ISSUES PAPER

NATIONAL COMPETITION POLICY REVIEW

COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS ACT 1963

COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS REGULATION 2000

CONTENTS

1. INTRODUCTION

In line with the National Competition Policy, a review of the *Commercial Agents and Private Inquiry Agents Act 1963* is currently being undertaken by the Ministry for Police (see Chapter 2 for information on the Agreement).

This Issues Paper represents an important part of the review process, and is designed to assist the Ministry in its consultation with interested stakeholders. A report on the results of the review is to be submitted to the Minister for Police in March 2002.

HOW TO MAKE SUBMISSIONS

Additional copies of the issues paper may be obtained from the Ministry for Police by phoning 02 9339 0600.

All interested parties are encouraged to make a written submission to this review. While submissions on any aspect of the legislation are welcome, they should primarily address the terms of reference of the review.

This Issues Paper has been prepared to assist those wishing to make a submission. For convenience a number of discussion points have been identified throughout the Paper. However, submissions are invited on any further issues that have not been raised in this Paper. As far as possible submissions should be fully supported by reasons and, where applicable, practical examples.

All submissions should be forwarded to:

The Ministry for Police
Level 19
Avery Building
14-24 College Street
DARLINGHURST NSW 2010

The closing date for submissions is 31 January 2002.

2. BACKGROUND TO THE REVIEW

NATIONAL COMPETITION POLICY

On 11 April 1995, Heads of Government[1] agreed at a Council of Australian Governments (COAG) meeting to a National Competition Policy reform program. The reform program consists of three major agreements:

- the Competition Principles Agreement, which provides the jurisdictions with guiding principles for ensuring competitive markets are maintained;
- the National Competition and Related Reforms Agreement, which provides a regime under which the Commonwealth funds the States and Territories for performance of obligations under the Policy; and
- the Conduct Code Agreement, which outlines formal notification protocols in relation to the Policy.

The aim of the National Competition Policy reform program is to encourage greater competition in the marketplace and to extend the productivity enhancing effects of competition to as many sectors of the economy as are in the public interest. The program includes a number of reforms which aim to lower business costs, improve competitiveness and provide for more sustainable economic and employment growth.

Underlying the National Competition Policy is the idea that greater competition will create incentives for:

- more effective use of resources, resulting in higher productivity;
- costs to be constrained, thereby lowering prices; and
- improved responsiveness to users' demands in terms of improved quality.

Under the Competition Principles Agreement, all governments must review their legislation with a view to removing anti-competitive provisions where the costs of the provisions outweigh the benefits to the community.

The National Competition Policy clearly recognises that, in some cases, laws which have the effect of restricting competition are essential in order to achieve a significant community benefit. In such cases, the National Competition Policy requires that these laws must be clearly identified so that the benefits to the community and the necessity for the restriction can be examined objectively.

TERMS OF REFERENCE FOR THE REVIEW

This review examines the case for reform of legislative restrictions on competition contained in the *Commercial Agents and Private Inquiry Agents Act 1963* and the *Commercial Agents and Private Inquiry Agents Regulation 2000* (the Commercial Agents and Private Inquiry Agents legislation).

[1] Consisting of the leaders of the Commonwealth Government and the Governments of all the States and Territories.

The review is to be conducted in accordance with the principles for legislation reviews set out in the Competition Principles Agreement. The guiding principle is that legislation should not restrict competition unless it can be demonstrated that:

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

Without limiting its scope, the National Competition Agreement requires the review to:

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

3. LEGISLATIVE OVERVIEW

BACKGROUND TO THE *COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS ACT 1963*

The *Commercial Agents and Private Inquiry Agents Act 1963* commenced operation on 1 July 1963. The Aet establishes the regulatory framework for commereial agents and private inquiry agents.

Prior to the passage of this legislation only private inquiry agents were subject to a licensing regime.

Regulation of private inquiry agents dates from the *Private Inquiry Agents Act 1955*, which was introduced following adverse judicial comment on the evidence and behaviour of private inquiry agents.

The *Private Inquiry Agents Act* was repealed by the *Commercial Agents and Private Inquiry Agents Act*, but the provisions of the former Act were by and large re-enacted. The present legislation brought commercial agents within the purview of the licensing scheme for the first time. The scope of the legislation was broadened in response to requests from various sections of the community that similar controls be introduced to cover the operations of debt collectors, repossession agents and legal process servers.

In 1985 the Act was amended by legislation cognate to the Firearms and Dangerous Weapons (Amendment) Bill. The *Commercial Agents and Private Inquiry Agents (Amendment) Act 1985* removed security agents from the definition of private inquiry agent and placed them under separate legislation. The amendments also further strengthened controls over financial transactions and upgraded requirements for qualifications.

Although the present legislation has only been significantly amended once since its initial passage, the regulation of commercial agents and private inquiry agents in NSW has been examined on a number of occasions.

In 1991 Mr RJ Bartley prepared a report for the Business Deregulation Unit (BDU) of the then Department of Business and Consumer Affairs. This report recommended the repeal of the *Commercial Agents and Private Inquiry Agents Act 1963* and that licensing of commercial agents and private inquiry agents be abandoned.

This document was used as background material for the preparation of a discussion paper for public consultation, the BDU/Police NSW *Licensing of Commercial Agents and Private Inquiry Agents – Issues and Options*. This publication made no formal recommendations but had a similar emphasis to that of the Bartley Paper. Several submissions were received by the Police Service in response to the issues paper, but analysis of these submissions was deferred as a consequence of the inquiry by the Independent Commission Against Corruption (ICAC) into unauthorised release of government information.

In contrast to the Bartley Report, the ICAC report arising from that inquiry recommended that licensing in respect of the "private investigation industry" (encompassing private inquiry agents, debt collectors, repossession agents and process servers) not only be retained, but further tightened.

In response to the recommendations contained in the ICAC report the then NSW Minister for Consumer Affairs, the Hon K Chikarovski MP, accepted a request from the Premier that the Department of Consumer Affairs undertake a review of the private investigation industry. The Review Report was released in 1994 and recommended the implementation of a business licensing scheme for private inquiry business and debt collection agency business, but not for repossession agents or process servers. Ultimately, action on these recommendations was indefinitely postponed, pending the outcome of relevant developments in relation to the security industry.

The Industrial Relations Commission of NSW commissioned a report into *The Transport and Delivery of Cash and Other Valuables Industry*, following the shooting of two security guards. Based on the recommendations arising from this report and relevant observations and findings made by the Royal Commission into the NSW Police Service about the involvement of police officers in secondary employment in industries related to policing, the Government introduced new legislation regulating the security industry. The *Security Industry Act 1997* introduced stringent new licensing criteria to overcome the issues of competence, integrity and accountability raised in those reports.

The security industry and private investigation industry are comparable industries, sharing many similarities in terms of their function and in the risks to the broader community posed by persons operating within those industries. In many jurisdictions both industries remain regulated by a single piece of legislation. Reform in the regulation of the security industry is therefore of interest to the private investigation industry.

In late 1997 the Ministry for Police established a Commercial Agents and Private Investigators Working Party to assist in a review of the commercial agents and private inquiry agents' legislation. The Working Party included representatives from Workcover, Mercantile Mutual, the Association of Fire Investigators, the NRMA, Peter Cox Investigations, GIO, the Institute of Mercantile Agents, Mark Alchin and Associates, the Australian Collectors Association, Prime Assessing, the NSW Police Service, and the Ministry for Police. The Working Party examined the legislation in the context of the reforms to security industry regulation, and the *Security Industry Act 1997* was considered by the Working Party as a possible model for the regulation of the commercial agents and private inquiry agents industry. The Working Party then made a number of recommendations to the Minister.

The legislation is now the subject of a National Competition Policy review.

THE OBJECTIVES OF THE ACT

Identifying the legislative objectives is an important exercise because restrictions on competition that do not address the legislative objectives should, as a general rule, be reformed.

The objectives of the *Commercial Agents and Private Inquiry Agents Act 1963* are not explicitly set out in the Act.

The second reading speeches for both the Private Inquiry Agents Bill and the Commercial Agents and Private Inquiry Agents Bill emphasised the unique position that agents occupy in the community by virtue of their operations, and in particular the intimate character of the dealings that such agents have with the public.

In relation to the Private Inquiry Agents Bill the then Attorney General, the Hon Mr Sheahan, stated that "the main purpose of the bill is to ensure that the public shall be served in this type of work by men (sic) of the highest integrity and character, the imprimatur of which will be a licence under the provisions of the measure."[2]

The Minister emphasised that the benefits of the regulation are not confined to the public who deal with the agents. He anticipated that agents themselves would find worthwhile advantages in being licensed, by the reflected confidence that the public dealing with them will gain.

