this and may withhold essential information.

When evidence of market failure comes to light, it is necessary to consider firstly whether government action is required or whether the matter is one best left to the marketplace. A case for government intervention may be made provided that it is efficient and effective, in that it protects the interests of consumers without unnecessarily restricting business innovation and competitiveness. The full range of possible government action needs to be considered and the one which imposes the least cost in return for the greatest public benefit should be selected.

For the reasons outlined above, much consumer protection legislation is designed to ensure that consumers have access to relevant, truthful information to enable them to compare the value of goods and services available in the marketplace. Regulation that provides broad requirements for honesty and truthfulness in commerce is generally considered to be supportive of an efficient and competitive economy. These types of provision acknowledge that both sides of the market equation, consumers and business, have a legitimate interest in maintaining and promoting honest dealing and fair competition in the marketplace.

Other functions of consumer protection legislation are often to protect consumers from loss of money or, rarely nowadays, to restrict the price that can be charged for certain goods or services.

The provisions of the *Employment Agents Act 1996* were brought forward virtually unaltered from the *Industrial Relations Act 1991*. One of the purposes of this review of the Act is to consider present day marketplace issues and whether regulatory intervention is still warranted.

Like most New South Wales traders, employment agents became subject to the *Fair Trading Act 1987* on its commencement. The *Fair Trading Act* mirrors the consumer protection provisions of the Commonwealth *Trade Practices Act 1974* and includes a range of provisions which prohibit practices that seek to exploit or misinform the community, such as deceptive conduct, false representations and misleading advertising. A major policy objective of the *Fair Trading Act* is that consumers can expect that the information they are given about the product or service they are buying is accurate so that they can choose those that best satisfy their needs. If consumers are misled, the *Fair Trading Act* can require that traders remedy the situation.

Issue 1 *National Competition Policy and market theory*

- (a) What problems do consumers face in relation to employment agents in today's marketplace?
- (b) Which of these should appropriately be addressed by government?

2.1.3 Market failure and occupational licensing

The objective of occupational licensing is to strengthen the position of the consumer in their everyday dealings with service providers who are often in a stronger bargaining position. This type of regulation attempts to offset factors that may hinder consumers in obtaining optimum benefits in a competitive market. There are a number of situations in which markets fail to provide optimal economic, social and environmental outcomes including inadequate information and uneven bargaining power. In these instances, a case for government intervention may be made provided that government intervention is efficient and effective.

The purpose of occupational licensing for employment agents is to provide a level of protection where consumers are uninformed, inexperienced and vulnerable. Regulation may offer the assurance that checks are in place to minimise the risks to jobseekers when using the services of an employment agent.

Issue 2 - Market failure and occupational licensing

- (a) Is the information generally available to a consumer during a transaction with an employment agent adequate?
- (b) Does the market make this information readily available?
- (c) Is that information accessible and easily understood by consumers?

3 THE INDUSTRY

3.1 Industry profile

There are 2248 current employment agent licences in New South Wales, held by 1835 licensees. The difference in numbers arises from the requirement for a licensee to hold a licence for each place of business from which the agency operates. The industry has increased by 138% since 1991 when there were 942 licences held by 850 licensees.

The bulk of the industry members are small businesses which employ fewer than 10 staff. Some of the larger multi-site agencies are operated by the non-profit or charitable sector of the industry. Some firms specialise in a specific sector such as hospitality, nursing, banking or legal services. Others provide a general range of clerical or other skills.

3.2 Role of employment agents

Employment agents typically offer one or more of the following range of services:

- Finding employment for parties who are unemployed or who wish to change employment;
- Recruiting staff on behalf of an employer for a set fee;
- Acting as a counsellor and careers adviser, sometimes offering psychological assessment for persons seeking their first job or who have been recently retrenched;

- Providing advice on career development, including study programs and , qualifications required for the desired career path;
- Providing assistance with resume preparation;
- Providing training in interviewing skills;
- Providing small businesses with advice on their human resources needs; and
- Providing casual staff for short term vacancies. [This activity is not regulated by the Act as it is considered to be a master/servant relationship and as such falls within the province of the Industrial Relations Act 1996]

The general role of an agent is to act on another's behalf. With employment agents it is often unclear on whose behalf the agent is acting during the employment process. Many of the commercial agents would see the employer as their client, while the focus of the non-profit agency is more likely to be finding employment for the jobseeker. It is possible that in any one transaction both the employer and the jobseeker may believe that the agent is acting on their behalf.

