REVIEW OF THE PROPOSED REGULATION OF PRIVATE EMPLOYMENT AGENTS

DEPARTMENT OF INDUSTRIAL RELATIONS

May – August 2004

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Call for Submissions

An advertisement was placed in the Courier Mail dated 26 June 2004 calling for submissions to a review on the operations of agents and future regulation of the industry. Copies of the Terms of Reference for the review and a draft copy of this PBT Assessment were made available via the internet. Below is the text of the advertisement.

"Review of the Private Employment Agents Act 1983

The Department of Industrial Relations has developed a draft Public Benefit Test assessment that has been designed to canvass a range of issues and alternatives for the future regulation of private employment agents after the expiry of the *Private Employment Agents Act 1983* on 26 April 2005. The purpose of the review is to ensure that any future regulatory framework for private employment agents in Queensland accords with National Competition Policy. Under this Policy regulation must not restrict competition unless it can be demonstrated that:

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

The public is invited to provide comment on the Public Benefit Test assessment and to respond to the issues raised.

For further information and copies of the Public Benefit Test assessment and terms of reference for the review:

- call (07) 3225 2298
- fax (07) 3225 2275
- visit www.dir.qld.gov.au or
- email mark.hopgood@dir.qld.gov.au

The closing date for comments is:

23 July 2004.

Your comments can be mailed to:

Review of Private Employment Agents Act 1983
Private Sector Industrial Relations Policy Branch
Department of Industrial Relations
GPO Box 69, Brisbane Q 4001"

Persons making submissions to the review are informed that all submissions will be treated confidentially but that the content of their submission may later be accessed under Freedom of Information legislation.

1.0 LEGISLATION

Proposal to regulate private employment agents.

2.0 BACKGROUND

2.1 Reasons for the Review

In 1995, the Council of Australian Governments (CoAG) entered into a number of agreements to implement a National Competition Policy (NCP), including the *Competition Principles Agreement* (CPA). Under Clause 5 of the CPA, the Queensland Government, along with all other jurisdictions, is required to review, and where appropriate reform, all existing legislation (as at June 1996) that included restrictions on competition. The guiding principle is that legislation should not restrict competition unless it can be demonstrated that:

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

The CPA also requires jurisdictions to:

- examine all new legislation that restricts competition and provide evidence that the proposed new legislation is consistent with the guiding principle as outlined above; and
- systematically review all legislation that restricts competition at least once every 10 years to ensure the legislation remains consistent with the guiding principle.

2.2 Conduct of the Review

To assist in reviewing existing and new legislation which may include restrictions on competition, the Government published *Public Benefit Test Guidelines* ('the PBT Guidelines') in 1999. The guidelines provide for a legislation review process based on a rigorous assessment of the costs and benefits of proposed restrictions and viable alternatives. The Government also recognises the need to tailor review processes according to each particular review situation depending on the significance of the issues under consideration and to take full account of employment, regional development, social, consumer and environmental effects.

The proposed regulation of private employment agents is subject to a reduced review undertaken in accordance with the PBT Guidelines. The Review was undertaken by the Policy Branch, Private Sector Industrial Relations Division within the Queensland Department of Industrial Relations. A reduced review of the competition impacts was deemed appropriate because the extent of the restrictions impacts on a relatively small but nevertheless important group of stakeholders and the issues have been extensively canvassed in a previous NCP review.

In undertaking the Review, the following matters were taken into account as required by clause 1(3) of the CPA:

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

- the efficient allocation of resources.

Consistent with Clause 5(9) of the CPA the Review was required to:

- clarify the objectives of the regulatory proposal(s);
- identify the nature of any restriction(s) on competition in the proposal(s);
- analyse the likely effect of the restriction on competition and on the economy generally;
- assess and balance the costs and benefits of the restriction and implementation of the identified reform options and mechanisms; and
- consider alternative means for achieving the same result including non-legislative approaches.

In accordance with the PBT Guidelines, the Review also took into account Government's Outcomes and Priorities for Queensland, in particular contributing outcome of "More Jobs for Queensland - Skills and Innovation - The Smart State" by ensuring a fairer industrial relations system by putting people, safe jobs and workplaces first.

2.3 Industry Background

2.3.1 Legislative History

The licensing and regulation of employment agents in Queensland commenced with the *Labour Exchange Act of 1915*. This was replaced in 1946 by the *Labour and Industry Act 1946,* which contained similar provisions. However regulations regarding the operation of the Act were repealed the following year. A policy of not renewing or issuing licences was then adopted which resulted in a reduction in the number of licensed private employment agents.

Although the Commonwealth Employment Service had been established in 1946, demand for the services of private employment agents remained and in 1963 the Labour and Industry Act was amended to reactivate the licensing and regulation provisions. These regulations were cited as the Private Employment Regulations of 1963. This legislation was replaced by the *Private Employment Agencies Act 1983*, which was amended in 1985 to provide, among other things, for theatrical performer and model agents to charge applicant employees a prescribed fee.