The important tools of trade of agents are their honesty and integrity. A primary function of the legislation was accordingly to protect the public against persons of undesirable character by the strengthening of the ethical standards of agents in the interests of both the operators themselves and in the wider public interest.

Discussion points:

- Does this objective remain valid today?
- Is this objective being met?
- If legislation is to be retained what ought to be the express objective or objectives of the legislation?

[2] Hansard, 16 November 1955 at page 1512

4. RATIONALE FOR REGULATION

While competition in markets is generally regarded as the most efficient method of allocating resources, unrestricted competition does not always provide the most desirable economic or social outcomes. The two most common bases for government intervention in a competitive market are market failure or provider failure.

MARKET FAILURE

A perfect market is one where maximum satisfaction and profit are sought, all parties are completely informed and there are no hidden transaction costs, and where there are no costs to other parties.

The commercial agents and private inquiry agents legislation seeks to overcome the following instances of market failure.

Information asymmetry
Information asymmetry occurs where consumers are unable to ascertain information about service providers.

The licensing system is intended to operate to inform consumers that the available service providers satisfy certain minimum standards of integrity and competency. Licensing seeks to remove from the market services that consumers would not knowingly or willingly purchase. Thus, the licensing regime is intended to exclude the entry of undesirable providers without disadvantaging those who may be otherwise qualified from market participation.

Externalities
This refers to costs to parties not directly involved in the transaction. Through their conduct, commercial agents and private inquiry agents have the capacity to directly impinge on the rights of all citizens, not simply their clients. Persons potentially affected by these agents include the person who is the subject of the investigation or other proceeding, and other third parties (such as observers or other providers of information).

PROVIDER FAILURE

In some cases, unregulated markets may not fail, but they may produce a state of affairs that is unacceptable from a broader social perspective. For example, a provider may satisfy the norms and standards dictated by the market, but these might be less than the standards of probity, competence or conduct that are generally socially acceptable.

In this context, provider failure involves the failure of the service provider to achieve socially accepted standards by reason, for example, of dishonesty, insolvency or systematic performance of sub-standard work.

Risks to consumers and the general public from provider failure are generally classified as risks to health and safety, financial risks and risks of criminal activity.

Where public health and safety are potentially at risk the justification for government intervention is greater. It has also been argued that the irreversible nature of the impact that provider failure by commercial agents and private inquiry agents can have weighs in favour of instituting preventative measures, rather than being forced to rely on remedies after the fact. In the commercial agents and private inquiry agents industry the consequence of provider failure can be great, since members of the industry often deal with consumers and members of the public in their own homes or workplaces, and supply their services in circumstances of trust and reliance.

Some of the specific risks that attach to provider failure by commercial agents and private inquiry agents are considered below.

Private inquiry agents

Back in 1955 when licensing of private inquiry agents was introduced, the principal legislation providing work for private inquiry agents was the *Matrimonial Causes Act*.

Licensing was introduced in response to considerable criticism by the judiciary of private inquiry agents giving evidence before the courts and concerns about the methods used by some persons pursuing this particular occupation.

Since 1955 the nature of work performed by private inquiry agents has diversified. With the advent of no-fault divorce the proportion of total work performed by private inquiry agents that is of a domestic nature has declined. In addition to domestic matters, today private inquiry agents are just as likely to be involved in investigation of insurance fraud, corporate fraud, workers compensation, missing persons (including locating witnesses etc), employment checks, investigation of detection of listening devices, and collecting evidence for civil or criminal litigation.

While the role of private inquiry agents in the administration of divorce laws has declined, private inquiry agents continue to work closely in the administration of laws generally, and therefore regularly encounter aspects of law enforcement. In their day to day work, agents are regularly relied upon by the courts, both civil and criminal, and they are frequently in contact with the police and other law enforcement agencies, as well as dealing with prospective witnesses. During the course of their work private inquiry agents have access to sensitive information and to private property, and have in their power the reputation of individuals.

Unless private inquiry agents are of undisputed integrity there is a clear risk that they may abuse their position, by engaging in unlawful, unethical or otherwise corrupt behaviour.

Complaints levelled against private inquiry agents suggests that in the conduct of an investigation private inquiry agents have the potential to harass third parties, invade their privacy, illegally enter property and to steal or otherwise inappropriately deal with property or information.

During its inquiry into unauthorised release of government information, the Independent Commission Against Corruption found that private inquiry agents were amongst the most direct participants in the trade of government information. Evidence before the Commission showed that in some instances private inquiry agents obtained the information through friendship or some other relationship with the public official who improperly released it to them. In some instances they obtained it by deceit, but in the majority of cases they corruptly paid for the information, the payments being inducements to public officials to release it in breach of their duty.

In collating evidence from an investigation private inquiry agents are reported to have provided false evidence and to have threatened third parties in order to obtain their support for false evidence.

Clients risk financial loss if the private inquiry agents with whom they deal are of questionable integrity. Problems experienced in practice include:

- demands for additional money after payment of an initial fee. The client is told that part of the initial fee was a retainer and the rest has already been spent on investigations
- requirement for payment of a lump sum payment in advance
- false claims about work undertaken (for example, charges for work that did not take as long to perform as claimed, or charging for disbursements that did not cost the amount claimed)
- charges for work that was performed poorly or not at all
- threats by an agent to apply for a summons in local court for more money
- attempts by the agent to avoid action for redress.

Commercial agents

Commercial agency work can involve both locating debtors and then dealing with them. There are obvious abuses that can and do occur in the course of negotiations or other dealings that follow.

As with private inquiry agents, there is potential for commercial agents to:

- engage in harassing and intimidating behaviour
- engage in unethical or corrupt behaviour in order to obtain information
- misuse confidential information collected during the course of their work.

There are other additional risks of financial loss associated with the activities of commercial agents. In particular, misappropriation of debt repayments collected on behalf of their clients or other improper use of debts collected or goods repossessed.

Process servers

In some jurisdictions (for example, Victoria) process servers have been deregulated. In others, (for example, Tasmania) removal of the licensing requirement for process servers has been recommended. Deregulation of process servers was recommended by the Bartley Report and the report of the review of the private investigation industry completed by the Department of Consumer Affairs in 1994.

In his second reading speech, the then Minister for Justice explained the rationale for extending the coverage of the Commercial Agents and Private Inquiry Agents Bill to include process servers. He stated that "the service of legal process, if performed by

persons who are either unaware of or deliberately unmindful of their responsibilities to the courts of justice, can bring justice into disrepute, and great hardship to individuals who are more or less at the mercy of unscrupulous persons".

Process servers are responsible for serving legal process. By its nature, process serving activity is closely connected with the judicial system. There are several risks inherent in this activity.

First, persons undertaking this function (particularly for the debt collection industry) are frequently required to establish the identity of the person being served, the location of the person to be served and to be able to discuss and offer resolution on the matter of the process. During its inquiry into the unauthorised release of government information, the ICAC found that information concerning a person's address was frequently sold for the purpose of serving a summons.

Second, the act of process serving allows an individual to enter onto someone's property in circumstances which may otherwise give rise to a charge of unlawful entry. This position could be exploited by a person of undesirable character.

Third, there is the risk of defective service of process and the swearing of false affidavits. Allegations have been made about process not being served directly on persons named in the process and of notices being thrown in a bin, placed under a door or not delivered at all. Defective service of process (mis-served or un-served process) can lead to time delays and court costs which directly impacts on parties waiting to have their case heard, and ultimately adversely affects the justice system generally. Persons may be falsely arrested under a warrant issued on the basis that they were served correctly, or they may suffer judgment without ever knowing that the case has been instituted, leaving an innocent party with their reputation tarnished.

According to a public discussion paper released by the Victorian Government, there is some anecdotal evidence that the quality of process servers has declined since deregulation in that State.[3]

Discussion points:

- To what extent do the identified risks exist today?
- Are there additional risks not identified in this Paper?
- Is the existing regulatory framework the most appropriate means of addressing these risks?
- Should private inquiry agents be licensed?
- Should debt collection agents be licensed?
- Should process servers be licensed?
- Should repossession agents be licensed?

[3] Department of Justice *Regulation of Victoria's Private Security Industry: The Private Agents Act 1966*, Public Discussion Paper, at 16.