Issue 3 – Role of employment agents

The current Act does not regulate all activities of an employment agent. Additionally it not always clear whether the agent is acting on behalf of the employer or the jobseeker.

- (a) Should the Act clarify the role and responsibilities of agents, and if so, how?
- (b) What activities of an employment agent should be regulated and why?

3.3 Recent developments and their impact on the industry

3.3.1 Contracting out of the Commonwealth Employment Service (Job Network)

Contracting out of these services, previously provided by the Commonwealth, has resulted in a number of new private employment agents entering the market. Consortiums of the non-profit sector agencies have also developed to provide the contracted services. Any NSW agency which becomes contracted to the Commonwealth under this scheme, must also obtain an employment agents licence prior to commencing operations. All NSW agencies are thus subject to dual monitoring processes, ie licensing under the Employment Agents Act and contract monitoring processes through the Commonwealth.

Additionally, as the people targeted by the contracted services are the medium to long term unemployed, there would be expected to be a resultant change in the composition of the client group of employment agents generally.

3.3.2 Impact of the Internet

The Internet has had a significant impact on the industry with many positions now advertised on the Internet and the ability for resumes to be emailed between jobseekers, agents and employers. This has reduced advertising costs and speeded up the processing

of applications. Agents may also base themselves in other Australian jurisdictions, where no licensing requirements exist, and still operate in NSW through the Internet.

Issue 4 – Impact of recent developments in the industry

The Commonwealth Job Network and the Internet have brought new players and new relationships into the industry.

- (a) Has the introduction of the Job Network resulted in any additional risks to users of employment agents? If so how should these risks be managed?
- (b) Are the dual monitoring processes necessary?
- (c) What are the long term implications of the Commonwealth contracting arrangements for NSW employment agents?
- (d) Has the use of the Internet resulted in any additional risks to users of employment agents? If so how should these risks be managed?
- (e) What are the long term implications of Internet based employment agency services for the NSW licensing regime?

3.4 Industry regulation in NSW

Licensing of employment agents has been incorporated into industrial relations legislation for many years. Several review processes during the early 1990's examined the appropriateness of retaining this connection with industrial relations legislation. These were:

- a *Regulatory Impact Statement in relation to Private Employment Agents Licences* prepared in 1990 for the then Department for Industrial Relations, Employment, Training and Further Education; and
- a joint review conducted in 1992 by the Departments of Consumer Affairs and Industrial Relations, Employment, Training and Further Education.

Although the recommendations of each review differed, both agreed that the regulatory scheme for the industry under the Industrial Relations Act was inappropriate.

In 1996 the employment agent provisions were separated from the Industrial Relations Act and the Employment Agents Act 1996 came into being. This new Act, together with the Employment Agents Regulation 1996 provide the mechanism for the regulation of the industry in New South Wales.

Since 1 July 1998 the Act has been administered by the Department of Fair Trading.

The entertainment industry

Agents acting for models and performers are not required to have licences under the Act. [section 24] These agents are regulated under the Entertainment Industry Act 1989. There are a number of vocations involved in the entertainment industry that are not captured by the definition of performer under the Entertainment Industry Act, such as stage hands and lighting specialists. If a person acts an agent for the employment of these

persons he or she will require a private employment agents licence. To this extent, there is some overlap between the two licensing systems.

Issue 5 – Scope of the Act

In NSW employment agents are licensed by the Department of Fair Trading.

(a) *Does the Act cover the appropriate sections of the industry? If not which others should be included and why?*

4 THE ACT

4.1 Potential risks arising from consumer transactions with employment agents

In order to determine whether there are reasonable community benefits arising from Government intervention in the relationship between a jobseeker and an employment agent, it is necessary to identify the potential risks for the jobseeker arising from the transaction. These predominantly arise from the differing interests and needs of the jobseeker and the agent and also by the gaps in the jobseeker's knowledge of the industry and the role of the agent. These risks may include:

- *Misleading advertising* Agents may advertise positions as available when no position exists. This may be done to increase the agents portfolio of prospective employees. The practice may raise false hopes in the jobseeker and add to the frustration felt by the long term unemployed or the older jobseeker to the point where they withdraw completely from the employment market.

- *Inappropriate charging of fees* Agents may advertise a job finding service at a small fee to the applicants, aiming to attract mass applications with no intention of undertaking any work in response to them. This practice has been outlawed since 1975 in NSW but instances of it occurring are still reported in Victoria where there is no similar legislation.

Some agents may advertise job finding services which on application require the jobseeker to undertake, for a fee, the preparation of resumes and/or training courses. In these cases the advertising is misleading and the applicant may receive no jobfinding services beyond the resume and training.