The *Private Employment Agencies Act 1983* was independently reviewed in 2000 to address National Competition Policy (NCP) issues and other issues related to the regulation of private employment agents. The primary recommendations of the review embodied by the enactment of the ***Private Employment Agents Act 1983*** (the Act) were as follows:

- the repeal of the legislation over a period of 2 years with a simplified licensing system introduced immediately (the repeal date has subsequently been extended, as permitted by the Act, to 26 April 2005);
- the retention of protections for workers against being charged inappropriate fees by employment agents for the procurement of work (provisions relating to this issue were transferred to the ***Industrial Relations Act 1999***); and
- the establishment of an Employment Agents Advisory Committee (EAAC) to formulate a draft Code of Conduct for employment agents. Section 31 of the Act provides that EAAC will formulate the draft Code of Conduct to include the following matters regulating private employment agents after the expiry of the Act:
  - the type of work arrangements and commercial operations covered by the Code;
  - standards of competence and training for private employment agents;
  - disciplining private employment agents who contravene the Code; and
  - the records that private employment agents must keep.

During the period prior to the expiry of the Act, EAAC is also given the functions, if asked by the licensing officer, of advising on the grant or renewal of licences, of making recommendations on the possible cancellation of licences and of helping and advising with any matter arising under the Act or

under the fee charging restrictions in the *Industrial Relations Act 1999*. In this regard EAAC, with members appointed by the government from unions and employment agent groups, is viewed as being representative of stakeholder's views in the industry.

2.3.2 Private Employment Agents

The Act defines a **"private employment agent"** as a person who, in the course of carrying on business and for gain—

(a) offers to find—
  (i) casual, part-time, temporary, permanent or contract work for a person; or
  (ii) a casual, part-time, temporary, permanent or contract worker for a person; or
(b) negotiates the terms of contract work for a model or performer; or
(c) administers a contract for a model or performer and arranges payments under it; or
(d) provides career advice for a model or performer."

By definition in the Act, labour hire agencies i.e. where the "agent" makes temporary placements of employees with a client but the "agent" retains the status of employer, are not private employment agents.

There are a range of business operations which fall within the ambit of this definition including clerical and secretarial placement agencies, executive placements, nursing agencies and industrial or trade temporary assistance. Private employment agents typically offer one or more of the following services:

- finding employment for parties who are unemployed or who wish to change employment;
- recruiting staff on behalf of an employer for a set fee;
- providing casual staff for short term vacancies, although this activity is generally exempted from the definition of agent as the "agent" is usually the employer;
- acting as a counsellor and careers adviser, sometimes offering psychological assessment for persons seeking their first job or who have been recently retrenched;
- providing assistance with resume preparation;
- providing training in interviewing skills;
- providing businesses with advice on their human resources needs; and/or
- providing advice on career development, including study programs and qualifications required for the desired career path.

Within the private employment agents industry, agents representing models and performers form a separate and distinct group. Agency practices in this industry sub-group tend to be quite different from those in the general employment agency area. The most visible manifestation of this is that while the *Industrial Relations Act 1999* prohibits any fee to be charged of a job seeker in the general employment agency area, limited fees may be charged by agents of job seekers who wish to be placed as models or performers. This reflects the fact that in the theatrical and modelling industries, the role of an agent may commonly involve a more intensive degree of representation over longer periods of time than in the general employment agency area. The *Industrial Relations Act* recognises the status of a manager who by providing a range of services additional to their role as an agent earns the right to charge unlimited fees of a job seeker.

As at August 2004 there were 1288 private employment agency licence holders. Because of the prescribed date of expiry of the Act licences are not renewable each year but end when the Act expires.

Licences are granted to applicants unless the licensing officer reasonably believes that the applicant has contravened the Act or the fee charging restrictions in the *Industrial Relations Act 1999* or that the applicant has been convicted in the preceding 5 years of a serious offence. If such a reasonable belief is formed, the licensing officer asks for the advice of EAAC on whether the licence should be granted. If the licensing officer decides not to grant the licence, the applicant may appeal the decision to an industrial magistrate. Similar processes are also provided for dealing with complaints about

agents and cancellation of licences. The relevant provisions are set out in sections 17 – 29 of the Act.

2.3.3 Developments in the Job Placement Market

A number of developments in business practices are continuing to influence the operations of private employment agents:

- the growth in contracting out of both back-office and core functions has meant that a range of industries are increasingly relying on employment agents to find people with the skills that they need. The employment agency industry expects these trends to continue, and forecasts continued and sustained growth in the employment agency industry;
- until recent years the Commonwealth provided a free job matching service for unemployed persons through the Commonwealth Employment Service (CES). From 1 May 1998, the function of the CES was contracted out to private, public and community organisations. The contracting out of these services has resulted in a significant number of new private employment agents entering the market. DIR has therefore experienced an influx of applications from private employment agencies requiring licences. Any agency which becomes contracted to the Commonwealth under this scheme must comply with the Job Network Code of Conduct but must also if they operate in Queensland, obtain an employment agents licence prior to commencing operations;
- many positions are now being advertised on the Internet and resumes are frequently emailed between jobseekers, agents and employers. This has reduced advertising costs and speeds up the processing of applications. Agents may also base themselves in other Australian jurisdictions, where no licensing requirements exist, and still operate in Queensland through use of e-commerce. Thus, traditional state-based regulatory regimes are being undermined by the uptake of e-commerce by agents in other jurisdictions; and
- there appears to be a growing sense of the need for professionalism in the industry, at least with respect to agents operating outside the entertainment industry. This is demonstrated by the Recruitment and Consulting Services Association (RCSA) move to take a more active role in the regulation of the industry. Members of the RCSA must comply with that organisation's Code of Conduct but must also if they operate in Queensland, obtain an employment agents licence.

2.4 Regulatory Objectives

Although the current legislative regime does not include any specific objectives, an examination of its provisions over time indicates the objective to be:

"the protection for job seekers and employer clients from the adoption of unfair practices by private employment agents through the application of minimum standards of operation for employment agencies."