5. RESTRICTIONS IMPOSED BY THE SPECIFIC LICENSING CRITERIA UNDER THE COMMERCIAL AGENTS AND PRIVATE INQUIRY AGENTS LEGISLATION

PERSONS REQUIRING A LICENCE UNDER THE ACT

Commercial agents, private inquiry agents and sub-agents all require a licence to act in that capacity.

A **commercial agent** is defined as:
Any person (whether or not the person carries on any other business) who exercises or carries on any of the following functions, namely

a) serving any writ, summons or other legal process
b) ascertaining the whereabouts of, or repossessing, any goods the subject of a lease, hire purchase agreement, or bill of sale or taking possession of any goods the subject of a mortgage within the meaning of the Credit Act or
c) collecting or requesting or demanding payment of debts

on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee of a licensed commercial agent.

A **private inquiry agent** means any person (whether or not the person carries on any other business) who exercises or carries on any of the following functions, namely

a) obtaining and furnishing information as to the personal character or actions of any person or as to the character or nature of the business or occupation of any person or
b) searching for missing persons

on behalf of any other person and for or in consideration of any payment or other remuneration (whether monetary or otherwise), but does not include any employee of a licensed private inquiry agent.

A **sub-agent** is any person in the direct employ of, or acting for or by arrangement with, a commercial agent or private inquiry agent who exercises or carries on for such commercial agent or private inquiry agent any of the functions of a commercial agent or a private inquiry agent as the case may be, whether the person's remuneration is by way of salary, wages, commission or otherwise but does not include:

a) any person employed by a licensed commercial agent where such person would be a subagent as hereinbefore defined by reason only that the person receives in any office of such licensed commercial agent any money paid to such licensed commercial agent in respect of a debt being collected by such licensed commercial agent on behalf of any other person, or
b) any person in the direct employ of, or acting for or by arrangement with, a commercial agent who is required to hold a commercial agent's licence by reason only of the provisions of paragraph (b) of subsection (3) of section 5 [ie, a commercial agent involved in hire purchase repossessions].

At present in NSW there are 15,390 licences issued under the *Commercial Agents and Private Inquiry Agents Act 1963*, of which 1,553 are dual licence holders. The table below provides a breakdown of current licensees.

Type of licence	No of licences issued
Private Inquiry Agent	5177
Private Inquiry Sub-Agent	4272
Commercial Agent	1550
Commercial Sub-Agent	4391

A number of reviews have questioned the appropriateness of the existing licence categories. The Bartley Report concluded that since the amendments in 1985 that removed persons engaged in guard duty from the definition of private inquiry agents, the distinction between commercial agents and private inquiry agents has become blurred and there is no reason to retain the two different categories for licensing purposes.

The ICAC Report on *Unauthorised Release of Government Information* endorsed this conclusion.

Submissions are also welcome on whether the category of sub-agent should be retained. The Final Report of the *Review of the Private Investigation Industry* released by NSW Consumer Affairs in 1994 recommended that this category be removed. The approach taken in that Report was that persons who conduct the business of private inquiry agency or debt collection agency but who operate as independent contractors to other licensees should be licensed. It was recommended that those who are employees of a licensee should no longer need to be licensed.

An alternative approach is that taken in the *Security Industry Act 1997*. This Act adopts a Master licence model, which distinguishes between licences for businesses and licences for operatives. All security operatives must hold the relevant class of security licence and must be employed by a Master licensee. Master licensees are subject to range of additional requirements under the Act that do not apply to their employee operatives.

In Victoria, the issue of the appropriateness of having licensing categories that are occupation specific has been raised. This issue has been raised in the context of Victoria's *Private Agents Act 1966* which regulates security agents as well as inquiry agents and commercial agents. This legislation establishes four main categories of licence (security guard, crowd controller, inquiry and commercial agent), reflecting the traditional occupational roles in the private security industry. The Victorian Department of Justice has identified two limitations of occupation specific licence categories.[4] The first is that it provides limited flexibility for accommodating new or emerging types of occupations in the industry. The other limitation is that it does not allow people operating under one licence to work in a different but potentially related field. The first limitation is more applicable to the security industry than the private investigation industry, and arguably there have not been sufficient changes to the private investigation industry in NSW to realise the first limitation. However, the second potential limitation arguably does apply, since there are certain functions that

[4] Department of Justice *Regulation of Victoria's Private Security Industry: The Private Agents Act 1966*, Public Discussion Paper, at 19.

are common to both commercial agents and private inquiry agents. As a way to overcome these potential limitations, the current occupation based approach to licensing could be replaced with a competency based approach.

If the existing approach is favoured, submissions are sought regarding the appropriateness of the current definitions used in the Act. For example, some members of the Commercial Agents and Private Investigators Working Party distinguished private inquiry agents who perform surveillance duties only (observation agents) from those that conduct factual investigations. Some pointed out that the definition in the Act makes no specific reference to surveillance, which is a substantial component of private investigation.

Discussion points:

- Are the definitions used in the legislation appropriate?
- Are the existing licence categories appropriate?
- Should the categories of licence remain separate or be merged?

EXEMPTIONS

Under section 5(1) of the Act, the following people are not required to hold a licence:

- members of the Police Service of any State or the Commonwealth
- members of the Defence Forces of the Commonwealth
- officers or employees of the Crown, any Minister of the Commonwealth or State, or any officer or employee of any government department, in the exercise of his or her functions as such officer or employee
- solicitors acting in the ordinary course of his/her profession
- registered company auditors or their employees
- persons carrying on the business of insurance (insurers) or of an insurance adjustment agency (eg loss adjusters) or their employees or agents (in the exercise of functions as such employee or agent)
- persons carrying on the business of banking (bankers) or their employees or agents (in the exercise of functions as employee or agent)
- the Public Trustee or any executor, administrator, trustee, liquidator, official receiver, master of the Supreme Court, trustee in bankruptcy of a bankrupt's estate, trustee under a composition or scheme of arrangement or under a deed of arrangement or under a deed of assignment, committee of the estate of a person who is mentally ill, or the manager of the property of an incapable person, in the course of performing, exercising or carrying out his or her powers, functions and duties as such.

Additional exemptions apply in respect of:

- Persons who carry on the business of obtaining or furnishing information as to the financial rating or standing of any person (section 5(2))
- Persons employed to exercise or carry on for one employer only (such employer not being a commercial or private inquiry agent) any of the functions of a commercial or private inquiry agent, except in the case of hire purchase repossessions (section 5(3)).

Under the Regulation, anyone whose business requires a licence under any other Act (and who holds such a licence) is exempted from the requirement to hold a licence under the *Commercial Agents and Private Inquiry Agents Act*.

Also under the Regulation, persons appointed under the *District Court Act* or the *Local Courts (Civil Claims) Act* to act as a bailiff are exempt from the requirement to hold a licence as a commercial agent or subagent, and industrial organisations within the meaning of the *Industrial Relations Act* are exempt from all provisions of the Act other than section 29.

The exemptions already existing under the *Private Inquiry Agents Act 1955* were re-enacted in the present legislation without alteration. The underlying philosophy, as expressed by the then Minister in his second reading speech for the Private Inquiry Agents Bill, is that exemptions are provided for classes of persons engaged in inquiry work that is implicit in their occupation.

In extending the legislation to cover commercial agents, the then Minister made clear that persons already licensed under existing statutes (with particular reference to real estate agents and stock and station agents) were not intended to be brought within the provisions of the Bill.

While the extension of the licensing requirement to commercial agents in general received bi-partisan support, the Opposition criticised those clauses of the Bill dealing with exemptions. It was claimed that the effect of the exemptions was to remove from the scope of the legislation the most complained about section of those operating in this sphere. During the debate, the Member for Burwood cited anecdotal evidence from a District Court judge that approximately 95% of cases brought to court involved employees of finance companies and retail stores. He further asserted that five times the number of processes are served by [such] employees as by bailiffs of the court.

The ICAC Report on *Unauthorised Release of Government Information* was also critical of the exemptions provided under the legislation:

> *If licensing is maintained and regulation of the industry is to be made effective, it will be necessary to review the exemptions. By way of example, there is no justification for retaining the exemption in respect of those who work for a single employer. Skip tracers employed by large commercial and financial institutions can be as much in need of regulation as agents who offer their services to the community generally.*[5]

Concerns about the conduct of "in-house" agents employed by financial or other institutions do not appear to have disappeared. The legitimacy of the exemptions for persons carrying on the business of insurance (including loss adjustment) or banking, and of the "one employer" exemption was considered by the Commercial Agents and

[5] Independent Commission Against Corruption *Unauthorised Release of Government Information* (1992) at 125.

Private Investigators Working Party in 1997. Overall it was felt that these exemptions should not be retained.