- *Deceptive conduct* Agents may publish advertisements which by their tenor imply that they are published directly by the employer not by an employment agent. This may be deceptive conduct.

- *Unskilled career* Uninformed advice and callous treatment from a person (who

- counselling* appears to the jobseeker to be an expert) may be damaging to a jobseeker who has low self esteem or who may have experienced the trauma of a recent dismissal. If an agent does not possess the required skills in counselling on career redirection he or she can do damage to a person's career by providing incorrect advice.
- *Inappropriate disclosure of confidential information* The jobseeker divulges much confidential information to the agent regarding his future career plans. Unauthorised disclosure of this information to his or her current employer through reference checks or indiscriminate circulation of resumes may lead to dismissal from the current position.
- *Business failure* Most employment agencies in New South Wales are small businesses. In times of market downturn small business is the sector most susceptible to experiencing financial difficulty. In addition there may be participants who have not adequately developed their business skills to maintain a successful business.

Government intervention should be aimed at assisting the consumer to address those risks where it can be demonstrated that the consumer would not normally have sufficient knowledge and resources to address the risks alone.

Issue 6 – Risks associated with transactions using employment agents

The Act attempts to address some of the risks associated using employment agents.

- (a) Are the risks listed the only ones associated with the use of an employment agent?
- (b) What are the risks associated with misleading advertising? What is the best way of managing these risks?
- (c) What are the risks associated with charging of fees? What is the best way of managing these risks?
- (d) What are the risks associated with deceptive conduct? What is the best way of managing these risks?
- (e) What are the risks associated with unskilled career counselling? What is the best way of managing these risks?
- (f) What are the risks associated with disclosure of confidential information? What is the best way of managing these risks?
- (g) What are the risks associated with business failure? What is the best way of managing these risks?

4.2 Objectives of the Act

In the absence of any stated objectives of the Act, the implied objective based upon the specific provisions of the Act, would appear to be to protect consumers who seek employment through the services of an employment agent.

If it is accepted that the objective of the Act is to protect the client from possible exploitation, there is no mechanism within the Act which requires agents to inform clients of:

- their rights;
- the responsibilities imposed upon the agent by the Act; or
- mechanisms for complaint or redress.

Issue 7 – Objectives of the Act

- (a) In the absence of an explicit statement, is the implied objective of the Act to protect persons seeking employment through the services of an employment agent?
- (b) Are there any other objectives that might be implied from the legislation?
- (c) Should the objectives be specifically stated by the legislation?
- (d) Should the Act include a requirement for agents to inform clients of their rights under the Act and, if so, why?

4.3 Arrangements for administering the Act

In July 1998, responsibility for the administration of the Act was transferred from the Department of Industrial Relations to the Department of Fair Trading.

The principal persons and institutions now involved in the regulation of employment agents are the Minister for Fair Trading, the Department of Fair Trading, the Administrative Decisions Tribunal and the Fair Trading Tribunal.

The Director-General of the Department of Fair Trading is the licensing authority. Many of the Director-General's functions under the Act have been delegated to departmental staff. The Department also has roles that are complementary to licensing in such matters as inspections and compliance. The Administrative Decisions Tribunal has power to hear appeals in relation to licensing decisions made by the Department. The Fair Trading Tribunal makes determinations in relation to disputes between licensed employment agents and their clients.

Issue 8 – Administrative Arrangements

Administration of the Employment Agents Act is the responsibility of the Minister for Fair Trading with appeal and complaints roles administered by Tribunals.

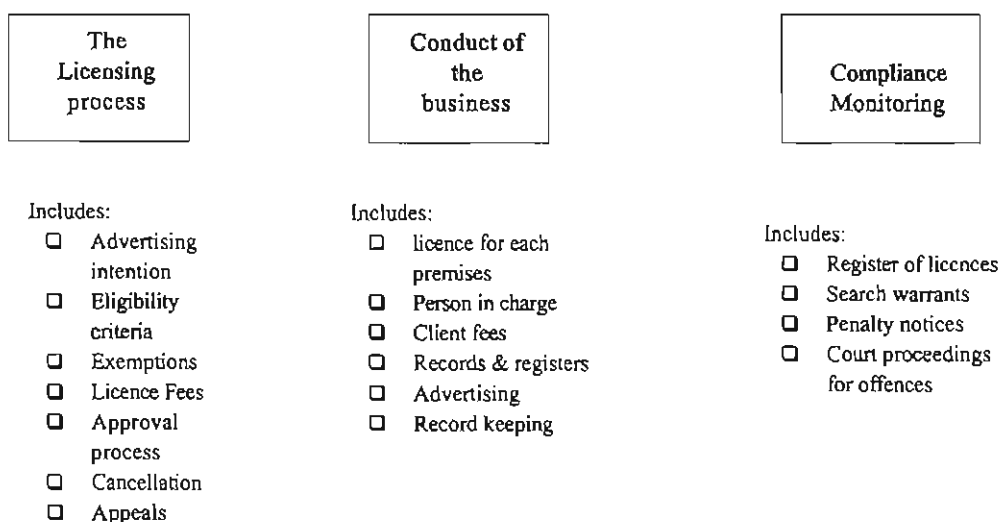
- (a) Are the institutions that currently provide and deliver the regulatory framework appropriately designed for the purpose?
- (b) Do they have appropriate powers?