This objective is reflected in the matters specified for inclusion in the draft Code of Conduct intended to apply after the expiry of the Act:

(i) the type of work arrangements and commercial operations covered by the Code;
(ii) standards of competence and training for private employment agents;
(iii) disciplining private employment agents who contravene the Code; and
(iv) the records that private employment agents must keep.

The protection against indiscriminate fees being levied for the procurement of employment by employment agents previously provided under the private employment agents legislation now resides in the Industrial Relations Act 1999.

3.0 ISSUES

3.1 Key Issues/ Reasons for Government Intervention

In line with the recommendations of the 2000 Review, the Act established the Employment Agents Advisory Committee (EAAC) to formulate a draft Code of Conduct (including certain specified matters) regulating private employment agents after the expiry of the Act. The Act does not specify whether the future regulation of agents is to occur under new legislation or by self-regulation of the industry via a voluntary Code of Conduct. However, the explanatory notes to the Bill amending the Act clearly state the objective of the Bill is to implement the recommendations of the NCP Review. In relation to the future regulation of private employment agents, the Review recommended, among other things, that:

- licensing will cease to operate from a date that is two years from the date of the introduction of the negative licensing system; and

- the Committee consider the formulation of "a Code of Conduct" for the future regulation of private employment agents, including an appropriate administration mechanism for such regulation and the type of matters to be covered by such a Code.

The major issue raised by stakeholders during the consideration of various options for the future regulation of the industry was whether an entirely voluntary Code would be effective in meeting the overall consumer protection objectives of the proposed regulatory regime. It was argued strongly any Code would need to be given a legislative underpinning if it was to achieve the desired objectives of the regulatory regime envisaged by the previous NCP Review in its recommendations. A pertinent example of a mandatory Code model is the statutory-based *Fair Trading (Code of Practice - Fitness Industry) Regulation 2003* made under the *Fair Trading Act 1989* to regulate the fitness industry.

The Queensland Government *Public Benefit Test Guidelines* state that a PBT must be undertaken by a Department or agency that seeks to retain or introduce legislation which restricts competition. The Guidelines provide as examples of legislation which restrict competition:

- occupational regulations which impose defined standards on the right to provide a service or to operate a business which provides a service
- required defined standards to be met prior to the issue of a licence or authority to engage in a particular activity and making lawful continuation of that activity dependent on compliance with those standards
- restrictions on the conduct of a business including such things as advertising and promotion.

It is apparent that the matters to be dealt with as required in the current Act in the draft Code of Conduct and the proposed establishment of the Code via legislation may restrict competition (as defined) and place it within the scope of the Government's commitments to undertake an NCP Review/PBT.

The PBT puts the onus on those arguing for retention or introduction of legislation to demonstrate why it is in the public interest to do so by identifying the nature of market failures in the industry and justifying why government intervention is necessary to prevent that market failure.

The primary market failure relevant to the review of the *Private Employment Agents Act 1983* is caused by the existence of information asymmetries i.e. where buyers and sellers do not have the same knowledge about the services to be provided. In the case of the employment placement industry, this information asymmetry is characterised by job seekers (the buyers) knowing little about the extent or quality of the placement services provided by an agent (the seller) until after those services are supplied/purchased. This type of market failure is particularly pertinent if a job seeker is a first time user of placement services.

Other reasons for the government to regulate or intervene in this market are to:

- protect consumers and/or employees, and
- provide an efficient means of recourse.

In the employment placement industry it could be said that jobseekers/employees who seek a job placement and employers who seek a worker are both consumers of the services of an agent. However, the Act deals primarily with the relationship between the job seeker/employee and the agent because this is the area most prone to market failure. Matters arising from the charging of fees for placement services are adequately dealt with in other legislation i.e. *the Industrial Relations Act 1999* and so are not matters for concern in this review.

The Act and the draft Code seek to address concerns associated with imbalances of information (and therefore standards of service) and bargaining power between jobseekers and agents.

There is already in existence a range of laws which provide for consumer protection generally by seeking to ensure that consumers receive the goods and services for which they contract. These include the *Trade Practices Act 1974 (Cwlth)*, the *Fair Trading Act 1989 (Qld)* and tort law all of which seek to ensure goods and services are of a merchantable quality and are provided as described. However, consumer protection laws do not stop the seller (the employment agent) from providing inappropriate services as long as they are described to the buyer (the job seeker) and provided as contracted.

The draft Code and any new Act that may accompany it seeks to make the general concept of consumer protection more relevant to the employment placement industry by specifying what is/is not appropriate in the industry and provides for sanctions against those agents who do not provide services to the required standard as a means of encouraging compliance. The content of the proposed Code has been developed from long consultation with industry representatives (i.e. through EAAC).

The existence of market failures (i.e. information asymmetry) is a common event and does not itself justify government intervention. There is less justification for intervention when:

- harm created by the market failure is not significant,
- harm is reversible,
- the risk is voluntarily assumed, and
- there is a low probability of harm occurring.

Members of EAAC are unanimous in supporting the proposed draft Code and its objective of ensuring that minimum standards of operation for employment agencies are prescribed and adhered to. The membership is drawn from the industry, from unions and from government and includes a member independent of industry or employee organisations as its chair. EAAC supports such a Code because its members are concerned at the significant harm done to individual job seekers and to the professional reputation of the industry as a whole through the inappropriate actions of some agents. They are concerned that although matters of fee charging are dealt with in other legislation there is still a potential for sub-standard and misrepresented services in the industry.