On the other hand, the 1994 *Review of the Private Investigation Industry* conducted by NSW Consumer Affairs argued that exemptions should continue to apply in respect of businesses or professions whose prime functions are not the carrying on of the business of private inquiry agency or commercial agency, and/or who are otherwise already regulated for those activities undertaken in the course of their businesses.

That review concluded that the existing exemptions should be retained in practice, not as separately listed exemptions, but by re-drafting the definitions of private inquiry agency and commercial agency to specify the carrying on of such business rather than referring to the undertaking of such functions.

Submissions are invited in relation to the appropriateness of all the existing exemptions, and on how the exemptions (if any) should be dealt with under the legislation.

Discussion points:

- Are the current exemptions appropriate and justifiable?
- Have problems been experienced with the activities of these groups?
- Are the current alternative control arrangements (ie legislation under which they operate) sufficient?

FEES

An application for a licence or for a licence renewal must be made in the prescribed form and be accompanied by the prescribed application fee. The *Commercial Agents and Private Inquiry Agents Regulation 2000* sets out the following application fees payable for the issue or renewal of a licence under the Act:

Licence	**Fee**
Commercial agent's licence	$55
Private inquiry agent's licence	$55
Subagent's licence	$15
Duplicate licence	$5

Licences are in force for a period of twelve months from the date of issue. These costs are based on a paper and not a photo-licence, and do not include any provision for enforcement or auditing costs.

The fees for comparable security industry licences are:

- $85 per annum for a class 1 or class 2 licence (or $115 for a licence including both sub-classes); or
- $350 for a 5 year class 1 or 2 licence (or $380 for a 5 year licence including both sub-classes).

These costs are based on photo-licences produced by the Roads and Traffic Authority, and reflect the additional administrative and auditing work associated with the higher standards of integrity checking and training required by the *Security Industry Act 1997*.

Discussion points:

- Do you consider that the prescribed fees constitute a significant barrier to entry?
- Do you consider that the prescribed fees in any way discriminate as between licensees?
- Do you consider that these fees reflect the administrative and other costs of regulating the industry?
- Do you consider that the licences should be photo-licences?
- What are the costs and benefits associated with annual licence renewals?

FIDELITY BOND

Applicants for a commercial agent's licence must lodge a fidelity bond before a licence can be issued. The Regulation establishes the amount of the fidelity bond at $20,000.

The fidelity bond is intended to protect against the risk of defalcation (ie theft) of clients' money. A fidelity bond is an agreement to guarantee the integrity or good behaviour of a person. An insurance policy is taken against the loss of money from fraud, embezzlement or larceny committed by a principal or an employee during the term of the insurance policy. The fidelity bond is a compensatory back up in the event that the company's trust account has been embezzled.

Only commercial agents are subject to this requirement, because they are most likely to handle significant amounts of other peoples' money as part of their everyday work.

A review of the comparable financial surety requirements under the Victorian legislation concluded that the risks of misappropriation of funds by commercial agents were real, but that the current surety arrangements were inappropriate and should be managed differently. As in NSW, applicants for a commercial agent's licence in Victoria must lodge a financial surety, which may be lodged in the form of a fidelity bond. The Victorian legislation establishes the surety amount at $30,000 for a corporation, $9,000 for a partnership and $12,000 for an individual. The Victorian review recommended further consideration of two alternative ways of managing the threat of misappropriation:

- imposing compulsory professional insurance requirements on commercial agents; or
- establishing a centralised industry compensation fund.

The review conducted by NSW Consumer Affairs considered that the requirement to lodge a fidelity bond should not apply to process servers or repossession agents because their businesses are not like that of a debt collector.

That review also recommended the introduction of a variable fidelity bond, tied to the amount of debt collection turnover through the trust account of the agency.

Discussion points:

- Is the fidelity bond requirement appropriate and/or effective?
- Does the amount of the fidelity bond represent the sums of money handled by commercial agents?
- To what extent does the amount of the fidelity bond reflect the risk posed by commercial agents to their clients?
- Are there any problems in practice in obtaining the fidelity bond from insurance companies?
- Are there preferable ways of achieving the financial surety requirements?

GROUNDS OF OBJECTION TO THE GRANT OF A LICENCE

All applications for a licence under the Act are required to be referred to the officer in charge of police at the nearest police station for the purpose of ascertaining whether there is any objection to the grant of a licence.

Under the Act, the officer in charge of police may object to the grant of a licence on the grounds that the applicant:

(i) Is not of good fame or character
(ii) Is not a fit and proper person to hold a licence
(iii) Does not have the prescribed qualifications or experience
(iv) Has not attained the age of 18 years
(v) Has not been continuously resident in Australia during the period of 12 months immediately preceding the making of the application
(vi) Is disqualified from holding a licence
(vii) Within the period of 10 years immediately preceding the date of the application has been convicted of an offence punishable on indictment

Where the applicant is a corporation, objection to the grant of a licence may be taken where:

- Any of the directors or the secretary of the corporation or any person employed as its manager to be in charge of the carrying out of its functions as holder of a licence is a person referred to in subparagraph (i), (ii), (iv)-(vi), or
- The person to be in charge of the carrying out of its functions as the holder of a licence is a person referred to in subparagraph (iii).

A survey of one quarter of licensing police in the State revealed that 24 objections were lodged by this sample of licensing officers in 2000/01 in response to applications for a licence under the Act. The objections were based on the following grounds:

Lack of qualifications/experience	11
Not fit and proper	4
Criminal record	6
Sub-agent not employed by an agent	3

Extrapolating from these figures, it is estimated that almost 100 objections were made in 2000/01 across the whole State. The largest proportion of objection is taken on the grounds of lack of qualifications or experience, followed by criminal record, then fitness and propriety.

Any objection received is heard before a Magistrate sitting in open court. The magistrate has discretionary power to grant a licence despite the existence of a state of affairs qualifying for objection.

In relation to the objections made by the sample of licensing police surveyed, 11 (or 45.8%) were upheld, 12 were rejected (50%) and one objection (4.2%) is still subject of appeal.

By contrast, under the *Security Industry Act* licensing decisions are made by the Security Industry Registry under delegation from the Commissioner of Police. The *Security Industry Act* outlines the grounds on which a licence must be refused, and the grounds on which a licence may be refused. Where a licence is refused on discretionary grounds the applicant can seek a review of the decision from the Administrative Decisions Tribunal

Qualifications and competencies
The prescribed qualifications and experience for a licence under the *Commercial Agents and Private Inquiry Agents Act* are set out in the Regulation.

Clause 10 provides that in relation to a natural person applying for a licence, the prescribed experience is having been a licensed subagent for a continuous period of at least 12 months, and the prescribed qualification is a certificate issued by the TAFE Commission in Commercial Agency Practice (for a commercial agent's licence) and Private Agency Practice (for a private inquiry agent's licence).

The rationale for this licensing criterion is that consumers are unable to check the standard of competency of individual licence holders, and they therefore depend on the licensing system to indicate a certain quality of service. By requiring applicants for a licence to demonstrate the prescribed qualifications or experience, consumers can have more confidence that services provided will conform to a basic level of skill.

The 1994 Report of the *Review of the Private Investigation Industry* recommended that this statutory requirement be removed. It was argued that this requirement could not be justified since there is no risk to public health and safety by virtue of intellectual skills and competence. That review agreed that industry should be encouraged to attain qualifications, but that this should be achieved by other means, such as the establishment of an industry register of agents with accredited qualifications or experience.

The requirement for qualifications does impose a cost on applicants who must expend time and money in achieving the required educational standards. At present there are also restrictions on who can provide training, with only one training provider recognised by the Regulation.

The Training Committee of the Commercial Agents and Private Investigators Working Party supported proven training/experience as a criterion for obtaining a licence. It considered that the system of national competency standards forming part of the Australian Qualifications Framework provided the means by which the legislation can incorporate a system of training qualifications that is dynamic and addresses future changing conditions of the investigations industry. The Training Committee further suggested that training and assessment could be delivered by both private and public colleges.

Under the *Security Industry Act* security industry training courses must be approved by the Commissioner, and an operatives licence must not be granted unless the applicant has completed an approved security industry training course.

Under some licensing systems which distinguish between employee and contractor licences there is a requirement for contractor licensees to have business knowledge and experience. For example, in South Australia the Regulation requires completion of "subjects relating to business administration approved by the Commissioner". Where the licensee is a body corporate, the directors must collectively demonstrate business capabilities.

Reputation

As with qualifications, the capacity of consumers to assess the reputation of an operator is limited.