4.4 Scope of the Act

The Employment Agents Act 1996 provides for the licensing and regulation of employment agents. The Act, as depicted in Diagram 4.1, covers the following activities:

1. the licensing process;
2. the conduct of the business by the agent; and
3. compliance monitoring by the Department of Fair Trading.

Diagram 4.1 The Scope of the Act



4.4.1 The licensing process;

The Act requires that any person who carries on the business of an employment agent must be licensed. [sections 4 & 5]

The stages in the licensing process are depicted in Diagram 4.2.

4.4.1.1 Eligibility criteria

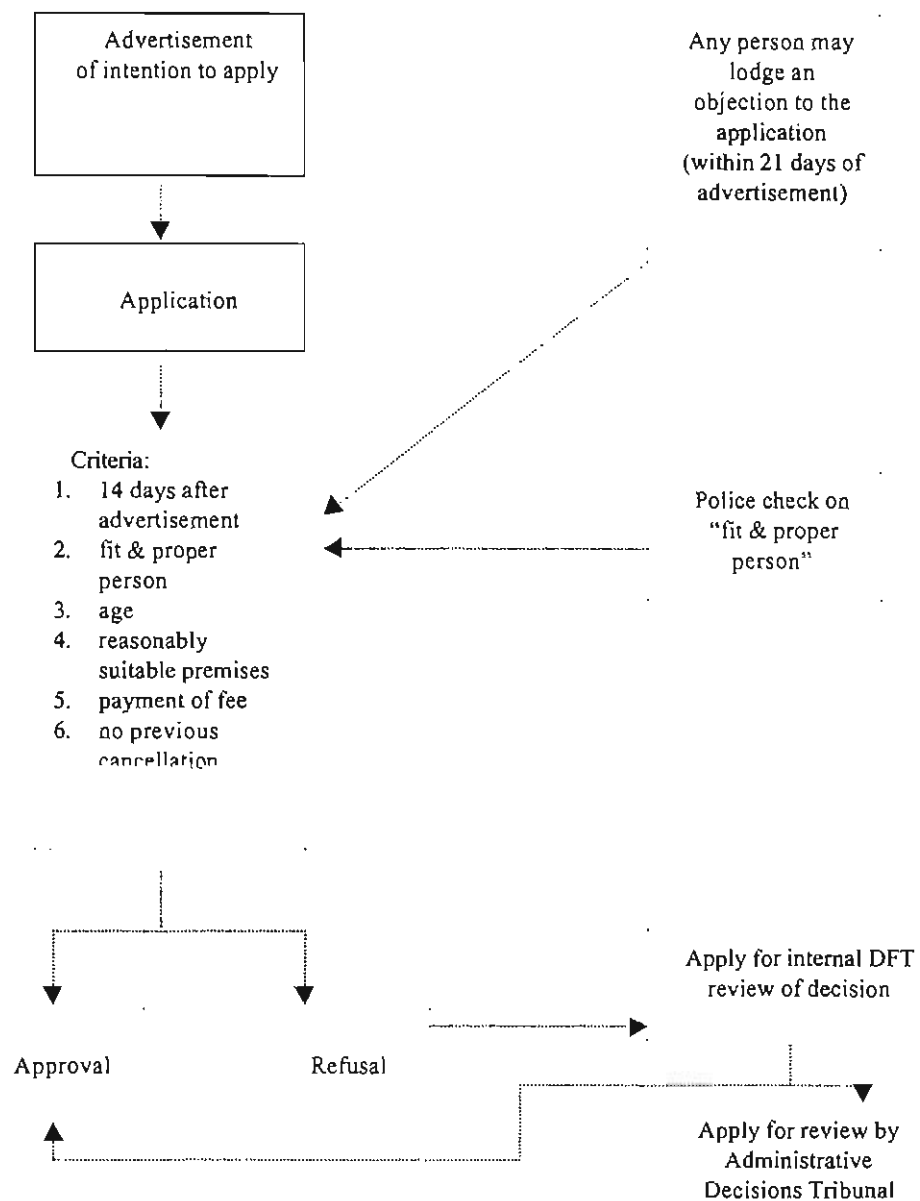
1. Advertisement of intention to apply

The Act requires that no action to be taken on the application until 14 days after it is lodged. This is to allow time for the receipt of any objections which may be lodged in response to the advertisement. It is assumed that the advertising provision was included in the Act to assist in the determination of the applicant being a “fit and proper person” to hold a licence. Experience of the regulator (both the Department of Industrial Relations and the Department of Fair Trading) has shown that there have been very few objections lodged in response to these advertisements. Additionally those objections which have been lodged have usually been made by other agents.

The Act requires that an applicant place an advertisement of their intention 14 days prior to lodging an application for a licence.

- (a) Would deleting the requirement for advertising simplify the licensing process?
- (b) Would deleting the requirement reduce the protection provided to prospective clients of the agent?
- (c) Should there be a penalty for making a vexatious objection to an application?

Diagram 4.2 The Licensing Process



2. Reasonably suitable premises

The Act requires that *the place of business is reasonably suitable for carrying on the business of a private employment agent*. Applications are determined on assessment of lighting, ventilation, furnishings, record storage, telephone, appropriate and adequate space for conducting private interviews and offices within residential premises to be used exclusively for business purposes.

Issue 10 – Reasonably suitable premises

The Act requires the applicant to have reasonably suitable premises.

- (a) What risk does the requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Is the requirement adequate to address that risk?

3. No previous cancellation of licence

The Act provides for a licence to be cancelled for a variety of reasons, including failure to notify the Department that the business has ceased trading or failure to comply with any other requirement of the Act. A person whose licence has been cancelled is ineligible to be granted a licence or become the person in charge of an agency for a period of 12 months after the cancellation of the licence.

Issue 11 – Previous cancellation of a licence