It is acknowledged that there is little quantitative data available on complaints. However, information provided by EAAC members indicates that job seekers will often make enquiries but will not proceed with a formal complaint because of their fear of being black-listed in the industry. This is especially so in the entertainment sector of the industry. Anecdotal information supplied by industry and union members and from government administration staff indicates that the significant nature of the harm that occurs (e.g. to children and youth) and the probability that it will occur is much greater than the available formal data on complaints would indicate. A preliminary joint submission to the review from the Queensland Council of Unions (QCU) and the Media, Entertainment and Arts Alliance (MEAA) states:

> "In relation to the entertainment industry, the 2000 review of the *Private Employment Agencies Act 1983* recommended retention of protections against the charging of inappropriate fees through a prescribed fee scale under the *Industrial Relations Act 1999*.

> That a significant number of agents collude to circumvent these protections in almost universally charging higher fees under the guise of management contracts sounds a cautionary note against a regime wherein no codification of obligations and responsibilities exists."

and

> "Removal of legislative protections against poor private employment agent practice, MEAA fears, may provide a "green light" for potential rogue agents to operate safe in the knowledge that they are freer from government regulation. If this eventuates, community interest clearly will not be served and governments will be failing in their obligations to protect those most vulnerable in the labour market – in this case, our children and youth."

In relation to the position that risk is voluntarily assumed i.e. the market does not dictate that job seekers have to use the services of an agent and may directly apply for employment from an employer, the QCU/MEAA submission states:

> "…the job market is principally filled through the use of employment agents. The capacity for direct employment, a feature in the near past, is paling into non-existence in the current employment environment. In the instance of the entertainment industry, direct employment dos not occur. Agents in all instances are used as the intermediary for job placement. In other industries, employment agencies have burgeoned as a result of a changed focus on employment, whereby employers are less likely to use direct employment in preference to a vetting system through an employment agent.
>
> Arguments that a potential employee has the choice of not using an employment agent, and finding employment directly, are not relevant in the current employment market. This adds impetus to the necessity of ensuring that employment agents have underpinning guidelines in regulating their operation."

As regards reversing harm that occurs it could be argued that the general consumer protection legislation as outlined above goes some or all of the way to righting any wrong committed. An argument, supported by EAAC, has been made that more effective protection from harm occurs through legislation setting out standards of service appropriate and specific to the industry, which has been drafted by representatives of stakeholders in the industry and which includes sanctions that will encourage adherence to the standards.

It is considered that the case for government intervention is justified and is supported by EAAC members representing key stakeholders.

3.2 Public Consultation

The draft Code has been formulated by EAAC as prescribed by the Act. To formulate the draft Code EAAC has been meeting on a regular monthly basis since September 2002 to consider the range of issues affecting the future regulation of employment agents. EAAC is comprised of representatives of unions, employment agents and government and is chaired by a member independent of the industry.

4.0 REGULATORY OPTIONS

4.1 Legislative and Non-legislative Alternatives

The following alternatives were considered to address the concerns in relation to the future regulation of private employment agents:

4.1.1 Industry self regulation

Under this alternative the Act would expire on 26 April 2005 and no legislation would be enacted to replace it. The draft Code formulated by EAAC would exist only as a set of principles with which

agents need only voluntarily comply.

Market forces would be relied on to discipline agents who provide sub-standard service or operate unethically. Job seekers who use the services of an agent tend to be repeat users and so will patronise only those agents that provide adequate and ethical service.

Other laws would also be relied on to govern the relationship of agent and job seeker – Industrial Relations Act, Fair Trading Act, Trade Practices Act, contract law, etc.

Non-statutory Codes already operate in the industry. Private employment agents that provide contracted federal government services under the Job Network are bound by the Job Network Code of Conduct and members of the Recruitment Consultant Services Association are bound by that organisation's Code of Professional Conduct.

No Codes operate in the theatrical and modelling industry. Experience has shown the greatest number of complaints arise from this industry sector.

There have consistently been calls from industry stakeholders that there be some form of regulating legislation in the absence of a widely representative industry association. Members of EAAC representing both agents and job seekers are unanimous in their views on this issue. It is considered that the effectiveness of this alternative in relation to future regulation of private employment agents as prescribed by the Act depends on the availability of a suitable body to assume responsibility as a self-regulatory organisation for the industry.

4.1.2 Industry regulation by a statutory Code of Conduct with no licensing regime

New legislation would need to be drafted to replace the Act which expires on 26 April 2005. This would create a "head of power" for the enactment of a regulation as a vehicle for the Code of Conduct drafted by EAAC.

The Code would address the following matters as currently prescribed by the Act as matters to be considered in the future regulation of agents:

- the type of work arrangements and commercial operations covered;
- standards of competence and training for agents;
- disciplining agents who contravene the Code; and
- records that agents must keep.

Licensing as required in the current Act would be abolished on the basis that it is unnecessary to ensuring that the Code provides for effective regulation of agents.

Offence penalty provisions for breaches of the new act or regulation/code would be prescribed. The seeking of formal undertakings as a means of dealing with alleged breaches of the Code is also under consideration as a compliance measure.

The use of independent accredited auditors to monitor compliance by industry with the Code and investigate suspected breaches is also under consideration as part of this alternative.

Administrative responsibility for the Act and regulation/code would remain with government but without the need to manage a certification/licensing scheme.