To address potential consumer vulnerability to unscrupulous operators, the Act allows an objection to be made to the grant of a licence if the applicant is not of good fame or character, is not a fit and proper person to hold a licence, or has within the period of 10 years immediately preceding the date of the application been convicted of an offence punishable on indictment.

Legislation in some other jurisdictions sets out a more comprehensive list of offences that may disqualify an individual from obtaining a licence, for example:

- offences of dishonesty;
- offences of violence;
- drug offences;
- offences against the listening devices legislation; and
- offences against the *Telecommunications (Interception) Act* 1979.

Under the *Security Industry Act* a person must be refused a licence if the applicant has within a period of ten years prior to application been convicted in NSW or elsewhere of an offence relating to:

- firearms or weapons;
- prohibited drugs;
- assault;
- fraud, dishonesty or stealing;
- robbery; or
- a total of at least five offences involving industrial relations matters during any period of two years.

An applicant is also disqualified from holding a security industry licence if they have been found guilty, but with no conviction recorded, of any such offence within the period of five years before the application for the licence was made.

Other entry restrictions?

Financial reputation

Legislation in other jurisdictions contains financial criteria to protect consumers from the risk of financial default and loss. While the NSW legislation requires lodgement of a fidelity bond by prospective commercial agents, elsewhere (such as in South Australia and Tasmania) additional criteria must be met to establish financial reputation for the purpose of obtaining a licence. Under these provisions, entitlement to a licence is dependent on a person demonstrating that they have sufficient financial resources.[6] These jurisdictions also prevent entry into the occupation of a person (both a natural person and a directors of a body corporate) who is an undischarged bankrupt or who is subject to a composition or deed of arrangement with or for the benefit of creditors.

Police officers

As with the security industry, the private investigation industry has a natural attraction for former police officers because of the quasi-policing nature of some of the functions that operators undertake. This was confirmed by the ICAC inquiry, which found that many private inquiry agents are former police officers.

The inquiry conducted by the ICAC into unauthorised release of government information raised special considerations about the position of serving and former police officers in the private investigation industry. The ICAC inquiry uncovered vast networks that had developed between former officers now engaged in the private investigation industry and their former colleagues in the Service. These networks were responsible for a great deal of confidential information getting onto the illicit market.

In recognition of some of the specific concerns about former officers operating in a private policing capacity, the *Security Industry Act* contains special provision dealing with licence applications from police officers. Former police officers who have been removed or dismissed from any Police Force on integrity grounds within the previous 10 years are ineligible for a security industry licence. Removal or dismissal from the Police Service on other grounds is a discretionary ground of refusal. All applications by former police officers must be referred to the Internal Affairs Branch for assessment as to the suitability of the applicant to hold a licence.

Discussion points:

- If licensing is preferred option, what are the appropriate grounds for objection?
- Are the licensing criteria strict enough to prevent higher risk individuals from operating in the industry?
- What are the costs and benefits associated with each of the licensing criteria?

[6] See for example, *Security and Investigation Agents Act 1995* (SA), ss9(1)(e)(iii) and 9(2)(d).

- Is the age requirement an appropriate licensing requirement?
- What are the costs and benefits of the requirement for applicants to have been continuously resident in Australia during the period of 12 months immediately preceding the making of the application?
- Is the "fit and proper person" criterion appropriate?
- Is the requirement to be of good fame and character an appropriate licensing criterion?
- Should the legislation more clearly define the type of offences that may or must disqualify an applicant from obtaining a licence?
- If so, what should be the disqualifying offences?
- Should agents be required to obtain set qualifications or demonstrate competency standards?
- Are the existing qualification requirements appropriate?
- Should the achievement of these qualifications/competency standards be mandatory or remain a matter of discretion for the licensing authority?
- Should there be suppliers of courses other than TAFE?
- Should financial threshold requirements supported by constraints on persons who are bankrupts or directors of wound up companies from being licensed be introduced?
- Should there be special provision to deal with applications from former police officers?

6. RESTRICTIONS ON COMPETITIVE CONDUCT

Apart from the requirement for licensing, the legislation also imposes a number of restrictions on the conduct of licensees. Failure to comply with these conduct requirements may expose licensees to disciplinary action (with sanction of licence suspension or cancellation) or liability for an offence.

In relation to each of the conduct restrictions, submissions are invited to consider:

- whether the requirement is restrictive;
- who benefits from the requirement; and
- what costs the requirement imposes (on either the licensee or the consumer).

It should be noted that irrespective of whether or not there is a licensing requirement, there may still be arguments for retaining and upgrading requirements which regulate conduct within the industry.

The conduct requirements contained in the legislation include the following:

- A licensed agent that is a corporation must employ a licensed individual as the person in charge of that place of business. Where the corporation conducts its business at more than one place, the Act forbids a single individual from being in charge of each place of business (section 8A).

- Licensed commercial agents, private inquiry agents and subagents must have a registered address (section 16) and, except in the case of subagents, must display certain notices (section 17).

- The Act contains prohibitions on the employment of unlicensed subagents or disqualified persons (section 19).

- Agents must notify the clerk of the local court if a subagent leaves their employ (clause 11 of the Regulation).

- Commercial agents and private inquiry agents must refrain from making false, misleading or deceptive statements, representations or promises (section 20)

- Advertisements published by commercial agents and private inquiry agents must include certain specified particulars (section 21).

- Commercial agents are required to report to the police repossessions of motor vehicles within 24 hours (section 22).

- Licensees must produce their licences to certain persons (section 23) and are prohibited from lending their licences (section 25)

- Unlicensed commercial agents, private inquiry agents and subagents are prohibited from recovering any consideration for any work done by them as such (section 26).

- Commercial agents are prevented from recovering from a debtor any costs, charges or expenses (other than stamp duty, Registrar-General fees and legal costs) incurred in the collection of the debt due by the debtor (section 29).

A further raft of conduct restrictions apply in relation to financial transactions. These restrictions are directed at minimising financial loss occasioned through financial insolvency or dishonesty of the operator.

For example:

- Commercial agents must keep a trust account and to pay moneys collected on behalf of any clients into such trust account (section 31).

- Commercial agents must arrange an annual audit of all accounts and papers relating to the trust account and send a copy of the audit report to the Commissioner of Police (section 32A).

- Commercial agents must keep certain records of transactions entered into by him/her and employees and subagents (section 33).

- Commercial agents must furnish a written statement of trust account balance to creditors (section 33A)

- Commercial agents and private inquiry agents must produce records for inspection upon request by any member of the Police Service of or above the rank of sergeant (section 34).

- It is a condition of a commercial agent licence that a fidelity bond in the sum of $20,000, from some insurance company or person approved for the purpose by the Minister for Police, has been lodged and is still subsisting (section 36 and clause 16 of the Regulation).

- Every subagent acting for a commercial agent must pay to that commercial agent all money received from or on behalf of any person (section 38) and licensed commercial agents are liable for the moneys received by their subagents (section 39).

Harassment

One of the most common complaints against commercial agents and private inquiry agents is of harassment. Under section 39C of the Act, if a licensee engages in harassing conduct (as defined in that section), the licensee is guilty of an offence. This section operates independently from section 60 of the *Trade Practices Act 1974* (Cth),[7] and the harassment offence in the *Fair Trading Act 1987* (NSW), both of which are considered further in section 9 of this Issues Paper.

Harassment can take many forms. In the original legislation the provision was expressly phrased in general terms to allow individual circumstances to be adjudicated by the court. During the debate on the Bill, the Minister described the use

[7] Section 60 prohibits corporations from engaging in physical force, undue harassment or coercion, in connection with the supply of goods or services to a consumer or in connection with the payment for goods or services by a consumer.

of gaudily coloured vehicles, flamboyantly displaying the sign "Debt Collector" as being an example of harassment.