A person whose licence has been cancelled is ineligible to be granted a licence or become the person in charge of an agency for a period of 12 months after the cancellation of the licence.

- (a) Is the barrier to entry as a licensee or person in charge for a period of 12 months justified in all cases of cancellation of licence? In what circumstances could it be waived?

3. Exemptions

The Act also provides for specific exemptions from the licensing requirements to be granted through the Regulation. There are no exemptions included in the Regulation at this time. There is some overlap in monitoring processes for those agencies which are also contracted to the Commonwealth Government to provide specific services for the unemployed. Some work has been undertaken by the Commonwealth on the development of a Code of Practice for these services.

Issue 12 – Exemptions

There are no classes of agencies which are exempted from the requirement to be licensed.

- (a) Are there any agency types which should be exempted? If so, why?
- (b) Could the dual monitoring processes for those Commonwealth contracted services be conducted in a more efficient manner?

4. *Licence Fees*

Current licence fees for employment agents are set at \$100.

Issue 13 – Licence fees

Current licence fees are \$100.

- (a) Does the licence fee act as a barrier to entry to the industry?

Issue 14 – Approval process

- (a) What opportunities exist for simplifying the licensing process and thereby making it more efficient?

5. *Appeals*

Appeals against certain decisions of the Director-General may be heard by the Administrative Decisions Tribunal. An application may be made if:

- an application for a licence has been refused;
- a condition has been imposed on a licence; or
- a licence has been cancelled.

4.4.2 **Conduct of the business**

1. *Separate licences for each premises*

Issue 15 – Conduct of the business

The Act requires a separate licence for each premises operated by the licensee.[section 5(2)]

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

2. *Person in charge*

The Act requires that there be a person in charge at each place of business. This person must be registered with the Department of Fair Trading. The person in charge may be the licensee or some other person. A licensee may not be the person in charge of more than one place of business.[clause 6 of the Regulation]

Issue 16 – Person in charge

The Act requires that there be an approved person in charge at each place of business.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

3. *Client fees*

A licensed agent makes its profits by charging the employer a placement fee, usually a percentage of the employee's first annual wage. The Act specifically prohibits the agent from charging the jobseeker for recruitment service

Issue 17 – Client fees

The Act prohibits the agent from receiving a fee from any person other than the employer.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (b) Are there other ways in which the risk could be managed?