It is envisaged that under this alternative the types of issues to be dealt with in the Act would include the following:

- definition of private employment agent -- similar to current Act with the following additions:
  - persons who have contravened prescribed legislative provisions and/or been convicted of defined serious offences may not be an agent -- similar to the current Act;

  - persons operating from interstate or making overseas placements are deemed to be an agent;
  - venue consultants (entertainment industry) who perform functions of agent deemed to be an agent;
- definition of manager -- same as s408C of *Industrial Relations Act 1999*;
- appointment arrangements, powers and duties of inspectors/auditors;
- continuation/establishment of EAAC as an industry body advising government on the Code and if asked advising on complaints and compliance issues -- membership and meeting procedures to be included;
- compliance/prosecution provisions – proceedings for offences in Industrial Magistrates Court, limitation on time to commence proceedings, appeals to Industrial Court, Evidentiary provisions, responsibility for acts or omissions of representatives, executive officer must ensure corporation complies with Act, arrangements on formal undertakings by person contravening Act and injunctions to cease trade after complaints (under consideration) -- similar provisions to the current Act; and
- a regulation making power.

The types of issues to be dealt with in the Code would include the following:

- Object of the Code -- to reflect s31(2)(a) of current Act;
- compliance with the Code -- links to the compliance and offence provisions in new Act;
- fee charging -- prohibitions reflect those in *Industrial Relations Act 1999*. Additional prohibition in Code regarding charging for resume preparation, etc as a condition for finding work. S.32 “Recovering Fees from Employer” of current Act to be incorporated in the Code;
- record keeping and retention -- same as s.33 of current Act which deals with information that each agent must record about persons looking for work, employers and placements;
- false information not to be published -- same as s.34 of the current Act.
- identification of agent in publications -- ensures all publications published by or for the agent includes correct name of business, address and telephone number. Similar to s.35 of the current Act less the references to licence holders;
- responsibilities of agents -- standards of service, including actions an agent is not to take in the course of referring a job seeker to any employer;
- Information Statement -- before providing any services an agent must provide to each job seeker an information statement setting out the following:
  - any fees that are charged of the job seeker will be in accordance with the relevant provisions of the *Industrial Relations Act 1999;*
  - the agent has a working knowledge of legislation affecting the placement of job seekers and employment including the *Private Employment Agents Act 1983*, *Anti-Discrimination Act 1991, Fair Trading Act 1989, Freedom of Information Act 1992, Industrial Relations Act 1999, Privacy Act 1988, Workcover Queensland Act 1996, Workplace Health and Safety Act 1995, Workplace Relations Act 1996 (Cwlth)* and the *Vocational Education, Training and Employment Act 2000.;*
  - the agent will make all placements and provide information to any person only in accordance with the provisions of relevant legislation;
  - if a job seeker believes an agent has acted illegally, inappropriately or in a false or misleading fashion in the course of providing services, the job seeker may contact the Department of Industrial Relations for information on any action that may be taken;
    (Note: The provision and content of the information statement is still under consideration.)
- training -- formal qualifications encouraged but not mandatory. EAAC to advise government on appropriate training courses to be listed in schedule to Code.

- agents not to seek or accept any monies from job seekers as a condition for finding work overseas and not to seek or accept monies from overseas job seekers as a condition for finding work for them in Australia;
- specific provisions for agents in the modelling and entertainment industry:
  - fee charging -- limitations reflect those in *Industrial Relations Act 1999*;
  - written notice regarding engagements -- written notice to be given to each successful job seeker setting out work conditions, nature of work to be undertaken, appropriate rates of pay and pay arrangements; and
  - financial statements -- agent or manager must give a financial statement to a model or performer within 5 working days following payment to the model or performer. Statements to include information on amounts received by agent or manager on behalf of model or performer and amount paid to the model or performer for the engagement. Any money received by an agent or manager on behalf of a model or performer must be paid to them directly or into a bank, credit union, etc nominated by them.

4.1.3 Industry regulation by a statutory Code of Conduct and the continuation of a licensing regime

The legislative arrangements and content of any new Act and regulation/code would be essentially similar to what has already been detailed above in 4.1.2 with the addition of provisions relating to licensing of agents.

Certificates of compliance would be issued under the Code dependent upon undertakings made by the applicant agent regarding Code compliance and training and competence commitments. This would be similar to the licensing regime that currently operates under the Act. Certificates would be renewable every two years subject to completion of an audit form checklist.

An agent found to be seriously or repeatedly in contravention of the Act or Code would face forfeiture of their license and therefore be denied the legal right to operate in the industry as an offence would be prescribed for operating without a licence.

EAAC would be continued with a legislative responsibility (similar to the current legislation) for overseeing the certification system, including advising on the grant or cancellation of a certificate; establishing ongoing training requirements; considering and advising on Code transgressions; and formulating necessary amendments to the Code for recommendation to the Chief Executive. Appeal provisions regarding decisions to refuse an application or cancel a licence would operate similar to those in the current Act.

4.2 Other Jurisdictions

Victoria, Tasmania, the Australian Capital Territory and the Northern Territory have no legislation regulating private employment agents. In the other State jurisdictions legislative arrangements are as follows:

4.2.1 New South Wales

In New South Wales private employment agents are covered by two pieces of legislation: the *Entertainment Industry Act 1986* administered by the Office of Industrial Relations and the *Fair Trading Act 1987* administered by the Office of Fair Trading. Both of these administering agencies are within the Department of Commerce.