Over time, amendments have been made to the Act to define what is meant by harassment. The current offence of harassment applies to all licensed agents and covers the following:

- To unduly harass by leaving any object (including a vehicle) inside or outside premises, with writing on it which indicates that the person is an agent, or anything else to do with that business, in circumstances which might cause someone visiting or passing by to infer that the agent is visiting the occupier for the purposes of carrying out the functions of an agent;
- To send any document to any person which would cause the person to believe that a vehicle or notice will be left as mentioned
- To make contact (in person or by telephone or otherwise) at unreasonable times or with unreasonable frequency
- To disclose or threaten to disclose to a person's employer that a person is a debtor (unless with the person's consent or by legal process)

In light of reported practice amongst commercial agents, recommendations were made in the of the review undertaken by the Department of Consumer Affairs to broaden section 39C to include:

- use by a creditor or agent of documents which resemble court documents or official forms;
- impersonation of police officers or court officials, particularly bailiffs;
- the carrying of weapons;
- misleading the debtor as to recovery procedures;
- misrepresenting to a debtor the possible consequences of failure to pay a debt;
- the use by a creditor of stationery which bears the letterhead of an independent collector; use by a creditor of a business name which suggests that he/she is a debt collector and the use by a creditor or a debt collector of stationery bearing the letterhead of a solicitor;
- unwarranted direct disclosure of debt information to third parties, such as the employer, neighbours of the debtor. Disclosure by a creditor or an agent of debt information should be restricted to those who have a clear interest in receiving that information, including credit reference agencies and creditors;
- unreasonable direct communication with the debtor when the creditor knows that there is a lawyer, a debt counsellor or other agent acting on the debtor's behalf;
- attempts to impose costs on debtors by the use of "collect" communications;
- purported serving of unissued summonses.

The report of the review by NSW Consumer Affairs further recommended that the offence of harassment be made applicable to creditors and finance providers who are non-agents (and their employees).

That report also called for the introduction of a civil remedy where the harassment has caused loss or damage to the victim.

Other conduct restrictions?

Requirement to provide a written contract

Some of the more common grounds of complaints about commercial agents and private inquiry agents can be difficult to establish because of the absence of documentation acknowledging the transaction or recording payments.

To address this difficulty, the *Review of the Private Investigation Industry* recommended that there should be a requirement for commercial agents and private inquiry agents to give clients a written contract or statement of fees containing prescribed terms and costs, and receipts for any money paid by clients.

Code of practice

In submissions to previous reviews, it has been suggested that licensees should be required to comply with a code of practice. Such a code could cover matters not provided for in the legislation or it could supplement the legislative conduct requirements. Codes of practice are further considered in section 9 of this Issues Paper.

Discussion points:

- Do these conduct restrictions achieve a good purpose?
- Do they produce any benefit to clients and/or general community?
- Are these restrictions necessary for the protection of consumers?
- Are these conduct restrictions effective?
- Are these conduct restrictions enforced?
- Are they appropriate for modern conditions?
- To what extent do these requirements restrict competition?
- What are the compliance costs associated with these conduct requirements?
- Do these costs outweigh the benefits secured by the conduct restrictions?
- Should the conduct proscribed by s39C be broadened? If so, what other forms of conduct should be proscribed as "harassment"?
- Do they unnecessarily duplicate provisions under general criminal law or fair trading laws?
- Are the existing grounds for suspension, cancellation or refusal to renew a licence appropriate?
- Should any of these grounds be removed, or should any further grounds be added?
- Are there any other offences or conduct restrictions that should be added or removed?
- Are the prescribed penalties for offences appropriate?

7. ADMINISTRATION OF THE LEGISLATION

The *Commercial Agents and Private Inquiry Agents Act 1963* is administered by the Minister for Police. The Police Service estimates that administering the legislation takes up approximately 12-13% of licensing police time. However, local courts and the Department of Fair Trading also have responsibilities in relation to the regulation of the private inquiry and commercial agents industry.

A review of the administration of the legislation is important because inefficiencies or other shortcomings in the regulatory framework (including unnecessary delays in the licensing process and ineffective enforcement) can impose costs on business and the wider community, and can ultimately defeat the objective of licensing and regulation generally.

Past reviews have considered the question of the appropriate point of administration of the legislation. In other jurisdictions responsibility for the administration of the equivalent legislation resides with either the Minister for Justice or Police, or with the Minister for Fair Trading or Consumer Affairs.

In NSW, the Department of Fair Trading already has some involvement with the private investigation industry in terms of consumer complaints and the review of the industry which it undertook when it was the Department of Consumer Affairs. The Department of Fair Trading is responsible for promoting an informed and fair marketplace, and it has experience administering business licensing and the *Fair Trading Act.*

On the other hand, there is a close relationship between the private investigation industry and law enforcement. Moreover, the licensing process involves criminal history checks making it administratively more efficient to place responsibility for licensing decisions with the police rather than to divide the process between the police and another agency (or other agencies).

Licensing procedure

Under the current legislation, local courts have responsibility for issuing licences. All applications for a licence are lodged with the clerk of the local court nearest to the place where the applicant proposes to carry on the business or function of a commercial or private inquiry agent. The legislation requires the clerk of the local court to refer applications to the nearest police station to give the officer in charge of police an opportunity to object to the issue of the licence, if appropriate. Unless the officer in charge of police at the relevant station objects to the grant of a licence within one month of the receipt of the application by the court, the clerk of the local court is obliged to issue the licence. If an objection is made by police, the application is set down for hearing before a magistrate. All police stations are supposed to forward details of applications for inclusion on a central database maintained by the Service's Organised Crime (Gaming and Liquor) Branch on behalf of the Commissioner of Police, in accordance with section 15 of the Act.

Previous reviews of the legislation have identified a number of limitations in the current licensing procedures.

The only person who may object to a licence application is the officer in charge of the Police Station nearest to the Local Court to which the application was made. The legislation adopted this procedure from the *Business Agents Act 1935* and the rationale for restricting objections to those made by police officers in that legislation was expressed by the then Minister to be that "there are always in the community cranks who believe that some hardship has been done to them, and they might attempt to bring a man to court without real justification".

Any objections that police have to the application must be raised within one month after the receipt of the application by the clerk of the court. However, while the Act requires that the clerk of the court send the application to the nearest police station, it does not require that that be done within any specified time. The one month after which the licence is to be granted if there is no objection commences to run as soon as the application is lodged and continues to run even if the Police are notified late or do not know of the application at all before the month bas expired. There is no provision for extension of time.

At the very least this process presents the possibility of significant breakdown of communication at vital stages of the application process. Grounds of objection to the application risk not being identified by reason of:

- failure by the clerk of the court to notify the police station;
- failure by the officer in charge of police to object within the required timeframe; and
- no record of an objection being received by court.

At worst, this procedure is susceptible to process corruption. There is no requirement for a record to be maintained by courts of notices they send out to police stations, nor for a record to be maintained by police stations of notices received. Court notices can become "lost" and there is limited accountability.

The information maintained by Organised Crime (Gaming and Liquor) Branch is not comprehensive. Forum shopping can, and does, occur. When a licence has been refused or revoked by one court, the applicant can apply to another court. For example, in one case police sought revocation of a licence because the holder had been convicted of a criminal offence. The usual procedure is that the licence holder is served a notice of the revocation proceedings and is invited to appear to show cause why the licence should not be revoked. At the hearing, if neither the licence holder nor any legal representative appears, the licencc is automatically revoked. That process was followed in the case in question, but some time later police were tipped off that three months prior to the revocation proceedings the person had applied for, and obtained, a new licence at another court.

A licence remains in force for a period of twelve months from the date of issue. During the period of the currency of the licence, disciplinary action against commercial agents and private inquiry agents can be taken by way of cancellation or suspension of the licence. Such action may be taken upon the complaint of a police sergeant or more senior police officer, by summons to appear before a magistrate to show cause why the licence should not be cancelled or suspended.

In 2000/01, only one action for revocation of licence was recorded amongst the representative licensing police surveyed. The revocation action was taken in response to the conviction of the licensee for a criminal offence. At the date of the survey, the matter was still before the court.

Applications for renewal of licence made before the expiry date of the licence sought are renewed as long as the fidelity bond (where applicable) has been lodged and is still subsisting. No further checks are conducted. The clerk of the local court notifies in writing the officer in charge of police at the nearest police station of the renewal. The same conditions and procedures apply in respect of applications for the grant of a licence made within three months of the expiry of a licence of the same kind.

General complaints about commercial agents and private inquiry agents can be made to the Department of Fair Trading or the Police Service. The sample survey of licensing police in NSW revealed that across one quarter of licensing police only 3 complaints were received about licensees in 2000/01. The nature of the complaints were not further described by respondents. Previous reviews of the legislation indicate that the major complaints against agents fall into the following categories:

- harassment/intimidation;
- invasion of privacy; and
- breach of contract/non-supply of service.

Particularly in relation to complaints falling in the latter category, establishing the complaint can be hard because of difficulties in proving the arrangement with the agent and the absence of receipts of moneys paid.

In contrast to the procedures for licensing and for enforcement found in the commercial agents and private inquiry agents' legislation, the administration of the *Security Industry Act 1997* is carried out through the Security Industry Registry, a branch of the Police Service, under delegation from the Commissioner of Police. This is a centralised Registry, staffed by civilian members of the Police Service. Officers of the Security Industry Registry have delegated authority to adjudicate, issue, suspend, refuse or revoke security licences.

