



ESTATE AGENTS COUNCIL

POSITION PAPER –

**MODERNISING THE
ESTATE AGENTS ACT 1980**

JULY 2009

3.1 Role of Agents' Representatives

Section 13 Agents' representatives states that a person must only act as an agents' representative for a licensed estate agent and that as the representative of the estate agent they are able to carry out all the functions of an agent (with the exception of the day to day management of the estate agency office) providing they are authorised to do so.

Section 13A Estate agents to be responsible for the acts of their representatives establishes that an estate agent

The Council has given some consideration to whether there is a need to have a legislated agents' representative role or a more transparent system might be gained from having an alternative model. For example if rather than having an agents' representative the licensed estate agent was to have simply a salesperson, who's conduct both the agent and officer in effective control were responsible for in the same way they are answerable for the actions of any other staff member employed in the estate ag

section 47 (1) deems that an agents' representative shall not perform any of the functions of an estate agent unless the agent has authorised this arrangement in writing, under section 130 of the Queensland Property Agents and Motor Dealers Act 2000 an employment authority clearly specifies the activities that the estate agent authorises the salesperson to perform on their behalf and must be in place upon the commencement of employment. This builds upon the intention of section 47 and ensures that proper accountability structures are in place from the outset so that there is no doubt regarding what functions agents' representatives are permitted to undertake and who is ultimately responsible for their possible misconduct.

While the Council's consideration of the role of agents' representatives in the context of this review is still in its infancy, its key concern is about the accountability question and how this translates in terms of authorisation. Ultimately accountability is important in terms of consumer protection and the Council is keen for such processes to be streamlined also for the benefit of business in terms of easing the regulatory burden.

3.3 Reducing the Regulatory Burden – Office Processes



capacity to physically locate the agent and their business and records. The Council sees the value in this provision, but thinks that it is important that it is reassessed in the context of emerging technology and changes foreshadowed as part of the introduction of national licensing. The Council considers that the requirement that a registered office address (and any subsequent changes) and the details of the employment (or cessation of employment) of agents' representatives in that office could be incorporated into the arrangements currently found in section 33 of the Act regarding the register.

Furthermore in relation to streamlining basic office requirements within the Act in order to reduce the regulatory burden on industry it seems unnecessary to have a provision as per section 36 about the name of an estate agency business. It should be noted though that most of the similar acts found in the other states have such a provision (the exceptions are Queensland and South Australia). The Business Names Act 1962 already establishes many of the principles found in section 36 such as prohibiting business names whi4dh0 10.98 139.82666 62098 357.14

within the Act dealing with keeping a log of sal

3.4 Fair Trading Act – Misleading or Deceptive Conduct, False Representations

Section 38 Unlicensed person pretending to be licensed as an agent provides that persons are not permitted to falsely represent themselves by displaying for example a sign near their place of business suggesting that they are a licensed estate agent when this is not the case.

Section 42 Advertising requires that any estate agent who publishes an advertisement regarding their business activities must feature their business name and office address on this material. Agents are not permitted to engage in false representation regarding claims that they have sold a particular property or hold a deposit for the sale of a property. Furthermore estate agents will be held accountable for any misleading statements made in their advertising.

Section 47A Seller must be given estimated selling price establishes that prior to obtaining a person's signature on an engagement or appointment to sell real estate, the agent must ensure that an estimated selling price has been stated. The estimate can be a single amount or a price range which is based on the amount the agent believes based on their experience, skills and knowledge that a willing but not anxious buyer would be prepared to pay. The upper and lower limits of price ranges should not exceed 10% of the amount of the lower limit of the range. There is no requirement that the estimated selling price and vendor's reserve must be the same amount.

Section 47B False representation to seller or prospective seller states that neither an estate agents or agents' representative should make a false representation to a seller or prospective seller of real estate as to the estimated selling price of the real estate.