The Entertainment Industry Act 1986 covers agents, managers and venue consultants in the entertainment industry. Provisions relate to a limitation of fees charged on performers (10%) and minimum requirements to be met by managers. Under this legislation agents are required to be licensed. These provisions were retained in the legislation after an NCP review.

The provisions of the *Fair Trading Act 1987* and the *Fair Trading General Regulation 2002* cover agents operating in any industry other than entertainment. The legislation prohibits the charging of fees against job seekers and provides that agents must provide specified information to job seekers about the agent's services. Following an NCP review of legislation, requirements for licensing of agents have been repealed.

4.2.2 Western Australia

The *Employment Agents Act 1976*, administered by the Department of Consumer and Employment Protection, is similar to the legislation in Queensland. The legislation was reviewed prior to 2000 with NCP issues addressed as part of the process.

The primary recommendation resulting from the review was to repeal the legislation. This action was favoured as it addressed problems similar to those experienced in Queensland and NCP principles.

In view of a subsequent change in government the future direction of the legislation is now unclear with no time table for further review established.

4.2.3 South Australia

The *Employment Agents Registration Act 1993,* administered by the Department for Administrative and Information Services, contains similar provisions to the Queensland legislation.

The Act has been reviewed for National Competition Policy but the recommendations are not available at this time.

5.0 SUMMARY OF PUBLIC BENEFIT ANALYSIS

5.1 Impacts on Key Stakeholders

The key stakeholders in the regulation of private employment agents are as follows:

- Job seekers, employees and their unions
- Private employment agents and their representative associations
- Government
- Employers

5.1.1 Alternative 1 - Industry self regulation

Australian jurisdictions are divided on whether legislative regulation of private employment agents is necessary. Queensland, New South Wales, Western Australia and South Australia currently have legislation governing agents while the other States and Territories have none. Western Australia and South Australia have decisions pending on the future of their legislation regarding NCP principles.

In a system of industry self regulation by a voluntary Code of Conduct, the business operations of agents would still be subject to some regulation through consumer protection laws (e.g. the *Trade Practices Act 1974 (Cwlth)*, the *Fair Trading Act 1989 (Qld)* and tort law). Regulation would also occur through adherence by individual agents to other Codes of Conduct (e.g. private agencies who are contracted to provide services under the Job Network are bound by the *Job Network Code of Conduct* and members of the RSCA are bound by the *Recruitment and Consulting Services Association Code of Professional Conduct*) although as these arrangements are voluntary adherence to them is only necessary for as long as it suits the agent's operations.

The option of industry self regulation was considered in the 2000 Review of the Private Employment Agencies Act 1983. Several submissions to that review opposed a de-regulated environment. One of the reasons for this was that there is no single body in the industry ready to assume a regulatory role. Given the content of a Code of Conduct required to be established by the Act for regulation after its expiry, it is considered that a strong industry body to administer even a voluntary Code is essential. While the RCSA has taken an expanding role in the general employment placement sector of the industry there is no similar organisation in the entertainment and modelling sector. EAAC with members representing the range of agency, job seeker/employee and government interests in the industry has since its establishment discounted the effectiveness of self regulation in favour of a legislative approach because of that committee's preference for regulation that features effective compliance.

The **benefits/advantages** that flow from adoption of industry self regulation/voluntary Codes of Conduct to establish standards of operation include:

- Standards in a voluntary Code are more likely to be observed by those who elect to adhere to the Code because they are made by those to whom they apply.
- Industry insiders' expertise and experience is used in the formulation of Codes or agreements.
- Voluntary Codes can be more responsive and flexible than regulation with changes and updating occurring more often.
- The Code can incorporate innovative behaviour of those agents that elect to adhere to the Code.
- Content of the Code deals directly with increasing standards of service to job seekers.
- Establishment of a Code of Conduct can increase the sense of professionalism in those operators in the industry thjat elect to adhere to the Code and gives greater confidence to customers – employers and job seekers.
- Agents would no longer have to pay for licences the value of which for the year ended 30 June 2002 totalled $284,780. Agents would also save on the time it takes to complete and submit licence applications – although this is not likely to be significant.
- Because they potentially compete with operators who chose not to adhere to the voluntary Code, there is likely to be limited scope for agents who do so to pass any additional costs associated with the Code on to employers. Abolition of licensing and a voluntary Code would reduce the overall cost of hiring employees, potentially increasing demand, leading to a rise in employment levels.

The **costs/disadvantages** that flow from them include:

- There are no legal remedies for breaches of industry developed Codes possibly leading to greater potential exploitation of job seekers and criticism of government for not providing appropriate protection for consumers.
- They can impose monitoring costs which are incurred by the industry association.
- With the abolition of a licensing system government would forgo revenue totalling $284,780 for the year ended 30 June 2002.
- Compliance may be low if a sense of commonality amongst those affected is not present and agents are unable to use membership of the industry association and/or adherence to the Code as effective marketing tools. There may be a strong incentive for non-members to "free-ride" on the efforts of association members.

5.1.2 Alternative 2 - Industry regulation by a statutory Code of Conduct with no licensing regime

This alternative is characterised by enactment of new legislation and a Code of Conduct in an accompanying regulation setting out standards of service and conduct for agents which if not adhered to leave the agent liable to prosecution for an offence.

However, under this alternative a person may commence to operate as a private employment agent without the need to apply for a licence or undergo any test of their competence.