4. Records & registers

Section 21 requires that the licensee keep a register of information relating to all persons who have sought work through the agency and another register recording all the details of engagements made by the agency and fees charged. [section 21] These are required to be kept in an approved form. There is currently no approved form for this purpose.

Issue 18 – Records and registers

The Act requires that the agent keep certain records and registers in relation to jobseekers and prospective employers who use the services of the agency.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?
- (d) Do the current requirements raise any privacy concerns?

5. Advertising

The Act requires that advertisements placed by agents must make it clear that the position is being advertised by an agent. It also bans advertising a position which does not exist. [section 22]

Issue 19 - Advertising

The Act prohibits false and misleading advertising by agents.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

4.4.3 Compliance and monitoring

The Act provides for the Department of Fair Trading to have a compliance monitoring role. The monitoring and compliance provisions include:

- maintenance of a register of licences issued under the Act;
- granting of search warrants to enable inspectors of the Department to investigate alleged breaches of the Act;
- serving of penalty notices by Departmental inspectors for breaches of the Act or the regulation

The Act also provides for offences under the Act to be dealt with summarily by a Local Court.

Issue 20 – Compliance and monitoring

- (a) Are the current compliance and monitoring mechanisms appropriate?
- (b) Do they act as a significant deterrent to unscrupulous behaviour?

4.5 Effect of the Act on Competition

As discussed in Part 2 of this paper, there are a number of ways that legislation can restrict competition and innovation. Legislation may impose barriers to entry to an industry by imposing educational or professional requirements before a person is able to practice or by disadvantaging new or would be entrants. Legislation may constrain industry operators in terms of the business decisions they make, may impose costs in complying with the provisions of the legislation, or may benefit one class of operator or consumer over another.

Costs imposed by legislation are usually passed down the line to the consumer in the form of higher prices or lower quality. The question that needs to be considered in this review is whether the costs borne by business and the community are reasonable given the benefits provided. Regulatory processes should be designed to minimise the costs of administration to government and of compliance by individuals and businesses.

Issue 21 Effects on Competition

- (a) Do the provisions of the Act restrict innovation and/or competition by employment agents?
- (b) Can the barriers to entry be justified?
- (c) Does the Act impose costs on employment agents?
- (d) Are there benefits to the community which should be balanced against any such restrictions or costs?
- (e) Do the provisions of the Act bring about a net public benefit?

5 REGULATION OF EMPLOYMENT AGENTS IN OTHER JURISDICTIONS

The key features of the relevant legislation in each of the other Australian jurisdictions is summarised in Table 2.1.

Table 5.1 Regulation in other jurisdictions

State	Legislation	Industry Coverage	Requires advertising of application	Bans charging employees fees	Bans misleading advertising	Prescribes records to be kept
ACT TAS NT VIC	No specific regulation	N/A	N/A	N/A	N/A	N/A
QLD	Private Employment Agencies Act 1983	All agents including those for performers and models	Yes Major provisions covering dealing with objections	Yes Does permit in relation to performers and models but requires statements of method of calculation and mechanism for redress	Yes	Yes
WA	Employment Agents Act 1976	All except agents for seamen	Yes Provisions for dealing with objections	No Provides a prescribed scale of fees with offences and remedies for fees charged above that scale.	Yes	Yes
SA	Employment Agents Registration Act 1993	All	Yes Provisions for dealing with objections	No Bans fee being charged until work has been found. Enables a refundable deposit to be paid prior to work being found.	Yes	Yes

Western Australia conducted a review of its Employment Agents Act in September 1999 which recommended that the Act be repealed. The WA Ministry of Fair Trading is considering that report.

Issue 22 – NSW and other jurisdictions

Not all jurisdictions licence employment agents.

(a) Are there any special circumstances in New South Wales which do not apply in the other jurisdictions?

6 OTHER OPTIONS FOR ACHIEVING OBJECTIVES

The following discussion examines several regulatory options. In evaluating these options, consideration should be given to achieving the objective of consumer protection without unnecessarily impacting on the efficient competitive nature of the employment agent industry.

It is not suggested that the following options are the only methods of regulation for the employment agent industry. While the review invites feedback on the appropriateness of the options discussed, it also welcomes receiving advice on any alternative approaches to regulation of the industry.

The main options identified are:

1. Maintain existing regulation
2. Negative licensing
3. Co-regulation
4. Remove regulation

6.1 Option 1 – Maintain existing regulation

The current system of regulation of employment agents in New South Wales is based on the Employment Agents Act 1996 and the Employment Agents Regulation 1996. Regulation in other states differs in number of aspects and some states do not specifically regulate employment agents at all.