Section 47C False representation to prospective buyer applies to an estate agent who holds a written engagement or appointment to sell real estate and also to any agent's representative employed by the agent. They must not quote an estimated selling price during the marketing of the property that is less than the lower limit of the range stated in the engagement or authority. This section extends to claims made in published advertising material as well as those communicated orally or in writing to prospective buyers.

watch them go. The provisions were intended not to penalise agents who genuinely made a mistake in their price estimate or were unable to accurately value a property due to volatile market conditions, but rather those who consciously engaged in misleading and deceptive conduct¹⁰. Similar provisions exist in legislation in Queensland and in particular in New South Wales, where the sections 72-75 of the Property, Stock and Business Agents Act 2002 are very similar to their Victorian counterparts. South Australia also has provisions which deal with false and misleading conduct generally, as does Tasmania with reference to auctions.

The Council has long followed the debate around underquoting, from the introduction of the amendments in 2003 to its consideration of the issues in the context of the furor around the practice in 2007. It is clear that there have been problems associated with the application of sections 47A-C. These sections establish the requirements that an agent must provide an estimated selling price and they cannot engage in false representations regarding price to the seller, prospective seller or buyer.

There appears to be some confusion in the market place regarding the obligations imposed on estate agents and agents representatives in regard to pricing by the Act, FTA and even the professional conduct regulations¹¹. This was raised by the REIV in their submission to this review¹² and is demonstrated by the need for CAV to issue guidelines for real estate salespeople regarding price advertising and underquoting in November 2007. Also identified during the consultation process was the difficulty in establishing a precise estimate in an often volatile market: *The expectation is that agents can estimate a sale price within 10% and that people act in reasonable and rational ways. The reality is that estimating unusual properties or estimating in a very volatile market is extraordinarily difficult. Agents are not trained as valuers...*¹³. That said, the Council is inclined to the view that the confusion in the industry as to the effect of the provisions is at least in part to a self-interested reluctance to comply by some elements of the industry.

It can be difficult to establish underquoting, as the common view is that the practice equates to a difference between the advertised property price and final sale price. Rather the legal definition of underquoting based on the Act is more complex¹⁴. Before underquoting can be established the knowledge and skills of the agent in valuing the property, the use of information regarding how the estimate was derived at based on recent sales of com

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3.5 Continuing Professional

4. Other Issues

4.1 Drafting and Structure of the Act

While the Council has identified particular provisions above that it considers worthy candidates for modernisation, in a general sense it believes there is also considerable room for improvement regarding such matters as the overall drafting style and structure of the Act.

It is the view of the Council that the Act is drafted in a style which is neither readily accessible for those engaged in the industry or consumers using estate agency services. Provisions should be written in a manner in which their meaning is immediately apparent without the reader having to rely on definitions, interpretation or referring to other pieces of legislation for clarification¹⁵. Suggesting drafting as a problem with the current Act may appear a minor point, but a clearer statute would enable industry to be in no doubt about their obligations encouraging compliance and allowing this process to be less cumbersome for business. More user-friendly legislation also enables consumers to be empowered, which allows for a high functioning market place where all participants are well informed and thus better protected.

There are also stylistic issues which the Council thinks could be addressed. For example while the same basic requirements of knowledge of the law, disclosure and business practices should be transferable whether an agent or agents' representative is operating in the sales or property management spheres, there is a perception that the Act is focussed too heavily on residential sales.

In the context of a discussion about drafting, the basic structure of the Act is also worth noting. For example, the role of agents' representative is dealt with in both Part III Licences and Part IV Agents and Agents' Representatives of the Act. In terms of structure the Council is unsure as to why the role is featured under the banner of licensing given that one of the distinguishing features of the agents' representative is that they are unlicensed. This may be a legacy item courtesy of the former sub-agents which were licensed prior to deregulation. While an agents' representative carries out many of the same functions (aside from the day to day manage

4.2 Level of Regulation

*Whilst I [acknowledge] that most of the regulations do protect consumers from unscrupulous estate agents, I believe we are over regulated and you get the feeling that there is an overall assumption that agents are all crooks...*¹⁶

The Council's preliminary view is that the industry is over-regulated and that significant sections of the Act need to be overhauled both in terms of style and more importantly content. Overall, the Act is too prescriptive, delving into areas in which in our view there is no need for regulation.