EAAC members support this alternative as it allows, in their opinion, for the most effective accomplishment of the function given to that committee in the Act (i.e. drafting a Code of Conduct for the regulation of agents after the expiry of the Act in respect of certain prescribed matters related to agency operations). The draft legislative Code provides adequate protection for job seekers by targeting standards of service provided by agents. At the same time the requirements in the draft legislative Code are considered by the industry stakeholders who developed it to be no more onerous than is necessary (e.g. licensing has been abolished as unnecessary for ensuring the objectives of the draft legislative Code are met).

Given that the legislative draft Code and any accompanying legislation proposed

- has been/will be developed and maintained with the advice of EAAC thus ensuring input from agent and job seeker representatives, and
- abolishes licensing

this alternative provides most of the same advantages/benefits as relate to Alternative 1 where industry self regulation through a voluntary Code of conduct was proposed.

The **advantages/benefits** from this alternative include:

- A statutory Code is more likely than a voluntary Code to meet the identified consumer protection objectives.
- Standards of service set out in the Code are more likely to be observed because they are developed with the assistance of those to whom they apply.
- Industry insiders' expertise and experience is used in the formulation of the Code.
- The Code can incorporate innovative behaviour of industry participants as part of the standards of service.
- Content of the Code deals directly with increasing standards of service to job seekers.
- Establishment of a Code of Conduct can increase the sense of professionalism in the industry and gives greater confidence to customers – employers and job seekers.
- Agents would no longer have to pay for licences the value of which for the year ended 30 June 2002 totalled $284,780. Agents would also save on the time it takes to complete and submit licence applications – although this is not likely to be significant.
- Any reduction in costs to agents are readily passed on to employers. Abolition of licensing would reduce the overall cost of hiring employees, demand would increase, leading to a rise in employment levels.
- Abolition of licensing makes administration of regulation cheaper for government. In 2000 the costs of administration of the Act and licensing system was estimated at $100,000 per year. With the simplification of licensing these costs would have reduced but are still a significant cost to government.
- Less barriers to entry into the industry.
- A legislative Code gives the ability to impose effective sanctions on agents who do not adhere to prescribed standards of service and therefore encourage compliance.

- With no licensing requirements there are less barriers to entry into the industry than under Alternative 3.

In comparison the potential **disadvantages/costs** of this alternative include:

- As no positive screening occurs the number of inappropriate participants initially entering an industry may be higher than under a licensing process.
- Some agents may be able to operate or act inappropriately before they are detected. That is, sanctions will only be imposed after the detection of a breach.
- Enforcement/auditing activities may need to be increased to ensure compliance with standards, thereby negating the benefits of decreased administration costs.
- Increased costs of complying with Code standards.
- With the abolition of a licensing system, government would forgo revenue which for the year ended 30 June 2002 totalled $284,780.

5.1.3 Alternative 3 - Industry regulation by a statutory Code of Conduct and the continuation of a licensing regime

Like Alternative 2 this alternative is characterised by enactment of new legislation and a Code of Conduct in an accompanying regulation setting out standards of service and conduct for agents which if not adhered to leave the agent liable to prosecution for an offence.

Additionally under this alternative a person may not commence to operate as a private employment agent until they have applied for a compliance certificate dependent upon undertakings made by the applicant agent regarding Code compliance and training and competence commitments. This will be similar to the licensing regime that currently operates under the Act.

An agent found to be seriously or repeatedly in contravention of the Act or Code would face forfeiture of their license and therefore be denied the legal right to operate in the industry as an offence would be prescribed for operating without a licence.

The **advantages/benefits** from this alternative include:

- A statutory Code is more likely than a voluntary Code to meet the identified consumer protection objectives.
- Standards of service set out in the Code are more likely to be observed because they are developed with the assistance of those to whom they apply.
- Industry insiders' expertise and experience is used in the formulation of the Code.
- The Code can incorporate innovative behaviour of industry participants as part of the standards of service.
- The standards in the Code have the agreement of major industry participants and therefore awareness and compliance is likely to be higher.
- Content of the Code deals directly with increasing standards of service to job seekers.
- Establishment of a Code of Conduct can increase the sense of professionalism in the industry and gives greater confidence to customers – employers and job seekers.
- Government would continue to receive income from licensing to offset compliance activity costs. For the year ended 30 June 2002 income from licensing totalled $284,780.
- A legislative Code with licensing gives the ability to impose effective sanctions on agents who do not adhere to prescribed standards of service and withdraw the right to operate in the industry therefore encouraging compliance.

In comparison the potential **disadvantages/costs** of this alternative include:

- Agents would continue to pay for licences the value of which for the year ended 30 June 2002 totalled $284,780. Agents would also expend time on completion and submission of licence applications.
- Government would continue to expend money on administration and enforcement of the legislation and licensing system which in 2000 was estimated to cost $100,000 per year.
- Licensing restrictions make it difficult to enter the industry.
- Increased costs of complying with Code standards.

5.2 Public Consultation

5.2.1 Methodology

An advertisement was placed in the Courier Mail dated 26 June 2004 calling for submissions to a review on the operations of agents and future regulation of the industry. The deadline for submission of comments was set as 23 July 2004 and was pointed out in the advertisement.

Subsequently all holders of a current private employment agents license were sent a letter from the Chair of EAAC informing them of the review. Approximately 1300 letters were posted. The same deadline for submission of comments was included in the letter.

The Terms of Reference for the review and a draft copy of this PBT Assessment were referred to in the advertisement and letters and were made available via the internet or were subsequently posted to interested parties who requested the documents.