Discussion points:

- What agency or agencies should have responsibility for the administration of the legislation?
- How effective are the existing regulatory processes?
- How efficient are the existing regulatory processes?
- Who should be entitled to object to the grant of a licence?
- Should there be a mandatory public reporting requirement to alert the public to the fact that either an application has been made or that a licence has been granted to a particular firm or individual?
- Do the existing regulatory processes incorporate adequate dispute resolution procedures?

8. COSTS AND BENEFITS OF RESTRICTIONS ON COMPETITION IMPOSED BY THE LEGISLATION

As can be seen by the preceding sections of this Issues Paper, the restrictions on competition imposed by the commercial agents and private inquiry agents legislation fall principally into one of two categories, namely barriers to entry or restrictions on the operations of licensed agents.

Benefits of the regulatory scheme in place for commercial agents and private inquiry agents

The benefits of the regulatory scheme for the general public, consumers of private inquiry or commercial agency services, and the industry itself can be characterised as follows:

- Statutory regulation introduces a transparent system, clearly defined by reference to statutory approvals, authorisations and other regulatory controls.

- The regulatory scheme provides a universal measure and standard against which service providers can be benchmarked and evaluated. The licensing system reduces the cost to the consumers of searching out information about service providers in order to choose who is both competent and competitively priced, and provides consumers with an assurance and confidence in the standards which can reasonably be expected from service providers.

- The regulatory scheme protects the public against risks to health and safety, risks of criminal activity and financial risks. The licensing system screens out applicants with a history of fraudulent behaviour or other business malpractice, and applicants who are insufficiently qualified. This reduces the likelihood of poor service quality and criminal activity. The maintenance of a register of licensees increases traceback capability, which also reduces the risk of criminal activity.

- The regulatory scheme is proactive rather than reactive. It introduces mechanisms to provide for the protection of the community rather than relying upon options which may only be enforced upon the happening of identifiable loss or personal injury. This arguably leads to more efficient use of police resources, and reduced burden on court resources.

- The regulatory scheme also provides a basis for discipline for misconduct. The existence of enforceable penalties and the threat of licence disqualification operate as an incentive for service providers to comply with prescribed standards of conduct.

- By introducing threshold entry standards and mechanisms for expelling and disciplining members who fail to adhere to the standards established, the regulatory scheme lifts the image of the entire industry.

Costs of the regulatory scheme in place for commercial agents and private inquiry agents

The costs can be characterised as follows:

- Statutory regulation restricts entry to the market through the imposition of requirements and standards which service providers are required to meet. This may impede competition and consumer choice.

- Statutory controls are relatively inflexible, and less capable of adapting to and accommodating changing practices or technologies. Regulation pursuant to a statutory framework may accordingly inhibit the evolution of innovative forms of service delivery.

- Regulation imposes additional costs on service providers which they may not otherwise incur. The burden on small businesses is arguably greater since complianee costs may represent a larger proportion of the operational cost base.

- Restrictions on supply of service providers and increased costs on service providers may raise the cost of services to consumers.

- The general public incurs costs in the event that regulation is ineffective.

- Licensing creates an impost on individuals, businesses and on the Government. Identified costs of licensing include:
  - costs to potential licensees in attaining competencies or training required for licence;
  - costs to licensees in terms licence fees, fidelity bond requirements (in the case of commercial agents);
  - costs of administration of licensing (including processing of applications and enforcement);
  - compliance costs; and
  - costs to consumers of a restricted provision of services.

Discussion points:

- What other costs and benefits of the current regulatory scheme are there?
- To what extent, if at all, do the benefits of the restrictions imposed by the regulatory scheme outweigh the benefits to the community as a whole?

9. ALTERNATIVES

As part of this review, a number of alternative, less restrictive options to the current regulatory regime are being examined. Submissions are invited to consider whether any of these alternative mechanisms would be equally or more effective or efficient at achieving the objectives of the legislation. The options outlined below are not exhaustive, and submissions are welcome to nominate further alternatives.

NO REGULATION

In an unregulated system the industry would be governed by market forces. Consumers would rely on existing laws of general application to protect them against provider failure.

Consumers have a number of legal rights available to them where operators fail to deliver. Under the law of tort, agents may be liable for damage caused by their negligence in circumstances where a duty or care exists and is breached. Depending on the circumstances, an action for trespass may also lie. Contract law also provides consumers with some legal remedies. Under the common law, misrepresentations regarding the price or quality of services may give a consumer legal rights to void the contract or, in certain circumstances, to claim damages. These common law rights are supplemented by fair trading legislation which extends legal rights in cases of misrepresentation, or misleading and deceptive conduct. In addition, the Fair Trading and Trade Practices legislation implies a number of standard terms that cannot be excluded from contracts for the purchase of good and services. Consumers may have also legal remedies available under the *Contracts Review Act 1980* or the *Consumer Claims Act 1998*.

The use of undue harassment or coercion in connection with the supply of goods or services to a consumer or the payment for goods and services by a consumer is prohibited under section 55 of the *Fair Trading Act 1987* (NSW) and section 60 of the *Trade Practices Act 1974* (Cth). The Australian Competition and Consumer Commission (ACCC), the body responsible for administering and enforcing the *Trade Practices Act* (TPA), recently undertook a project on section 60 as it applies to commercial agents and subagents. The outcome of this project was the release of a report entitled *Undue harassment and coercion in debt collection* as well as guidelines entitled *Debt collection and the Trade Practices Act*. This project has increased awareness amongst both industry and consumers about the existence of section 60, and has also put industry on notice of the ACCC's interest in this area. The ACCC has vowed to crackdown on offenders, stating that debt collectors who fail to comply with the guidelines will face prosecution. To date, however, there has only been one successful case of undue harassment and coercion prosecuted under section 60 of the TPA.

From 21 December 2001 the *Privacy Amendment (Private Sector) Act 2000* (Cth) commences, introducing data protection regulation of all private sector organisations. Where personal information is dealt with otherwise than in accordance with the National Privacy Principles (NPPs), complaints may be taken to the Privacy Commissioner. The Act also gives consumers the power to apply to the Federal Court

or the Federal Magistrate's court for an order to stop an organisation from engaging in conduct that breaches the NPPs.

Service providers are also subject to the *Crimes Act 1900* and other criminal law, including the *Oaths Act 1900* which creates an offence for swearing falsely in affidavits.

Benefits
Deregulating the private inquiry agent and commercial agent industry would eliminate establishment and on-going regulatory costs (such as monitoring and compliance costs). It would also increase flexibility for service providers and competition would be enhanced by removing barriers to entry.

Costs
There is a significant risk that unscrupulous operators may seek to take advantage of unregulated environment. There is potential for inappropriate persons to enter and remain in market unmonitored, and deregulation may result in a decline in the quality of service provision. On the basis of the ICAC's previous findings, deregulation could be expected to, at best, not assist with decreasing illegal behaviour, and at worst result in an increase in illegal behaviour within the industry.

With deregulation, the onus is shifted to the consumer to seek a remedy for sub-standard performance. Consumers therefore bear high transaction costs in taking court action. These transaction costs, and the risk of losing the case and having costs awarded against them may create reluctance on the part of consumers to take legal action.

Deregulation can be expected to result in increased insurance premiums. Private and public court costs incurred in seeking compensatory payments consequent upon loss or damage are also likely to increase.

Relying on the general law is reactive rather than preventative. Furthermore, as observed by the Australian Institute of Criminology, consumer protection laws are essentially a form of individualised remedy and do nothing to detect illegal or unethical behaviour in any systematic fashion.

Discussion points:

- Is deregulation a viable option for either private inquiry agents, process servers, repossession agents, debt collectors or the industry as whole?
- What are the costs and benefits of deregulating the commercial agents and private inquiry agents industry wholly or in part?
- What would be the impact of deregulation in terms of industry behaviour and/or public safety?

SELF-REGULATION OR CO-REGULATION

Self-regulation

Self-regulation involves exclusive control of regulation by industry organisations. Under a system of self-regulation there are no statutory barriers to entry and no statutory prohibitions on activity. Service providers seek membership of an industry association, which provides public accreditation of that company or person. Generally, conduct of industry members is controlled or guided by the industry association through an agreed code of practice. Non-compliance with the code may lead to loss of membership.

There are a number of examples of professions that self regulate. For example, the accounting profession has never been the subject of a licensing or regulation system.