In general, the Act is structured in ways that make it difficult for practitioners to meet the requirements of the professional conduct regulations regarding their knowledge of the law. It is an entirely reasonable expectation and as noted by the TUV important that those in the industry are aware of their responsibilities¹⁷. It may be unrealistic to assume that all agents and agents' representatives are familiar with the level of detail contained in the Estate Agents Act, Sale of Land Act 1962, Residential Tenancies Act 1997, associated regulations, Fair Trading Act 1999, various guidelines in addition to keeping abreast of legislative changes as well as actually doing their job and meeting industry professional development requirements.

The Act might focus on the big picture in terms of licensing, enforcement, trust requirements, administration, conduct, and not bother with the material, which is confusing for industry, does not protect consumers or is dealt with by other legislation. In particular, the Council would advocate a focus on accountability processes, trust accounts, conflicts of interest and generally practices that present the likelihood of consumer detriment. The basic legislative requireme

5. Initial Consultation Process

The Council wrote to both industry and consumer stakeholders in early March 2009 inviting them to lodge written submissions to this review. Submissions were received from the Real Estate Institute of Victoria (REIV) and Tenants Union of Victoria (TUV), the content of which will be detailed below. Other stakeholder groups did not respond to the opportunity to provide feedback.

In addition the Council sought the input of individual estate agency practitioners and other interested parties via a special edition of the Estate Agents Council Bulletin being distributed in March 2009 and material being posted on the EAC website. The subsequent response was relatively modest, but still useful in providing the Council with a sense of the issues worthy of consideration. The Council is planning to do more extensive consultation following the release of this position paper, which raises a number of issues which will no doubt garner strong opinion. In particular the second stage of the consultation process will target the various segments of the industry in order to have the voice of a good cross-representation of the marketplace heard.

5.2 Tenants Union of Victoria

The TUV submission was largely focussed on property management, which is an area which features prominently in the complaints they receive and their casework. It was noted in their submission that the Act makes no specific reference of property manageme

maintenance of documents within the office for the purpose of inspection. They called for the Act to be updated so that document could be filed solely electronically, authorities to be completed online and the acceptance of electronic signatures. Again the Council does not disagree with this viewpoint, but it is yet to identify anything in the Act which necessarily prohibits the further embrace of modern technology in the estate agency office. For example documents can be currently stored electronically according to the Act, the only conditions that are imposed are that the documents must be written in the English language and be able to be easily printed into hard copy form for the purpose of inspection.

Other key themes identified in submissions were as follows:

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APPENDIX 1 - EAC MODERNISATION REVIEW –PRELIMINARY TABLE OF SECTIONS UNDER CONSIDERATION FOR MODERNISATION

EAA SECTION	CONTENT	OBJECTIVE
ROLE OF AGENTS' REPRESENTATIVES		
13. Agents' representatives	<p>(1) Subject to this Act—</p> <p>(b) a person shall not be or act as an agent's representative for any person who should be but is not the holder of an estate agent's licence.</p> <p>(2) Nothing in this Act shall be construed as requiring any agent's representative, so far as he performs for any licensed estate agent any of the functions of an estate agent (other than managing the day to day operation of an estate agency office) and is duly authorized to do so by that agent, to hold an estate agent's licence under this Act.</p>	<p>As the name suggests agents' representatives' act on behalf agents, carrying out the functions of an agent (with the exception of the management of a branch office). Agents' representatives have taken on the role</p>