5.2.2 Results of Consultation

A moderate degree of interest in the review was evident from the number of phone enquiries received by the review officer. Most of these seemed to be prompted by the letter dispatched from EAAC rather than from the advertisement. Verbal comments were made during these phone enquiries in support or opposition of each of the above outlined Alternatives but these comments have not translated into formal submissions.

Submissions to the Review were received from the following interested parties (listed in the order in which they were received):

- **ADD Employment** – a 3 line statement that no regulation is necessary or desirable for those agencies whose only operations is under contract to DEWR (Job Network).
- **Dial an Angel** – favours retention of the existing Act with minor modifications including a Code of Conduct and the continuation of licensing.
- **Duncan Newnham of Total Quality Staff P/L** – states that his submission contains his personal views and does not necessarily reflect those of the other directors of his company. Belief that enough checks and balances exist to regulate the recruitment industry without continuing specific legislation. Argues that entertainment industry agents should be dealt with in their own specific legislation while general recruitment agents need no regulation. Does not consider that an argument has been made under NCP principles to continue to regulate the industry.
- **Eagle Placement Enterprise** – favours industry regulation by a statutory Code of Conduct and the continuation of a licensing regime.
- **Queensland Council of Unions** – (EAAC member) favours regulation of the industry by a statutory Code of Conduct with no licensing.
- **Tony Auckland of Kubler Auckland Management** – (EAAC member) favours regulation of the industry by a Code of Conduct underpinned by legislation.
- **Media Entertainment and Arts Alliance** – (EAAC member) favours ongoing regulation of agents under a statutory Code of Conduct with no licensing.

- **Australian Workers Union** – favours ongoing regulation of agents under a statutory Code of Conduct with no licensing.
- **Recruitment and Consulting Services Association Ltd** – (EAAC member) RCSA's preferred means of regulation is to allow committed industry bodies to undertake the process of industry self regulation but recognises that such self-regulation schemes may have anti-competitive effects. RCSA recognises that not all industry participants choose to belong to industry bodies and that, in the absence of legislative intervention, an industry body has no power to discipline or regulate the conduct of persons who are not its members. RCSA therefore supports the proposition that a statutory Code of Conduct that contained appropriate provisions would make a significant contribution towards the achievement of
  - Raising the standard of professional business practice of industry participants;
  - Providing guidance with respect to minimum and best practice standards;
  - Raising the level of confidence of persons (clients and candidates) dealing with participants;
  - Supporting industry led initiatives in areas such as dispute resolution; complaints handling; member discipline; education and training; and accreditation.

In summary, of the 9 submissions:

- 4 were from agents in the general recruitment industry and 5 from unions and peak bodies who are members of EAAC (none were received from agents in the theatrical, modelling or entertainment industry);
- 7 favoured the continuation of some form of statutory regulation in the industry and 2 generally favoured no regulation at all (1 of these argued that the case for continued regulation of the industry considering NCP principles has not been made and that if any statutory regulation is continued it should be limited only to the entertainment industry).

5.3 Net Benefit Assessment

It is considered that the alternative that will deliver the greatest net benefit to the community in establishing a Code of Conduct for the regulation of private employment agents after the expiry of the current Act is **Alternative 2**. This alternative is characterised by the enactment of a new Act and accompanying regulation as a vehicle for the Code of Conduct. The Code will prescribe standards of service for agents and provide statutory mechanisms to impose sanctions on agents who do not adhere to those standards.

In arriving at this position the written submissions made to the Review as outlined above have been taken into consideration.

In addition to advantages and disadvantages outlined in 5.1.2 above it is considered that **Alternative 2** is the best alternative for the following reasons:

- It targets the market failure most prevalent in this industry of information asymmetry where job seekers are not as informed about appropriate levels of service as are agents. The proposed Code deals with standards of service and information that is to be given by agents to job seekers before, during and as a result of a successful placement.
- It provides for the most effective means of ensuring adherence to the standards and dealing with matters prescribed by the current Act for inclusion in the Code. As a legislative Code provided for by regulation, legally binding compliance measures will be included to discipline agents who do not comply with the Code. A voluntary Code would not be able to effectively fulfil the same function.
- The proposed draft Code in Alternative 2 has been developed by representatives of stakeholders in the industry – job seekers, agents and government – through EAAC and has the full support of that committee as being relevant to industry operations and problems.
- The proposed draft Code by abolishing licensing restrictions has made regulation of agents as non-onerous as possible consistent with the matters to be dealt with in the Code as prescribed in the current Act.

- The social objective of providing effective protection for job seekers interests through this alternative are considered to outweigh any costs to government associated with its continued role as regulator of the industry.

6.0 CONCLUSION AND RECOMMENDATION(S)

It is recommended that a Code of Conduct regulating private employment agents through a statutory regulation and enabling Act and incorporating the principles in Alternative 2 of this review be established to operate after the expiry of the *Private Employment Agents Act 1983*.

7.0 REFERENCES

Review of the *Private Employment Agencies Act 1983* – Final report prepared for the Queensland Department of Employment Training and Industrial Relations by Ray Dempsey Consulting – November 2000

Private Employment Agencies Act 1983 – A Public Benefit Test Assessment under National Competition Policy – Final report prepared for the Queensland Department of Employment Training and Industrial Relations by the Allen Consulting Group Pty Ltd – July 2000

Queensland Treasury – Public Benefit Test Guidelines

The *Private Employment Agents Act 1983*