Self-regulation directly involves the parties with the best institutional knowledge about the need for action and the efficacy of various policy alternatives. It is more flexible and is thus less likely to stifle innovation or excessively limit consumer choice.

Under a self-regulatory system the costs of regulation are generally being borne by the industry itself.

On the downside, self-regulation can be used to exclude competitors and otherwise limit competition. Also, an industry association may be less inclined to consider social welfare or economic objectives, particularly where such aims conflict with the association's overriding goal of optimising conditions for its members.

Co-regulation

Under a co-regulatory system the regulatory role is shared between Government and an industry body. Typically it involves an industry organisation or a representative of a large proportion of industry participants formulating a code of practice in consultation with Government. The code is designed to ensure that breaches are enforceable via effective sanctions by the industry or professional association.

Co-regulation enables the industry to take the lead in the regulation of its members by setting industry standards and encouraging greater responsibility for the performance of its own members.

An example of co-regulation in practice is the security industry in NSW. Under the *Security Industry Act* all persons who carry out security activities, as defined in the Act, are required to hold a security industry licence. Applicants for a master licence must show evidence of membership of a security organisation approved by the Commissioner of Police. The role of the approved security industry organisations is to ensure that their members comply with the industry code of practice endorsed by the Commissioner. Each approved industry organisation has undertaken to conduct audits of its members to identify ethical and professional deficiencies and provide remedial assistance and direction. Thus, while the Police Service is responsible for administration of the legislation, the approved industry organisations are responsible for ensuring compliance by their members with the code of practice. The approved industry organisations are also represented on the Security Industry Council, a forum

dedicated to ensuring the highest level of professionalism and ethics across the security industry.

Dual compliance management by both Government and industry potentially leads to increased enforcement and better service standards in the industry. The involvement of industry participants can make it easier for issues within the industry to be identified and can deliver greater flexibility in responding to these issues.

Sharing the regulatory burden with industry can reduce some costs to Government, although these savings may be offset by the additional costs involved in dealing with multiple industry bodies in relation to issues associated with industry regulation.

Service providers, who are required to be both licensed and a member of the approved industry association, will incur additional administrative and compliance costs in meeting the requirements of two or more regulatory bodies.

Compulsory membership of an industry association restricts choice of service providers, and there are risks that new providers will be excluded by the industry association.

To maximise the effectiveness of a self-regulatory or co-regulatory scheme, it is critical that the industry association or associations are well established and capable of fulfilling the required regulatory role. Some of the criteria that an industry would need to be able to demonstrate in order that self-regulation or co-regulation would be considered might include:

- The legal basis upon which the industry group(s) operate(s)
- Evidence that the industry as a whole is supportive of the proposed role
- Evidence that the industry group(s) has/have sufficient coverage of the industry concerned
- Evidence of public and consumer consultation in the development of the proposal
- Methods for identifying and reporting on individual industry members and systemic industry problems, and consultative mechanisms
- Evidence that formal industry agreement and the delegated powers will be applied in a consistent and fair fashion and will not be applied to the detriment of a particular industry sector or non-member in an anti-competitive manner
- Proposals for independent evaluation of the undertaking of the delegated authorities
- Proper funding proposals
- Evidence of capacity to handle delegations

Discussion points:

- Is the commercial agents and private inquiry agents industry capable of self-regulating?
- Is co-regulation a viable option for regulating the industry?
- What are the costs and benefits of self-regulation of the industry?
- What are the costs and benefits of co-regulation?

- To what extent would either self-regulation or co-regulation meet the objectives of the legislation?

CODES OF PRACTICE

Codes of practice are intended to prescribe standards of good practice within the particular industry or profession. They can be used as a means of supplying supplementary information to the industry and public about appropriate industry practice, over and above the actual regulatory requirements, or they can take on a more formal and central status in the regulatory system, effectively functioning like regulations.

Codes of practice are usually developed via a consultative process between all interested parties in a particular industry and, in many cases, with Government.

Codes may be voluntary or mandatory. A voluntary code may be sponsored by an industry association which may make compliance with the code a condition of association membership. Since a voluntary code has no legal authority to ensure compliance, for it to be successful there must be sufficient market power and commonality of interest within the industry to deter non-compliance. By contrast, mandatory codes, prescribed or backed by legislation, are enforceable.

Discussion points:

- Should the commercial agents and private inquiry agents industry be subject to a code of conduct?
- Should the code by voluntary or mandatory?
- Is a code of conduct sufficient in itself to regulate the industry or should it be supplement other forms of regulation?
- What are the costs and benefits of instituting a code of conduct?
- To what extent does a code of conduct achieve the objectives of the legislation?

NEGATIVE LICENSING

Under a negative licensing model there is free entry to the market and anyone would be permitted to engage in private inquiry or commercial agency services. Although the person or business is not licensed, operational requirements are prescribed. If these minimum standards of conduct, performance or quality are not met by an operator, their right to continue participating in the industry may be withdrawn.

By definition, negative licensing must allow more unacceptably low quality service providers into the market than licensing. Negative licensing is arguably unsuitable in circumstances where the probity of the service provider is paramount and where community interest dictates that inappropriate persons be excluded from the outset.

Negative licensing permits public resources, which under a licensing system would be devoted to handling notification and prior approval, to be redirected to enforcement of the prescribed operational requirements. However, while negative licensing schemes impose a cost on government in terms of administering and enforcing the prescribed standards, there is no offsetting revenue from licensing. Negative licensing therefore imposes a cost on the wider community which is funded from general revenue.

Negative licensing is also a reactive form of regulation. By the time a service provider who has failed to meet the prescribed service standards is identified, his or her behaviour may have already had a serious negative impact.

Discussion points:

- Is negative licensing a viable option for regulating the commercial agents and private inquiry agents industry?
- What are the costs and benefits of negative licensing?
- To what extent does negative licensing achieve the objectives of the legislation?

REGISTRATION

Registration refers to a system involving no more than the listing of people in an official register. Registration is a means of identifying those who practise the occupation to ensure they receive information facilitating their practice and to ensure they are complying with any special legal requirements.

The requirement to register may be voluntary or mandatory. Registration can be as basic as furnishing a name and/or business name and address or can involve some minimum standards which must be met to obtain registration. In the event of non-compliance the service provider is deregistered. Non-compliance is usually determined after a complaint is lodged or an offence committed, or possibly as a result of a random check.

Registration poses no barrier to entry. A registration system entails minimal administrative costs to Government and compliance costs to service providers are negligible. The existence of a register permits traceback of registered persons in cases of complaint and the threat of deregistration provides some incentive for high quality service delivery.

A registration system depends on high levels of consumer awareness, as the full benefits of a registration system cannot be realised unless consumers seek registration details. Under a system of registration there is a greater likelihood of inappropriate persons entering the market because of less effective screening. Deregistration is dependent on detection of breaches. There are monitoring and enforcement costs associated with a registration system.

Discussion points:

- Is registration a viable option for regulating the commercial agents and private inquiry agents industry?
- What are the costs and benefits of registration?
- To what extent does a registration system achieve the objectives of the legislation?

CERTIFICATION

Certification provides formal recognition of those who have attained certain qualifications considered desirable for persons practising in a particular industry. Certification imposes no barriers to entry as a person who is not certified is still permitted to practise in that industry. They are, however, forbidden from holding themselves out as a certified member of the industry.

Certification addresses information asymmetry through the provision of a defined set of standards which must be met before certification can occur. Consumers can identify higher quality service providers by their certified title. Certification preserves freedom of choice by allowing consumers to make an informed choice regarding the service provider they engage. Consumers may elect for a lower quality service at what will be a lower price.

A certification scheme involves some administrative costs to the Government through monitoring and undertaking the administration of the compliance scheme. Service providers will incur costs in undertaking additional training or education in order to meet the defined requirements for certification.

The effectiveness of a certification scheme depends on sufficient numbers of serviee providers seeking certification.

Discussion points:

- Is certification a viable option for regulating the commercial agents and private inquiry agents industry?
- What are the costs and benefits of certification?
- To what extent does certification achieve the objectives of the legislation?

10. CONCLUSION

As has been stated earlier, this Issues Paper is designed to assist in consulting with stakeholders who wish to comment on the review of the *Commercial Agents and Private Inquiry Agents Act 1963*.

All interested parties are encouraged to make a written submission to the Ministry for Police, addressing the terms of reference of the review.

All submissions should be forwarded to:

The Ministry for Police
Level 19
Avery Building
14-24 College Street
DARLINGHURST NSW 2010

The closing date for submissions is 31 January 2002.