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EAA SECTION	CONTENT	OBJECTIVE
SUPERVISION AND ACCOUNTABILITY		

29B. Duties of agents and officers in effective control	<p>1) This section applies to a natural person—</p> <ul style="list-style-type: none"> (a) who is a licensed estate agent who carries on an estate agency business; or (b) who is an officer in effective control of the estate agency business of a corporation. <p>(2) The person must—</p> <ul style="list-style-type: none"> (a) be regularly and usually in charge at the principal office of the estate agent; and (b) give regular and substantial attendance at that office; and (c) properly control and supervise any estate agency business carried on by the agent or for which the person is responsible; and (d) take reasonable steps to ensure that any estate agents, agents' representatives or other employees of the business comply with the sections of this Act, the Sale of Land Act 1962 and any other laws relevant to the conduct of the business while they are engaged in that business; and (e) establish procedures designed to ensure that the business is conducted in accordance with the law and good estate agency practice; and (f) monitor the conduct of the business in a manner that will ensure, as far as is practicable, that those procedures are complied with; and (g) properly control and supervise the management of any branch office of the estate agency business. 	
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EAA SECTION	CONTENT	OBJECTIVE
	<p>of managing the estate agency office concerned it may approve and permit that person to manage that office for a period specified by the Authority.</p> <p>(3) Notwithstanding section 30(1) an appointment in writing made under sub-section (1)(a) and an approval given by the Authority under sub-section (2) shall authorize the person so appointed or approved to manage the estate agency office in respect of which the appointment was made or the approval was given during the period of the absence of the estate agent or branch manager or for the period specified by the Authority (as the case may be).</p>	
REDUCING THE REGULATORY BURDEN – OFFICE PROCESSES		
35. Registered office and address	<p>(1) Every licensed estate agent shall have a registered office within Victoria, and every agent's representative shall have a registered address within Victoria, to which all communications and notices may be addressed.</p> <p>(2) Any change in the situation of a registered office or registered address shall be promptly notified in writing to the Registrar by the agent or agent's representative concerned, and the Registrar shall alter the register accordingly.</p> <p>(3) An estate agent shall within fourteen days of the establishment of a branch office advise the Registrar in writing of the address of that branch office.</p> <p>(3A) Subject to sub-section (3B), every licensed estate agent must have a principal office in Victoria.</p> <p>(3B) A licensed estate agent who is also licensed or otherwise authorised under the laws of another State to carry on the business of an estate agent in that State who operates an estate agency business in that State and the main or only estate agency office of that business is located within that State may have his or her principal office outside Victoria if it is within 48 kilometres of Victoria.</p> <p>(4) Any change in the situation of the principal office or a branch office of an estate agent shall be promptly notified in writing to the Registrar by the estate agent concerned and the Registrar shall alter the register accordingly.</p> <p>(5) For the purposes of this Act where a licensed estate agent carries on business at only one place that place shall be recorded as his principal office.</p> <p>(6) Every estate agent shall, within seven days after he employs and within seven days after ceasing to employ any agent's representative, in writing notify the Registrar of such employment or cessation of employment and the Registrar shall enter the fact in the register.</p> <p>(7) Any agent or agent's representative who carries on business without complying with the requirements of this section shall be guilty of an offence.</p>	<p>The rationale behind this section is that all estate agency branch offices operating in Victoria have an identifiable office location, so that consumers or the authorities have a means of contacting the branch office and seeking redress in instances where wrongdoing may have occurred.</p> <p>It states that the Registrar should be notified of agents' representatives employed in the office, which provides a means of keeping track of agents and agents' representatives so that they and their officer in effective control and branch manager can be held responsible for any possible breaches of the Act committed by those working under their supervision.</p>