6.2 Option 2 – Negative licensing

Negative licensing would be based upon legislation which prescribes acceptable standards for employment agents. It would not require agents to hold a licence as such but could exclude or fine those agents who failed to comply with the legislation. The term negative refers to an absence of licensing rather than an absence of legislation.

Under a negative licensing approach there would be no restrictions to entry, other than those persons excluded for breach of the legislation.

6.3 Option 3 – Co-regulation

Co-regulation refers to the involvement of a non-government body in the regulatory framework. Co-regulation would involve the industry in a more open and competitive structure with significantly reduced government regulation. There are a number of ways in which co-regulatory options could be implemented. A co-regulatory scheme can seek to substantially devolve regulatory options from government to industry association, requiring them to take responsibility for enforcing their own Codes of Practice. A parallel but limited core of regulation and related enforcement functions may be necessary, possibly requiring a

system of industry monitoring to ensure that employment agents are effectively complying with their Codes of Practice. Alternatively the transfer of regulation may be total with government retaining the power to invoke regulation in the event that industry associations are unable to satisfactorily manage their members.

In some co-regulatory models, while there is some transfer of government control to the co-regulatory body there must still be legislation to provide a legislative basis to enable prosecution of unlicensed practitioners. There needs to be a parallel government regulation body for non-affiliated operators and for an appeal mechanism from the industry bodies. Significant government cost would be incurred to operate such a co-regulatory scheme.

6.4 Option 4 - Remove regulation

This system involves the total removal of the current system of licensing employment agents. This would allow any person to present themselves to the consumer as an employment agent. The performance and conduct of employment agents would be determined by market forces, the effectiveness of industry bodies and general consumer redress would be the common law, the Crimes Act and the Fair Trading Act.

Regular and informed users of employment agents, usually the prospective employer, would maintain their own directories of persons experienced in the type of work they require. However, the removal of licensing may mean that new agents entering the market may have difficulty competing with established agents.

Issue 23 - Other options for achieving objectives

The main options to the current regime have been identified as:

- Maintain existing regulation
- Negative licensing
- Co-regulation
- Remove regulation

- (a) Are there any other options?
- (b) Do any of these options provide a net public benefit which is greater than the current licensing regime?
- (c) Would any of these provide a more efficient mechanism to achieve the objectives of the current Act? If so, why?

Appendix A Parties involved in preliminary consultations

- the Department of Industrial Relations;
- The Cabinet Office and
- the Department of Fair Trading.
- the Fair Trading Advisory Council;
- the Recruitment and Consulting Services Association;
- the Migrant Employment Taskforce;
- NSW Council of Social Service;
- Jobfutures;
- the Australian Business Chamber; and
- the Employers Federation.

Appendix B Summary of Issues

COMPETITION POLICY ISSUES

Issue 1 National Competition Policy and market theory

- (a) What problems do consumers face in relation to employment agents in today's marketplace?
- (b) Which of these should appropriately be addressed by government?

Issue 2 Market failure and occupational licensing

- (a) Is the information generally available to a consumer during a transaction with an employment agent adequate?
- (b) Does the market make this information readily available?
- (c) Is that information accessible and easily understood by consumers?

THE INDUSTRY

Issue 3 – Role of employment agents

The current Act does not regulate all activities of an employment agent. Additionally it not always clear whether the agent is acting on behalf of the employer or the jobseeker.

- (a) Should the Act clarify the role and responsibilities of agents, and if so, how?
- (b) What activities of an employment agent should be regulated and why?

Issue 4 – Impact of recent developments in the industry

The Commonwealth Job Network and the Internet has brought new players and new relationships into the industry.

- (a) Does the introduction of the Job Network result in any additional risks to users of employment agents? If so how should these risks be managed?
- (b) Are the dual monitoring processes appropriate?
- (c) What are the long term implications of the Commonwealth contracting arrangements for NSW employment agents?
- (d) Has the use of the Internet resulted in any additional risks to users of employment agents? If so how should these risks be managed?
- (e) What are the long term implications of Internet based employment agency services for the NSW licensing regime?

THE ACT

Issue 5 – Scope of the Act

In NSW employment agents are licensed by the Department of Fair Trading.

- (a) Does the Act cover the appropriate sections of the industry? If not which others should be included and why?

Issue 6 – Risks associated with transactions using employment agents

The Act attempts to address some of the risks associated using employment agents.