EAA SECTION	CONTENT	OBJECTIVE
36. Name of estate agency business	<p>(1) This section applies if, in the opinion of the Authority, the name under which a person operates, or proposes to operate, an estate agency business—</p> <p>(a) incorporates the name of an unlicensed person or the name of an agent's representative or any name which might be confused with the name already used by a licensed estate agent; and</p> <p>(b) may mislead the public.</p> <p>(2) The Authority—</p> <p>(a) may refuse to issue the person with an estate agent's licence until the person chooses a name that is acceptable to the Authority; or</p> <p>(b) if the person already holds an estate agent's licence, may require the person to change the name of the estate agency business.</p> <p>(3) A person must comply with any requirement made by the Authority under sub-section (2)(b) within the time specified by the Authority.</p> <p>Penalty applying to this sub-section: 25 penalty units.</p>	<p>The purpose of section 36 is to require each estate agency to have an identifiable business name that allows consumers to know who they are dealing with.</p> <p>The section also enables the Authority to have a means of attributing a pattern of behaviour to a particular estate agency and have standards regarding business naming conventions, for example not incorporating the name of an unlicensed person.</p>
39. As to displaying notice on places of business	<p>Every licensed estate agent carrying on the business of an estate agent shall paint or affix and keep painted or affixed on each place of business so as to be easily read from outside—</p> <p>(a) in the case of an estate agent other than a corporation—</p> <p>(i) his name and description as a licensed estate agent; and</p> <p>(ii) if the business is not carried on in his own name, the name under which he or the partnership in which he is a partner is registered under the Business Names Act 1962; and</p> <p>(b) in the case of an estate agent being a corporation—</p> <p>(i) its name and description as a licensed estate agent;</p> <p>(ii) the name of every director of the corporation engaged in the estate agency work of the corporation who is a licensed estate agent and his description as a licensed estate agent; and</p> <p>(iii) if the business is not carried on in its own name, the name under which it is registered under the Business Names Act 1962.</p>	<p>The aim of section 39 is that the premises of a licensed estate agent should be readily identifiable, including the name of the corporation and name of directors involved in the corporation. This ensures transparency so that the consumer is equipped with the relevant information prior to engaging the services of an estate agent or agency.</p>
40. Letterhead	<p>(1) Every licensed estate agent (other than a corporation) shall have his name and description as a licensed estate agent printed or shown on all correspondence from his estate agency business.</p> <p>(2) Every licensed estate agent being a corporation shall have its name and description as a licensed estate agent and the name of every director of the corporation engaged in the estate agency work of the corporation who is a licensed estate agent and his description as a licensed estate agent printed or shown on all correspondence from its estate agency business.</p> <p>(3) A person who is not a licensed estate agent or a director of a corporation which is a licensed estate agent shall not use or permit to have used on any correspondence from an estate agency business anything which implies or indicates that he is a licensed estate agent or a director of a corporation which is a licensed estate agent (as the case may be).</p>	<p>Section 40 prescribes that all licensed estate agents should have their name and description as a licensed estate agent on all correspondence printed from the business. Similarly this applies to corporations engaged in estate agency work, who must also detail the names of all of the corporation directors. The section is designed to ensure that consumers are not misled about an estate agent claiming to be licensed and that estate agencies are accountable for the material they produce which bears their name.</p>
46. Employee	<p>(1) Every estate agent shall—</p>	<p>Section 46 requires agents who are in effective control</p>

EAA SECTION	CONTENT	OBJECTIVE
statements	<p>(a) make or cause to be made and keep at his registered office in Victoria a true statement in writing containing particulars as to the name and the work or services of and the salary wages or commission paid in each month to each person employed by him in connexion with his business as an agent;</p> <p>(b) produce that statement for inspection during office hours whenever demanded by the Director or by a member of the police force of or above the rank of sergeant or by any person authorized in writing by the Director or by any such member of the police force; and</p> <p>(c) from time to time advise the Director in writing of the premises at which are kept the records from which that statement was made and their location on those premises.</p> <p>(2) Any agent who makes any false entry in any statement made under sub-section (1) shall be guilty of an offence.</p>	<p>to maintain a written log in their registered office detailing the names of staff, services undertaken, salaries and commissions. The section seeks to mandate transparent business processes and transactions which can readily be inspected or requested by the Director,</p>

EAA SECTION**CONTENT****OBJECTIVE**

business has been carried on by the vendor.

EAA SECTION	CONTENT	OBJECTIVE
47C. False representation to prospective buyer	<p>(1) This section applies to an estate agent who holds a written engagement or appointment to sell real estate, and to any agent's representative employed by the agent.</p> <p>(2) In making any statement while marketing the real estate, the agent or representative must not state as his or her estimate of the selling price of the real estate a price that is less than the estimated selling price, or in the case of a price range, less than the lower limit of that range, stated in the engagement or appointment (200 penalty units).</p> <p>(3) For the purposes of this section, a statement is taken to be made by the agent or representative if it is made by a person acting on behalf of the agent or representative.</p>	<p>snapshot of what their property is worth by the agent and price valuations are transparent and open to scrutiny.</p>