- (a) Are the risks listed the only ones associated with the use of an employment agent?
- (b) What are the risks associated with misleading advertising? What is the best way of managing these risks?

- (c) What are the risks associated with charging of fees? What is the best way of managing these risks?
- (d) What are the risks associated with deceptive conduct? What is the best way of managing these risks?
- (e) What are the risks associated unskilled career counselling? What is the best way of managing these risks?
- (f) What are the risks associated with disclosure of confidential information? What is the best way of managing these risks?
- (g) What are the risks associated with business failure? What is the best way of managing these risks?

Issue 7 – Objectives of the Act

- (a) In the absence of an explicit statement, is the implied objective of the Act to protect persons seeking employment through the services of an employment agent?
- (b) Are there any other objectives that might be implied from the legislation?
- (c) Should the objectives be specifically stated by the legislation?
- (d) Should the Act include a requirement for agents to inform clients of their rights under the Act and, if so, why?

Issue 8 – Administrative Arrangements

Administration of the Employment Agents Act is the responsibility of the Minister for Fair Trading with appeal and complaints roles administered by Tribunals.

- (a) Are the institutions that currently provide and deliver the regulatory framework appropriately designed for the purpose?
- (b) Do they have appropriate powers?

Issue 9 – Advertisement of intention to apply

The Act requires that an applicant place an advertisement of their intention 14 days prior to lodging an application for a licence.

- (a) Would deleting the requirement for advertising simplify the licensing process?
- (b) Would deleting the requirement reduce the protection provided to prospective clients of the agent?
- (c) Should there be a penalty for making a vexatious objection to an application?

Issue 10 – Reasonably suitable premises

The Act requires the Act to have reasonably suitable premises.

- (a) What risk does the requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Is the requirement adequate to address that risk?

Issue 11 – Previous cancellation of a licence

A person whose licence has been cancelled is ineligible to be granted a licence or become the person in charge of an agency for a period of 12 months after the cancellation of the licence.

- (a) Is the barrier to entry as a licensee or person in charge for a period of 12 months justified in all cases of cancellation of licence? In what circumstances could it be waived?

Issue 12 – Exemptions

There are no classes of agencies which are exempted from the requirement to be licensed.

- (a) Are there any agency types which should be exempted? If so, why?
- (b) Could the dual monitoring processes for those the Commonwealth contracted services be conducted in a more efficient manner?

Issue 13 – Licence fees

Current licence fees are \$100.

- (a) Do the licence fees act as a barrier to entry to the industry?

Issue 14 – Approval process

- (a) What opportunities exist for simplifying the licensing process and thereby making it more efficient?

Issue 15 – Conduct of the business

The Act requires a separate licence for each premises operated by the licensee.[section 5(2)]

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

Issue 16 – Person in charge

The Act requires that there be an approved person in charge at each place of business.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

Issue 17 – Client fees

The Act prohibits the agent from receiving a fee from any person other than the employer.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

Issue 18 – Records and registers

The Act requires that the agent keep certain records and registers in relation to jobseekers and prospective employers who use the services of the agency.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?
- (d) Do the current requirements raise any privacy concerns?

Issue 19 - Advertising

The Act prohibits false and misleading advertising by agents.

- (a) What risk does this requirement seek to address?
- (b) Does the risk justify the requirement?
- (c) Are there other ways in which the risk could be managed?

Issue 20 – Compliance and monitoring

- (a) Are the current compliance and monitoring mechanisms appropriate?
- (b) Do they act as a significant deterrent to unscrupulous behaviour?

EFFECT OF THE ACT ON COMPETITION

Issue 21 – Effects on competition

- (a) Do the provisions of the Act restrict innovation and/or competition by employment agents?
- (b) Can the barriers to entry be justified?
- (c) Does the Act impose costs on employment agents?
- (d) Are their benefits to the community which should be balanced against any such restrictions or costs?
- (e) Do the provisions of the Act bring about a net public benefit?

OTHER JURISDICTIONS

Issue 22 – NSW and other jurisdictions

- (a) Not all jurisdictions licence employment agents.
- (b) Are there any special circumstances in New South Wales which do not apply in the other jurisdictions?

OPTIONS

Issue 23 - Other options for achieving objectives

The main options to the current regime have been identified as:

- Maintain existing regulation
 - Negative licensing
 - Co-regulation
 - Remove regulation
- (a) Are there any other options?
 - (b) Do any of these options provide a net public benefit which is greater than the current licensing regime?
 - (b) Would any of these provide a more efficient mechanism to achieve to objectives of the current Act? If so, why?